ANNOTATIONS INCLUDE 179 N. C.

NORTH CAROLINA REPORTS

VOL. 113

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SEPTEMBER TERM, 1893

REPORTED BY

ROBERT T. GRAY

2 ANNO. ED.

BY

WALTER CLARK

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CODE SECTIONS

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

SEPTEMBER TERM, 1893

MARY W. PILAND v. JESSE TAYLOR ET AL.

Probate of Deed—Judicial Functions—Deputies—Certificate of Officer Prima Facie Evidence of Authority.

1. The probate of a deed is an act judicial in its character.
2. An officer clothed with judicial functions cannot delegate the discharge of the same to a deputy.
3. By Laws 1829 (Revised Code, ch. 37, sec. 2) the deputies of county court clerks were expressly authorized to take acknowledgment and proof of deeds, and in exercising such functions a deputy acted by force of the statute alone, and not as the agent of, or by a delegation of authority from, the clerk. Therefore, where on a trial a deed purporting to have been executed in 1852 by a grantor to a grantee, who was at the time a clerk of the county court, was offered in evidence, and objected to on the ground that the deputy could not, by reason of the interest of his principal, take the probate thereof: *Held*, that the deed should not have been excluded on such ground.
4. In such case, the deputy having independent authority under the statute to take the probate, and it appearing from the certificate that he, and not the clerk, performed the duty, the insertion of the clerk's name before the words "Per B. W. Cowper, D. C.," did not invalidate his act.
5. Proof of the official character of an officer taking an acknowlegment of a deed is not necessary to give it validity in the absence of any statute requiring such proof, if the certificate is in due form and purports to be made by an officer authorized by law to take acknowledgments, etc. Therefore the certificate of probate of a deed by a deputy clerk, expressly authorized by statute to take acknowledgment, etc., the deed having been duly registered, was *prima facie* evidence of his appointment and qualification, and it was error to exclude the deed as evidence on the ground that the signature of the deputy clerk was not a sufficient evidence of his official character.

ACTION to recover land, tried at Spring Term, 1893, of GATES, before *Bynum, J.*, and a jury.

Upon the trial the defendants offered in evidence a deed conveying the *locus*, which was objected to by plaintiff on the grounds referred to in the opinion of *Chief Justice Shepherd*. The objection being sustained, the defendants appealed.

W. D. Pruden for plaintiff.
L. L. Smith for defendants.

SHEPHERD, C. J. The question presented for our consideration is, whether there was error on the part of the court in excluding the deed which was offered in evidence by the defendants. This deed purports to have been executed in August, 1852, by one Elisha Umphlett to Henry L. Eure, and was registered on 18 January, 1861. It appears from the certificate of probate that it was proved upon the oath of one of the subscribing witnesses before R. B. G. Cowper, deputy clerk, and it is insisted that as the clerk, Henry L. Eure, was the grantee in the said deed, his deputy could not, by reason of the interest of his principal, take the probate thereof.

A deputy is usually defined to be one who, by appointment, exercises an office in another's right. He is regarded as an agent or servant of his principal, who must, as a general rule, do all things "in his principal's name, and for whose misconduct the principal is responsible."
(3) *Willis v. Melvin*, 53 N. C., 62; *Holding v. Holding*, 4 N. C., 324; *Martin v. Mackonochie*, L. R. 3, Q. B. Div., 741. "The authority given by law to a ministerial officer is given to the incumbent of the office. The authority is not given to the deputy, but to the principal, and is exercised by the principal, either by himself or his deputy." 5 A. & E. Enc., 624. Had Mr. Cowper been authorized, as is held in some of the States, to take the probate of deeds by virtue simply of his position as deputy, he would, it seems, have been acting only as an agent or servant of the clerk, and his act being necessarily that of the clerk, and deriving its efficacy entirely through him, the probate would have been void. This result would follow, not because of any statutory inhibition at that time similar to the provisions of the existing law (The Code, sec. 104), which forbids the clerk to take the probate of any deed to which he is a party, but for the reason that in so acting he would be offending a fundamental rule in the administration of justice, which is embodied in the maxim, *"Nemo debet esse judex in propria sua causa."* Mr. Cowper, however, had no authority, merely as deputy, to take the probate of a deed, as such an act has been decided in this State to be judicial in its character *(Shepherd v. Lane,*

13 N. C., 148; *Sudderth v. Smyth,* 35 N. C., 452; *Tatom v. White,* 95 N. C., 453), and it is well settled that an officer clothed with judicial functions cannot delegate the discharge of those functions to another. Broom's Leg. Max., 808. Laws 1777, ch. 115 (Rev. Code, ch. 19, sec. 19), providing for the qualification of deputy clerks, did not change in any respect the principle of the common law that the clerk could only delegate to another the performance of the ministerial functions of his office *(Jackson v. Buchanan,* 89 N. C., 74); and in respect to this very matter of the probate of deeds, it was held in *Sudderth case, supra,* that but for the express provisions of the act of 1829 the deputy could not exercise such a function. It is there explicitly held that such a power cannot be delegated by the clerk, but is conferred (4) upon the deputy by force of the statute alone. This being so, the conclusion would seem to be irresistible that in taking the probate of a deed the deputy is not acting merely as an agent or servant of the clerk, but is performing an independent judicial function which is vested in him by law so long as he occupies such an official position.

We are, therefore, of the opinion that the authority of the deputy in this instance was in no way affected by reason of the interest of the clerk.

There is some conflict of authority in other jurisdictions as to whether the deputy should sign the certificate in his own name or in that of the clerk, but as the decisions chiefly relate to cases in which the taking of a probate is held to be a ministerial act, they can have but little practical bearing upon the present question. According to the views we have indicated, the deputy (Cowper) had the authority, under the provisions of the Revised Code, to take this probate; and as it plainly appears from the certificate that he, and not the clerk, performed this duty, the insertion of the clerk's name before the words "per R. B. G. Cowper, D. C.," cannot invalidate his act.

It is further contended that the signature of Cowper in the capacity of deputy clerk was not in itself sufficient evidence of his official character, and that, for this reason, the deed was properly excluded.

When the deed was proven and registered in 1859, the deputy of the clerk of the county court was, as we have seen, expressly authorized to take the acknowledgment and proof of deeds, etc. (Rev. Code, ch. 37, sec. 2), and the official character of such deputy was so far recognized that it was provided, as a prerequisite to the validity of his acts, that he should take an oath "to support the Constitution of the United States and of the State, and an oath of office." Rev. Code, ch. (5) 19, sec. 15; *Shepherd v. Lane, supra.* It is also provided in the same section that the clerks of the Superior and county courts "shall

keep their offices at the courthouse in their respective county, where, by themselves or their lawful deputies, they shall give due attendance, . . . and that in case of death of the clerk of any court in the vacation, his deputy shall hold the office of clerk until another shall be appointed," etc. The office of deputy clerk being thus recognized by the law, as well as the authority of such officer to take the probate of deeds, we are unable to see why he should be excluded from the presumption which generally obtains respecting the due appointment of persons purporting to discharge the duties of public official positions. Accordingly, it has been held that "if the person taking an acknowledgment styles himself an officer before whom an acknowledgment may be taken, his certificate is *prima facie* evidence of the fact that he is such officer." 1 Devlin Deeds, sec. 500; *Tuten v. Gazan,* 18 Fla., 751. "The practice is to take a certificate which appears on its face to be in conformity with the statutes as proof of its own genuineness. . . . Accordingly, where the certificate describes the proper officer, acting in the proper place, it is taken as proof, both of his character and local jurisdiction." 1 Devlin, *supra,* sec. 500. In Lawson's Presumptive Evidence, 56, it is said: "To entitle deeds to be read in evidence, they are required to be acknowledged and recorded in a certain manner. A deed is produced purporting to have been acknowledged before a justice of the peace. The presumption is that the register of deeds who made the record had sufficient evidence of the official character of the magistrate to entitle the deed to be recorded." *Forsaith v. Clark,* 21 N. H., 409. To the same effect is the case of *Livingston v. Kettelle,* 41 American Dec., 166, in a note to which *Judge Freeman* says that "proof of official character of the officer taking an acknowledgment is not neces-
(6) sary to give it validity in the absence of any statute requiring such proof, if the certificate purports to have been made by an officer authorized by law to take acknowledgments, and is in due form, but the certificate itself is *prima facie* evidence of that fact." *Carpenter v. Dexter,* 8 Wall., 513; *Willink v. Miles,* 1 Pet. C. C., 429; *Thompson v. Morgan,* 6 Minn., 292; *Harding v. Curtis,* 45 Ill., 252; *Thurman v. Cameron,* 24 Wend., 87. These authorities, as well as considerations of public policy, abundantly sustain the position that the certificate of the deputy clerk was, at least, *prima facie* evidence of his appointment and qualification.

We are of the opinion that the deed should have been admitted in evidence, and that there should be a

New trial.

Cited: White v. Hill, 125 N. C., 200; *Nicholson v. Lumber Co.,* 160 N. C., 36; *S. v. Knight,* 169 N. C., 342.

JOHN L. HINTON v. H. T. GREENLEAF AND WIFE.

Mortgaged Land Treated as Surety—Principal and Surety—Forbearance to Sell Principal Security, Release of Surety Property.

1. Where a husband mortgages his property for his debt, and in the same mortgage the wife conveys her own separate property as security for the same debt, her property so conveyed will be treated in all respects as a surety, and will be discharged by anything that would discharge a surety or guarantor who was personally liable; therefore,
2. Where property of a wife was conveyed as additional security for a debt of her husband, and the creditor, before assigning the debt and after it was due, as well as the assignee of the debt, made an agreement with the husband to postpone the sale of the property included in the mortgage for a definite period, and such agreements for forbearance were made without the knowledge or consent of the wife, and without a distinct and explicit reservation of the creditor's right to sell the wife's property: *Held*, that the wife's property was discharged from all liability under the mortgage, and the purchaser at a sale under the mortgage (being the assignee of the debt who made the agreement of forbearance) acquired only a naked legal title, and is not entitled to recover the land.

ACTION to recover possession of land sold under deed of trust, (7) tried before *Bynum, J.*, and a jury, at Spring Term, 1893, of PASQUOTANK.

The facts are sufficiently stated in the opinion of *Chief Justice Shepherd*. From the judgment on a verdict for the plaintiff, defendants appealed.

W. D. Pruden for plaintiff.
Grandy & Aydlett and F. H. Busbee for defendants.

SHEPHERD, C. J. It is settled by abundant authority that, "where a husband mortgages his property for his debt, and in the same mortgage the wife conveys her own separate property as security for the same debt, her property so conveyed will be treated in all respects as a surety, . . . and will be discharged by anything that would discharge a surety or guarantor who was personally liable." 1 Brandt on Suretyship, sec. 32; *Cross v. Allen*, 141 U. S., 528; *Spear v. Ward*, 20 Cal., 659; *Gahn v. Niemcewieg*, 11 Wend., 312; *Bank v. Burns*, 46 N. Y., 170; Bishop Married Women, 604; Jones Mortgages, 114; *Gore v. Townsend*, 105 N. C., 228; *Purvis v. Carstarphen*, 73 N. C., 575.

The deed in trust in the present case was made for the purpose of securing the payment of certain indebtedness of the husband, H. T. Greenleaf, evidenced by his notes, executed to C. W. Grandy, Jr. The

deed conveys certain property of the said Greenleaf, and also the real estate of the wife, the latter alone being the subject of this controversy. It plainly appears from the said instrument that the property of the wife was conveyed as additional security for the indebtedness of the husband, and there can be no question as to the trustee, the *cestui que trust,* Grandy, and his assignee, Hinton, being affected with notice thereof. There is evidence tending to show that Grandy, before assigning the notes and after they were due, entered into a valid
(8) agreement with Greenleaf to postpone the sale of the property contained in the deed of trust for a definite period. There is also evidence tending to show a similar agreement on the part of Hinton, the assignee, under which a sale of the said property was to be postponed four years. These contracts of forbearance were made without the knowledge or assent of Mrs. Greenleaf, and, in our opinion, resulted in a discharge of her property from all liability under the said deed of trust. This property occupied, as we have seen, the position of a surety, and it is common learning that "time or forbearance given by the creditor to the principal debtor by a contract which binds him in law, and would bar his action against the debtor," will discharge the surety. *Bank v. Lineberger,* 83 N. C., 454; *Carter v. Duncan,* 84 N. C., 676; *Forbes v. Sheppard,* 98 N. C., 111; *Scott v. Fisher,* 110 N. C., 311.

It is insisted, however, by the plaintiff's counsel that the above principle does not apply to the facts of this case, because in the contracts of forbearance the remedy against the property was reserved. It is undoubtedly true that the surety will not be discharged when at the time of the agreement for indulgence, there is a reservation of the creditor's rights and remedies against the surety, but such reservation must be *distinct, explicit* (Brandt, sec. 376) and *unqualified. Bank v. Lineberger, supra.* We are unable to find in the record any evidence of such a reservation, as it is very clear that the testimony of Greenleaf that "Hinton did not agree to give up the mortgage," does not amount to such a reservation of the remedy against the surety property as is contemplated by the law. Had there been a valid agreement of that character, it would have amounted to an equitable discharge of the trust, in which event the creditor could not have reserved his right to proceed against the said property. *Nicholson v. Revill,* 4 Add. & Ell., 675; *Kearsley v. Cole,* 16 M. & W., 136. The fact, therefore that the "mortgage" was not given up or discharged, is entirely consistent with
(9) the principle invoked by Mrs. Greenleaf, which principle indeed would have nothing to operate upon but for the contemplated continuance of the liability. The agreement was, in effect, to postpone the sale of the *entire* property contained in the trust. This was an

alteration of the original contract without the consent of Mrs. Greenleaf, and deprived her of her right to discharge the indebtedness at maturity, and to immediately proceed against the principal. In order to retain the security there should have been a clear reservation of the right to sell her property; but instead of doing this, the creditor, as we have said, entered into a binding contract with the principal to forbear the sale of any part of the property contained in the trust.

We think his Honor erred in directing a verdict against Mrs. Greenleaf, for, if her contention be true, the assignee, Hinton, who purchased at the sale made by the trustee, acquired only a naked legal title and would not be entitled to recover.

We will add that we have carefully perused the testimony and have been unable to find any evidence that Greenleaf, in making the agreements above mentioned, was authorized to act as the agent of his wife. There must be a

New trial.

Cited: Weil v. Thomas, 114 N. C., 201; *Smith v. Loan Asso.,* 119 N. C., 259; *Hedrick v. Byerly, ib.,* 421; *Shew v. Call, ib.,* 455; *Sherrod v. Dixon,* 120 N. C., 67; *Meares v. Butler,* 123 N. C., 208; *Flemming v. Barden,* 127 N. C., 215; *Benedict v. Jones,* 129 N. C., 475; *Smith v. Parker,* 131 N. C., 471; *Edwards v. Ins. Co.,* 173 N. C., 618; *Foster v. Davis,* 175 N. C., 544.

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(10)

JAMES R. HARE v. THE BOARD OF EDUCATION OF GATES COUNTY.

Admission to Schools—White and Colored Children—Prohibited Degrees—Negro Blood—Evidence.

1. The statute (section 42, chapter 199, Laws 1889) relating to the admission of children into white or colored schools provides that the rule laid down in section 1810 of the Code, regulating marriages, shall be followed. By said section of the Code the intermarriage of whites with persons who are not beyond the third or in the fourth generation from the pure negro ancestor is prohibited. Therefore a child whose great-grandparent was a negro of full blood is not entitled to admission into a school for whites.
2. Where, in the trial of an action for a *mandamus* to compel a school committee to admit a child into a school for whites, it became material to ascertain whether the grandfather of a child was a negro or a white man, testimony was admissible to show that the grandmother of the child was living with a negro about nine months before the birth of the child's father.

3. While in doubtful cases only an expert would be qualified to testify, from the appearance of a person, as to the exact proportions in which white and negro blood are intermingled in his veins, it is competent to show, by other than expert testimony and by the appearance of a person, his color and other physical qualities, that such person's parent was a negro of full blood.

MANDAMUS to compel the Board of Education of Gates County to admit plaintiff's children to the school for white children of his district, tried before *Bynum, J.*, and a jury, at Spring Term, 1893, of GATES.

The defendants refused to admit the children upon the ground that the children were negroes and not entitled to be placed on the school list.

It was admitted that the mother of the plaintiff was a pure-blood white woman, and that his wife to whom he was married, and who was the mother of his children, was a pure-blood white woman; that the plaintiff was an illegitimate child. There was evidence, not contradicted, that the children were within the school age.

J. H. Ellis, a witness for the defendants, testified as follows: "I am eighty-eight years old." (Proposes to ask witness where the mother of plaintiff was living about nine months before plaintiff was born. Objection; overruled, and exception.) Witness answers: "She was living with Charles Jones." Witness further testified he had known the plaintiff from the time he was born until he was twenty-one years old. (Proposes to ask witness, "From your knowledge of the plaintiff, from your observation of him and his associations, do you say he is a white man or a negro?" Objection; overruled, and exception.) Witness
(11) answers: "I say he is a colored man. He associated with colored people until they would not have him."

Upon cross-examination witness said: "Jennie Hare, a white woman, was plaintiff's mother. Charles Jones was not a white man—was a yellow man. Charles Jones's mother was a white woman—Polly Wiggins. His father was a negro."

Morgan, a witness for defendants, testified he had known plaintiff all his life. "From my knowledge of him I say he is a colored man. He has associated with the colored race."

Upon cross-examination, says he (witness) and Matthews were accused of being the father of plaintiff; that both he and Matthews were white.

William Eason, a colored man, witness for defendants, testified: "I have known plaintiff for twenty-six years. He is a colored man. He associated with colored people; was at our church at the mourners'

bench for a week. He courted my wife; she is a colored woman. She and I were slaves."

The defendants introduced the plaintiff before the jury for their inspection.

One Jones, a witness for the plaintiff, testified he knew Charles Jones and Elbert Matthews; that Matthews was a white man, dark-colored; that Jones was a colored man, about three-fourths white; that his (Jones's) mother was a white woman; his father a colored man.

One Matthews, a witness for the plaintiff, testified: "I knew the plaintiff's mother; was present when she swore him. She swore him to Elbert Matthews, a white man. This was before the plaintiff was born. Matthews ran away, and after plaintiff was born and he found he was a colored child, he came back."

The plaintiff was introduced as a witness in his own behalf, and testified that the children were his and his wife's; that his wife was a white woman; that twenty-five years ago, when he went to get married, his mother told him Elbert Matthews was his father. (12)

Upon cross-examination, says he has his two oldest children in court, and has two at home. The two at home are darker than the ones he has in court; that they are not as dark as he is.

Plaintiff then introduced before the jury for their inspection the two children.

Upon the conclusion of the evidence the defendants agreed that the second and third issues, relating to alleged demands upon the board, should be answered "Yes," and the fourth issue, as to whether the matter in controversy had theretofore been decided, should be answered "No"; and that the only issue to be left to the jury should be the first.

The plaintiff's counsel asked, in writing, the following instructions:

"That if they believe the evidence in this case, then the children of James R. Hare are not within the prohibited degrees, and are entitled to be placed upon the school list for District No. 15 of the white race in Gates County, and the jury must answer the first issue 'Yes.'"

The court refused these instructions, and instructed the jury as follows:

"Under the North Carolina laws the marriage between whites and blacks is prohibited within the third degree, but the marriage of whites with persons of color beyond the third degree is allowed, and the children of this marriage, or children within the third degree of children born as a result of this marriage, are white children, and entitled to all the rights and privileges of white children. The question for the jury in this case is whether the children of the plaintiff come within this class. When a plaintiff comes into court the burden is upon him to show the facts necessary to prove his case. It is admitted that the

mother of the plaintiff was white, and that the mother of his
(13) children is white. So you need not follow the line of his ancestors on his mother's side. The only two names suggested in the evidence or argued by counsel as the father of the plaintiff are Elbert Matthews and Charles Jones. It being admitted he is an illegitimate child, there is no presumption arising as to who is his father. That Elbert Matthews was a white man is not denied, and if you find that Matthews was the father of the plaintiff, I instruct you to answer the first issue 'Yes.' It is not denied that the mother of Charles Jones was a white woman. Now, if you find that Jones was the father of the plaintiff—it becomes material to find who his father was—if you find that Jones was the father, Jones's mother being a white woman, and you find that Jones's father was a full-blood negro, then the children of the plaintiff would be within the prohibited degree, and you will answer the issue 'No.' If Jones's father was only a half-blood negro, then this would make Jones three-fourths white, and that will make the children of the plaintiff white, and you will answer the issue 'Yes.' If you find that neither Jones nor Matthews was the father of the plaintiff, then the question for you is, In what degree was the father of plaintiff? And in passing on this question you can consider the appearance of the plaintiff, the appearance of his children, the testimony of the witnesses who have testified as to his being white or black; and if from the whole evidence you find that the father of plaintiff was as much as three-fourths white, then his children are white children, and you will answer the issue 'Yes.' If his father was not as much as three-fourths white, you will answer it 'No.' And a man is three-fourths white when his mother is white and his father was the son of a white woman and black man, or a white man and black woman, or when his father was white and his mother the daughter of a white woman and black man, or of a white man and black woman."

The plaintiff excepted to the refusal to charge as requested, and to the charge as given, and to instructing the jury that the burden of proof was on the plaintiff.

There was a verdict for the defendants, and judgment accord-
(14) ingly, from which plaintiff appealed.

L. L. Smith for defendants.
No counsel contra.

AVERY, J. But a single question was raised by the exception to the charge, and that is, whether the Court, in any aspect of the testimony, should have instructed the jury that the children of the plaintiff belonged to the white race, and had a right to insist upon admission into the dis-

trict school for white children. The inference might have been drawn from the statement of one of the witnesses that the plaintiff's father was a mulatto, while others testified that he was a negro. "All marriages between a white person . . . and a person of negro or Indian descent to the third generation inclusive are void." The Code, sec. 1810. The statute (Laws 1889, ch. 199, sec. 42) provides, "That in determining the right of any child to attend the white or colored schools, the rule laid down in section 1810 of The Code regulating marriages shall be followed." It is manifest that the jury, acting under the instructions given them, must have found from the testimony that Charles Jones was the father of the plaintiff, and was a full-blooded negro. There was no error in the charge of the court of which the plaintiff could complain. Whether we concede or deny that for the purpose of establishing the right of a person of mixed blood to contract a marriage with a white person, or gain admission into a school for white children, testimony tending to show that the reputed father of his father was only a negro of the half-blood is admissible, or that it is competent for either purpose to go behind the presumption that an admitted slave was a full-blooded negro, and attempt to show the exact proportions in which the Caucasian and negro blood were intermingled in his conception, in either event, if the plaintiff's father was in fact a full-blooded negro, as the jury must have determined that he was, his children (15) would not be beyond the third generation. This Court, in *S. v. Chavers,* 50 N. C., 11, construed the language of the old statute (Revised Code, ch. 107, sec. 79), "All persons descended from negro ancestors to the fourth generation inclusive," as classifying with the whites only persons who were removed beyond the fourth, or belonged to the fifth generation. The words used in section 1810, "to the third generation inclusive," must, therefore be construed to prohibit intermarriage of whites with persons who are not beyond the third or in the fourth generation from the pure negro ancestor. The statute in reference to schools is expressly required to be interpreted in the same way as section 1810 of The Code is construed, and it would follow that the plaintiff's children could not rightfully demand admission into the schools for white children without showing that the negro ancestor was more remote than the father of Charles Jones, and that they themselves belonged to the fourth succession from such ancestor. *McMillan v. School Committee,* 107 N. C., 609; *S. v. Watters,* 25 N. C., 455. It will be observed that in the statute creating schools for the Croatan Indians, the exclusion extends to the fourth generation, omitting the word "inclusive," which is synonymous with "the third generation inclusive." If it was material to know whether Charles Jones or a white man was the paternal grandfather of the children, and this was a question in dis-

pute, it was competent to show that their grandmother was living with Jones about nine months before the birth of the plaintiff. While in doubtful cases only an expert would be qualified to testify from the appearance of a person as to the exact extent to which white and negro blood are commingled in his veins, it does not require any peculiar scientific knowledge "to be able to detect the presence of African blood by the color or other physical qualities of the person." *Hopkins v. Bowers,* 111 N. C., 175; *S. v. Jacobs,* 51 N. C., 284. There is

No error.

Cited: Cogdell v. R. R., 130 N. C., 326; *Ferrall v. Ferrall,* 153 N. C., 176; *Johnson v. Board of Ed.,* 166 N. C., 473.

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(16)

THOMAS A. BROUGHTON ET AL. v. S. B. LANE ET AL.

Feme Covert—Trust Deed—Power of Cestui que Trust to Convey Limited to Mode Prescribed in Deed.

1. The power of a married woman to dispose of land held by her under a deed of settlement is not absolute, but limited to the mode pointed out in the instrument; therefore,
2. Where land was conveyed to a trustee for the benefit of a *feme covert,* the trustee to convey the same, "if requested by her in writing," and reinvest the proceeds on the same trusts, a conveyance by her and her husband, in which the trustee did not join, did not pass the interest held in trust for the *feme covert.*

ACTION for possession of land, tried at the Spring Term, 1893, of PAMLICO, before *Bynum, J.* The case agreed was substantially as follows:

In consideration of the money received from the sale of land to Sarah Williams, mentioned in the deed, James Norcom, on 1 November, 1856, conveyed to J. S. Jones, trustee, the lands described in the complaint, and the recitals of which are to be taken as further facts agreed. Afterwards, to wit, on 25 October, 1859, the said Levi D. Broughton and wife Eliza Broughton executed a deed for a valuable consideration for said land to one Luther Babbitt. Jones, trustee, did not execute or join in the execution of any deed for said land to any person. By subsequent and *mesne* conveyances the land came into the possession of the defendants. The plaintiffs are the children and grandchildren of Levi D. Broughton and his wife Eliza. Eliza died in 1861, and Levi on 18 June, 1888, and this action was instituted on 27 February, 1891.

Eliza Broughton purchased from John Godett a tract of land on Trent and Thomas Creek, by deed dated 27 October, 1857, and went into possession thereof, and plaintiffs are now in possession of the same as heirs at law of Eliza Broughton aforesaid. (17)

The material portions of the deed of Norcom to J. S. Jones, trustee for Eliza Broughton, are as follows:

"The conditions of the foregoing deed are such that, whereas, Mrs. Eliza Broughton, wife of Levi D. Broughton, has conveyed a tract of land to which she was entitled as *feme sole* in fee simple to Sarah Williams, upon condition that the purchase-money received for her land should be invested in other lands, to be held to the same trusts and purposes as the lands heretofore held by her as aforesaid; and whereas, the said Levi D. Broughton, husband of said Eliza, has consented thereto, and has requested James Norcom, the grantor of the above-described tract of land, so to convey, and for the purposes of carrying the said agreement into execution, the said tract has been granted to the said Joseph S. Jones as trustee for the purposes aforesaid:

"Now, it is covenanted and agreed by and between the parties to this indenture, that the said Joseph S. Jones should hold the same to the separate use of the said Eliza, wife of said Levi D. Broughton, as if she were a *feme sole,* and will permit her to have the use of the same and the profits deriving therefrom to her sole and separate use during her coverture with the said Levi D. Broughton, and will, if requested by her in writing during the coverture, convey the same and invest the purchase-money in such other property as she may designate, to be held to the same purposes and trusts as set forth in this indenture; and if the coverture should be dissolved by the death of said Levi, that then the said Joseph S. Jones, trustee herein, will convey said tract of land to the said Eliza Broughton, now the wife of said Levi, in fee simple, and if the coverture should be determined by the death of the said Eliza, wife of said Levi D. Broughton, that then the said Joseph S. Jones, trustee as aforesaid, will convey the same to the said Levi Broughton, her now husband, for life, with remainder to the children of the marriage, if there be any children, in fee simple, (18) and if there be no children living at the time of the death of said Eliza Broughton, wife of said Levi, then the said trustee shall convey to said Levi D. Broughton in fee simple."

The trustee, J. S. Jones, did not join in the deed from the Broughtons to Babbitt.

The defendants contended that inasmuch as Eliza held the lands which she sold to Sarah *as a feme sole,* the lands purchased with the proceeds of that sale should also have passed to her *as a feme sole;* that from the whole context of the deed, it appeared that Eliza was to have

the sole use of the land, and to *hold it as a feme sole,* and that being the intent of the parties, it is the duty of a court of equity to put the intention of the parties into effect.

His Honor gave judgment for the plaintiffs, and the defendants appealed.

O. H. Guion and W. W. Clark for plaintiffs.
W. T. Caho and W. D. McIver for defendants.

AVERY, J. The question presented by this appeal is whether the land conveyed to Jones, as trustee, for the sole and separate use of Eliza Broughton, passed by the deed executed by her husband and herself, in which the trustee Jones did not join. That the power of a married woman to dispose of land held by her under a deed of settlement is "not absolute, but limited to the mode and manner pointed out in the instrument," seems to be the settled law of this State, whatever may be the rulings of other courts. *Hardy v. Holly,* 84 N. C., 661; *Kemp v. Kemp,* 85 N. C., 491; *Mayo v. Farrar,* 112 N. C., 66; *Monroe v. Trenholm, ib.,* 634.

In *Hardy v. Holly* the *feme covert* was clothed with express authority to compel the trustee to sell and reinvest, and to remove
(19) the trustee when she deemed fit, and the fund was to be held subject to her control or as if she were a *feme sole.* But her power as to the disposition of the property in which the trust fund should be invested, was, in writing, to direct the trustee to sell, etc.

In the case at bar it was argued that the trustee should hold the land to the separate use of Eliza Broughton during coverture, and should, "if requested by her in writing during the coverture, convey the same," etc. The *feme covert,* Eliza Broughton, was "not only subject to the express restrictions" of the settlement "as to the manner of exercising such power as was granted to her, but she was dependent upon a strict construction of its terms for authority to make any disposition whatever of the property embraced in it." *Mayo v. Farrar* and *Hardy v. Holly, supra.* As the trustee did not join in the deed to Babbitt, and there is no evidence that he executed any separate conveyance by the request of the *cestui que trust,* we simply adhere to the repeated rulings of this Court in holding that the interest conveyed to Jones in trust for the separate use of Eliza Broughton did not pass by the deed of conveyance, in which her husband joined, to Luther Babbitt and was not transmitted by the subsequent conveyances to the defendants.

Judgment affirmed.

Cited: Kirby v. Boyette, 116 N. C., 167; *S. c.,* 118 N. C., 257; *Shannon v. Lamb,* 126 N. C., 44.

(20)

H. A. BOND, JR., v. JACOB WOOL.

Practice—Unsigned Judgment.

1. While, for many reasons, it is the better practice that a judgment should be signed by the judge, it is not mandatory nor necessary to its validity that it should be done.
2. When a judgment of the Superior Court was affirmed on appeal, an entry on the docket of the Superior Court, "Judgment as per transcript filed from the Supreme Court," was sufficient and a termination of the action. The former judgment having been merely suspended, and not vacated by the appeal, the affirmation by the Supreme Court ended the suspension, and the office of the last judgment was simply formal, to direct the execution to proceed and to carry the costs subsequently accrued.

MOTION to assess damages on an injunction bond, heard at the Spring Term, 1893, of CHOWAN, before *Bynum, J.*

The following are the facts in the case:

At Spring Term, 1890, of Chowan, there was a judgment dissolving the injunction. From this judgment there was an appeal by the plaintiff to the Supreme Court. Judgment was affirmed in the Supreme Court. The certificate of the Supreme Court was sent down to the Superior Court, to Spring Term, 1891, and at that term there was entered on the minute docket the following: "Judgment as per transcript filed from the Supreme Court." There was no judgment written and signed by the presiding judge at said Spring Term, 1891. The case was dropped from the docket and never placed upon the docket again until Spring Term, 1892, when, in consequence of the notice of 14 March, 1892, the clerk placed it on the civil issue docket for said Spring Term, 1892.

The motion was continued until the Spring Term, 1893, when the plaintiff moved to dismiss, upon the ground that there was no cause pending in which the motion of the defendant could be made.

The court gave judgment dismissing the motion to assess dam- (21) ages, and the defendant appealed.

W. D. Pruden for plaintiff.

F. H. Busbee and Grandy & Aydlett for defendant.

CLARK, J. While it is more regular and, for many reasons, the better course, that judgments should always be signed by the judge, it has been repeatedly held that this is not mandatory. *Matthews v. Joyce,* 85 N. C., 258; *Rollins v. Henry,* 78 N. C., 342; *Keener v. Goodson,* 89 N. C., 273; *Spencer v. Credle,* 102 N. C., 68. The entry on the docket,

"Judgment as per transcript filed from the Supreme Court," was sufficient and a termination of the action. Besides, under the provisions of chapter 192, Laws 1887, the former judgment of the Superior Court was not vacated by the appeal—merely suspended—and the suspension was ended by the affirmation of the judgment by the Supreme Court.

The subsequent judgment in the Superior Court added no validity to the former judgment of that court, nor to the judgment in the Supreme Court. Its office was simply formal, to direct the execution to proceed and to carry the costs subsequently accrued.

No error.

Cited: Range Co. v. Carver, 118 N. C., 338; *Wool v. Bond, ib.,* 2; *Brown v. Harding,* 170 N. C., 261; *Land Co. v. Chester, ib.,* 400; *McDonald v. Howe,* 178 N. C., 258.

JOSIAH MIZELL v. JOSEPH B. RUFFIN.

Description in Deed, Void for Uncertainty.

1. A deed conveying a "portion of grantor's cypress timber" on certain swamps is void for uncertainty, and such uncertainty is not cured by an immediately subsequent condition that the grantor "may retain from this timber enough for his farm and building purposes."
2. The rules of legal construction will not admit of a surmise as to the probable intention of a grantor contrary to the purport of his words.

(22) ACTION for damages for breach of warranty, tried before *Hoke, J.,* and a jury, at Spring Term, 1893, of BERTIE.

The plaintiff introduced in evidence a deed from one Holloman to J. B. Burden, also a deed from Joseph Burden to J. B. Ruffin, the defendant, dated February, 1871, conveying to the said Ruffin, his heirs and assigns forever, a portion of his (the grantor's) timber on Ahoskie and Loosing swamps. Following this clause was the following: "The conditions of this deed are that the said Joseph W. Burden and his heirs may retain from this timber enough for his farming and building purposes." Also a deed from Joseph B. Ruffin, the defendant, to the plaintiffs John Mizell and John C. Britton, dated in 1874, conveying "all the cypress timber on Ahoskie and Loosing swamps, formerly owned by Joseph W. Burden, except that portion retained by the said Burden when sold to Joseph B. Ruffin; that portion excepted by the

said Burden is just enough for his farming and building purposes." The deed contained a clause of general warranty, for a breach of which this action was brought.

There was evidence that the lands mentioned in the deeds and in the complaint were the same; that the defendant Ruffin, after his purchase, had cut a part of the timber on the place, until he sold to the plaintiffs in 1874; that the plaintiffs then under the deed to them from the defendant, cut and manufactured the timber until 1890, just before this suit was brought, when they were forbidden to cut more by one Wynns, who claimed under Burden by deed subsequent to that from Burden to Ruffin, sufficient in form, from said Burden, and that said Wynns has since cut some of the timber, and that plaintiff desisted from further cutting because forbidden by said Wynns, and brought this action for breach of warranty.

It was also admitted that the timber was on Ahoskie and Loosing swamps—being the swamps mentioned in the deed from Burden to Ruffin, and it did not appear in evidence that Burden owned (23) any land on said swamps other than that mentioned in the deeds offered in evidence.

It was contended by plaintiffs that the deed from Burden to Ruffin was too indefinite and that nothing passed by said deed, and that, therefore, the title of the subsequent grantees from Burden was superior, and that the ordering said plaintiffs not to cut said timber, and the taking possession of the same by Wynns under his deed from Burden, was a breach of defendant's warranty for which these plaintiffs might maintain this action.

The court held that the true construction of the deed from Burden to the defendant Ruffin was to convey all of the timber of Burden on said swamps, except enough for his building and farming purposes, and on the whole evidence no breach of said warranty was shown which would entitle these plaintiffs to recover.

In deference to this holding and opinion of the court, the plaintiffs submitted to a judgment of nonsuit and appealed.

W. D. Pruden for plaintiffs.
F. D. Winston for defendants.

CLARK, J. The deed from Burden to Ruffin conveyed "a portion of his cypress timber on Ahoskie and Loosing swamps." This is void for uncertainty, for it does not appear what portion is conveyed. *Harrison v. Hahn,* 95 N. C., 28; *Blakely v. Patrick* (the "buggy case"), 67 N. C., 40; *Atkinson v. Graves,* 91 N. C., 99; *McDaniel v. Allen,* 99 N. C., 135. Nor is this helped out or rendered more certain by the condition which

immediately follows, that the grantor and his heirs "may retain from *this* timber enough for his farm and building purposes." The relative pronoun "this" refers to its antecedent, which is the "portion" which is attempted to be conveyed. But if the reservation was out of the whole body of the timber, the "portion" conveyed would still remain
(24) indefinite. It may or may not be that the grantor *intended* to convey all his timber, except that reserved, but it is clear that such is not the plain meaning of the words used, and the rules of legal construction will not admit of a surmise of the probable intent of the grantor contrary to the purport of his words. The subsequent deed given by Burden to Wynns is admitted to be sufficient in form.

There has been a breach of the warranty given by Ruffin to the plaintiffs, for which they can maintain their action. Whether the defendant is protected by the statute of limitations, or has other adequate matter of defense, is not now before us.

Error.

Cited: Britton v. Ruffin, 120 N. C., 88; *York v. Westall,* 143 N. C., 281.

J. C. GALLOP v. WILLIAM F. ALLEN & CO.

Practice—Action to Set Aside Judgment of Justice of the Peace—Injunction.

An action in the Superior Court will not lie to vacate and set aside and enjoin the execution of an irregular and voidable judgment of a justice of the peace where no fraud is alleged, the proper remedy being a motion before the justice who rendered the judgment, or his successor in office, to set aside the judgment, or a writ of *recordari* in the nature of a writ of false judgment in the Superior Court.

ACTION, commenced in the Superior Court of CURRITUCK, to vacate and set aside, as null and void, a judgment rendered by a justice of the peace of said county in favor of the present defendants and against the plaintiff in this action.

The complaint alleged that the summons in the action before the justice was served upon this plaintiff on 5 September, 1892, returnable on the next day at the courthouse in said county before the justice named; that this plaintiff, then defendant, was sick on the re-
(25) turn day and could not attend at the place of trial; that thereupon the cause was continued for his absence, and for further

hearing, but that no notice was given him of the time or place for the further hearing, and that he heard nothing further of the matter until a few days before this action was begun, when he was notified by the sheriff of said county that said sheriff had an execution in his hands against said plaintiff, who was the defendant in said execution, upon a judgment rendered by said justice in said action on 27 September, 1892, at Shawboro in said county, a place other than the courthouse. This plaintiff alleged in his complaint, used as an affidavit, that he had a meritorious defense to the said action. A restraining order was made returnable before *Bynum, J.*, at chambers in Elizabeth City on May 2, 1893, upon which return his Honor dissolved the restraining order and dismissed the application for an injunction, for want of jurisdiction, and the plaintiff appealed.

Grandy & Aydlett for plaintiff.
No counsel contra.

MACRAE, J. Assuming the affidavit of the plaintiff to be true, the judgment rendered by the justice was irregular and voidable.

The remedies open to defendant in that action, the plaintiff herein, were a motion before the justice who rendered the judgment, or his successor in office, to set aside the judgment, or a writ of *recordari* in the nature of a writ of false judgment in the Superior Court.

If it had been alleged that the judgment was obtained by fraud, an action to set it aside would have been the proper procedure.

The subject has been so recently discussed and explained that it will be unnecessary now to do more than refer to *King v. R. R.*, 112 N. C., 318, and *Whitehurst v. Transportation Co.*, 109 N. C., 342. As an action did not lie to vacate the judgment, his Honor prop- (26) erly dissolved the restraining order and denied the application for an injunction.

Affirmed.

R. C. CHERRY v. MACK LILLY.

Practice—Jurisdiction—Waiver of Objection by Appearance and Plea.

Irregularity of service is waived by appearance and plea in bar; therefore, although a summons issued by one justice cannot be made returnable before another, except in cases provided by statute to that effect; yet, if the person served with process so issued appear and, instead of moving to dismiss, enter a plea in bar, he will be deemed to have waived the objection.

APPEAL, at May Term, 1893, of BEAUFORT, from *Bynum, J.*, upon an appeal by the plaintiff from a justice of the peace, before whom both the plaintiff and the defendant appeared in person and by attorney.

In the Superior Court the defendant, for the first time, moved to dismiss the action, because the summons was issued by A. Mayo, a justice of the peace, and made returnable before O. H. P. Tankard, another justice of the peace of the same township. The latter justice tried the action below, and the defendant there did not move to dismiss. The court granted the motion to dismiss, and plaintiff appealed.

W. B. Rodman for plaintiff.
C. F. Warren for defendant.

MACRAE, J. There is this distinction between the present case and that of *Williams v. Bowling,* 111 N. C., 295, wherein it was held
(27) that a summons issued by one justice of the peace cannot be made returnable before another, except in cases provided by statute to that effect. In the former, the defendant appeared and answered, submitting to the jurisdiction of the justice before whom the summons was returned. In the latter, the defendant appeared and moved to dismiss, and the justice properly dismissed the action.

Here both justices had jurisdiction of the subject-matter of the action, but the defendant was brought into court by irregular process. He could have moved to dismiss, but he chose to submit to the jurisdiction of the justice, entered his pleas and went into the trial, and made no objection to the jurisdiction of the justice until after the case had been brought by appeal into the Superior Court. It is somewhat like the case of *West v. Kittrell,* 8 N. C., 493, where a suit was carried from the county to the Superior Court by consent of parties, and not by appeal, and it appeared that it was a case in which the Superior Court had concurrent jurisdiction with the county court of the subject-matter of the proceeding; and the petition and plea being entered in the Superior Court, that court had jurisdiction as if the suit had never been in the county court.

In the case before us the action was entered upon the docket, the defendant appeared, the pleadings were noted, and without objection the trial proceeded.

The justice who tried the action acquired jurisdiction, not by the irregular process issued by another justice, but by the appearance and plea of the defendant. As in the case of *McMinn v. Hamilton,* 77 N. C., 300, where the court had jurisdiction of the subject-matter of the action, but the *venue* was wrong, it was held that the objection must be taken in apt time. If the defendant pleads to the merits of the ac-

tion he will be taken to have waived the objection. See also, *Morgan v. Bank,* 93 N. C., 352.

An entirely analogous case is *Moore v. R. R.,* 67 N. C., 209, where it was held that the clerk of the Superior Court of one (28) county has no right to issue a summons returnable to the Superior Court of another county, but irregularity of service is waived by an appearance and answer in bar.

Error. Judgment Reversed.

Cited: Davison v. Land Co., 118 N. C., 370; *Riley v. Pelletier,* 134 N. C., 318; *Rutherford v. Ray,* 147 N. C., 216.

D. MARKS & SON v. M. D. BALLANCE.

Jurisdiction of Justice of the Peace—Separation of Items of Account after Consolidation of Same in Statement Rendered to Debtor.

When a creditor having items of account contracted by a debtor at different dates consolidates them and renders a statement to the debtor, claiming the round sum, to which the debtor makes no objection, the creditor cannot afterwards separate the items so as to sue on them separately before a justice of the peace.

ACTION on open account, tried, on appeal from a justice of the peace, before *Bynum, J.,* at Spring Term, 1893, of HYDE.

It appeared that in May, 1891, the defendant purchased of plaintiffs, on sixty days time, a bill of goods to the amount of $95.98, and in October, 1891, he purchased, on sixty days time, a second bill of goods to the amount of $210.67, on which was credited a payment of $68, leaving a balance of $142.67. After both bills became due, to wit, on 3 January, 1893, the plaintiffs rendered a statement to defendant showing a balance of $238.65 to be due them, to which the defendant made no objection. Payment having been refused, the plaintiffs brought two actions—one on each of the above-mentioned bills. The defendant pleaded to the jurisdiction of the justice of the peace, and asked (29) that the action be dismissed.

Upon the above statement of facts it was agreed that if the judge should be of opinion that the justice of the peace had jurisdiction, then the judgment of the justice of the peace should be affirmed; otherwise, that the two actions should be dismissed.

The court being of opinion that the plaintiffs had the right to sue on each separately, and that the justice of the peace had jurisdiction, rendered judgment accordingly, and the defendant appealed from the judgment rendered in each case.

J. E. Mann for plaintiffs.
Thomas G. Skinner for defendant.

BURWELL, J. We think that the matter involved in this appeal is determined in *Hawkins v. Long,* 74 N. C., 781.

The plaintiffs have seen fit to consolidate the items of their account against the defendant, and to deduct therefrom the items of credit, and having rendered to the defendant a statement, in which they struck a balance and claimed that round sum as a debt, are bound thereby, unless the defendant has objected to such statement, and this he has not done. On the contrary, he has assented to the rendered account, impliedly, by his failure to object thereto, and expressly by his pleas in the two actions brought against him, thus making himself bound with the plaintiffs by this account stated. Upon the facts agreed, the two actions should have been dismissed.

Error. Reversed.

Cited: Simpson v. Elwood, 114 N. C., 529; *Copeland v. Tel. Co.,* 136 N. C., 13.

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(30)

J. B. BONNER v. D. C. STYRON.

Mortgage—Application of Proceeds of Sale Under to Unsecured Debt, with Consent of Mortgagee.

1. While a mortgagee must apply the proceeds of any part of mortgaged property on the mortgage debt, if the mortgagor instructs him so to do or if no instructions are given, and he is not at liberty of his own accord to apply such proceeds on another debt, yet if the mortgagor consents or directs that such application shall be made, and it is so made, the mortgagor cannot be allowed to say that an application of his money made at his request or on his demand was a misapplication; therefore,
2. Where, in the trial of an action to recover possession of for the purpose of selling personal property which had been mortgaged, together with cotton belonging to the defendant and his sons, it appeared that the plaintiff had received from the defendant sufficient cotton to discharge the debt for which it and the personal property were security, but had applied the

proceeds to the credit of another and unsecured debt of defendant, and there was conflicting testimony as to whether such application was made with the consent and by the directions of the defendant, it was error in the court to charge the jury that, although defendant assented to such application, unless the sons assented thereto the debt for which the cotton was security would be deemed satisfied.

ACTION to obtain possession of personal property in order to sell the same to pay two certain mortgages, tried before *Bynum, J.*, and a jury, at February Term, 1893, of BEAUFORT.

From the judgment upon a verdict for the defendant the plaintiff appealed.

The pertinent facts are set out in the opinion of Associate Justice BURWELL.

W. B. Rodman for plaintiff.
Chas. F. Warren for defendant.

BURWELL, J. The personal property in controversy in this ac- (31) tion belonged, it seems, to the defendant D. C. Styron, and was assigned to the plaintiff by two separate mortgages, one given in 1889 to secure a debt of about one hundred and sixteen dollars, and one given in 1890 to secure a debt of seventy-five dollars. The first mortgage or lien was signed by the defendant and his two sons, and gave to the plaintiff, to secure the debt therein mentioned, a lien not only on the defendant's property here in dispute, but also on certain cotton which was the joint property of the three mortgagors or lienors. The second mortgage, executed by the defendant alone, as stated above, assigned to plaintiff his crop of cotton as well as the property described in the complaint.

The defendant in his answer averred that both of the debts had been paid, and upon the trial introduced evidence that tended to show that there had been delivered to plaintiff on account of these secured debts cotton of sufficient value to extinguish them, if the proceeds had been applied to their satisfaction, and that the cotton so delivered was the cotton covered by the mortgage or lien.

The plaintiff admitting that he had received some cotton from the defendant, testified that with the consent of the defendant and indeed at his request, he had applied a portion of the proceeds of the cotton delivered to him as aforesaid on debts due to him from the defendant other than those secured by the two mortgages above mentioned, but there was no evidence that the sons of the defendant, who were jointly liable with him for the debt of one hundred and sixteen dollars, had in any way assented to or ratified such application of the proceeds of the cotton.

The plaintiff, among other instructions, asked his Honor to charge the jury "that though the plaintiff received enough of the joint property of the obligor to extinguish the debt, yet he could, by the request or consent of defendant, apply the proceeds of this joint property to other purposes than the payment of this bond, and while it
(32) might extinguish the security and debt as to S. W. and H. S. Styron and their property, it would leave it operative as to D. C. Styron and his separate property."

This instruction was refused, and the jury was told that if they found the fact to be that defendant and his two sons raised the cotton of 1889, and the cotton was carried to plaintiff by one of them, and plaintiff knew it was the cotton of the three, and that it was the cotton covered by his mortgage, then, although defendant assented to the application to another debt of a part of the proceeds thereof, unless they found the fact to be further that the two sons assented to the application of the proceeds to another debt, they should find that the first debt was paid.

We think that there was error in refusing the instruction for which the plaintiff asked.

While it is true that a mortgagee who receives the proceeds of any part of the mortgaged property must apply such proceeds on the mortgage debt, if the mortgagor instructs him so to do, or if no instructions are given him, and he is not at liberty of his own accord to apply such proceeds on another debt, yet if the mortgagor consents or directs that such application shall be made, and it is so made, he will not be allowed to say that an application of his money, made at his request or on his demand, was a misapplication.

This being conceded, it seems to us to follow that if the defendant agreed that the proceeds of a part of the mortgaged cotton, the property of himself and his sons, should be diverted from the mortgage debt and used to extinguish other liabilities of his, he will not be permitted thereafter to deny his authority to do what he has seen fit to do, nor to question the validity of an act done by another at his instance. As to him and his property, this appropriation to other debts must be sustained.

Error. New trial.

Cited: Lee v. Manley, 154 N. C., 247.

(33)

JACOB WOOL v. TOWN OF EDENTON.

Mandamus—Duty of Municipality—Riparian Owner—Misjoinder of Parties.

1. Where a statute (section 2751 of The Code) provides that an incorporated town shall regulate the line on deep water in front of the lands of proprietors to enable the latter to erect wharves, etc., thereon, the performance of such duty may be compelled by the courts.
2. Where in an action against a town corporation to compel it to regulate the line of deep water in front of plaintiff's land the complaint alleged that the defendant did undertake to locate the line but that said line did not extend to deep water, nor did it regulate the deep-water line as required by law, a demurrer by defendant that it appears from the complaint that the defendant had fully performed its duty in the premises was properly overruled.
3. The joinder of unnecessary parties is not a ground of demurrer.

ACTION, heard on complaint and demurrer before *Bynum, J.*, at Spring Term, 1893, of CHOWAN.

The plaintiff, as the owner of a lot of land in the town of Edenton, fronting on Edenton bay, sought by his action to compel the location by the town authorities of the deep-water line in front of his property as provided by section 2751 of The Code. The action was brought against the individual members of the board of councilmen, as well as against the "Board of Councilmen." One allegation of the complaint was as follows:

"That the board of councilmen of said town did on the -- day of March, 1888, undertake to locate the said line of deep water in front of the property of plaintiff above described, but that in fact the line so located does not extend to the deep water of Edenton bay, nor does it regulate the deep-water line as required by law, and if plaintiff be precluded from going further than the line so attempted to be fixed, he will not be able to enjoy the use of his riparian rights." (34)

The individual members of the board of councilmen demurred to the complaint on the ground that they as individuals had no connection with the matter, and owed no duty to the plaintiff, while the board of councilmen demurred upon the following grounds:

"1. It appears from complaint that the councilmen of Edenton did in March, 1888, fix the line to which plaintiff might enter, and it does not appear that plaintiff made any objection thereto, but acquiesced in same, until this suit was begun.

"2. It appears the board has regulated the line to which he might enter, and there is no allegation of fraud or collusion.

"3. For that in law these defendants are the judges in regulating

said line, and it appears that they have regulated same, and their discretion cannot be controlled by the court."

His Honor overruled the demurrer, inasmuch as the complaint did not allege that the town had regulated the line of deep water, but only that it had *undertaken* and failed to do so as required by law, and defendants appealed.

F. H. Busbee and Grandy & Aydlett for plaintiff.
W. D. Pruden for defendants.

SHEPHERD, C. J. It is provided by The Code, sec. 2751, "that persons owning lands on any navigable sound, river, etc., for the purpose of erecting wharves on the side of the deep water thereof, next to their lands, may make entries of land covered by water adjacent to their own, as far as the deep water of such sound, river, etc., and obtain title as in other cases. . . . and when any such entry shall be made in front of the lands in any incorporated town, the town corporation shall regulate the line on deep water to which entries may be made." The
(35) performance of the duty thus imposed upon the town corporation may be compelled by the courts (*Wool v. Saunders,* 108 N. C., 729), and it is for this purpose that the present action is brought. The complaint alleges that defendant did "undertake to locate the said line of deep water in front of the property of the plaintiff, . . . but that in fact the line so located does not extend to the deep water of Edenton Bay, nor does it regulate the deep-water line as required by law." It is further alleged that the plaintiff has demanded that the defendant "extend and regulate the said line to the deep water of the said bay," and that the defendant has refused to take any further action. It is insisted upon demurrer, that it appears from the complaint that the defendant has fully performed its duties in the premises, and that the action should be dismissed.

We cannot assent to such a conclusion, and are of the opinion that his Honor was correct in overruling the demurrer. The law requires that the town shall "regulate the line *on deep water,*" and it is explicitly alleged that this duty has not been performed, and that in fact the line does not extend to the deep water. We are aware of no principle which authorizes us to presume that the defendant has performed a plain statutory duty in the face of such admissions as are contained in these pleadings.

As to the joinder of unnecessary parties, it has frequently been decided that it is not a ground of demurrer. *Burns v. Ashworth,* 72 N. C., 496.

Affirmed.

Cited: S. c., 115 N. C., 15 and 117 N. C., 3; *Abbott v. Hancock,* 123 N. C., 103.

(36)

H. G. WILLIAMS & CO. v. JOHN S. HODGES ET AL.

Stoppage in Transitu—Possession of Consignee.

1. Where there is an actual or constructive delivery of goods to the purchaser before demand of the vendor the right of stoppage *in transitu* is at an end.
2. If the carrier, by reason of an arrangement with the consignee or for any cause, remains in possession, but holds the goods only as the agent of the consignee and subject to his order, such possession is the possession of the consignee.

CLAIM AND DELIVERY, tried before *Bynum, J.*, at Spring Term, 1893, of BEAUFORT, upon case agreed, the facts set forth in which were substantially as follows:

The plaintiffs, merchants doing business in Norfolk, Va., on 17 December, 1892, on the order of the defendant Hodges, a merchant doing business in Washington, N. C., sold and shipped to the latter certain articles of personal property, delivering the same to the Old Dominion Steamship Company, a common carrier between Norfolk and Washington. The goods arrived at Washington on or about 20 December, 1892, and were placed in its warehouse, where they remained until the beginning of this action, excepting one package, which was delivered, on the order of Hodges, before 28 December, 1892. Hodges was insolvent at the time of the sale of the goods, but his insolvency was unknown to the plaintiffs or to himself.

On 28 December, 1892, Hodges executed a deed of trust to his co-defendant Chauncey, whereby he conveyed to him all of his goods and personal property in trust to pay the debts of said Hodges, the deed of trust including, and being intended to include, the goods claimed by plaintiffs. Immediately upon the execution of the assign- (37) ment the defendant Chauncey went to the said company, and, through one of its employees, a night watchman, who then had charge of the warehouse and its contents, including these goods, directed the said goods to be put on storage for him. The next day, to wit, 29 December, 1892, Chauncey went to the agent of the said transportation company and paid the freight on the goods and asked the agent of the company to move them to another warehouse owned by the said agent, and to put the same on storage. The agent said that the other warehouse was full, but that he would store them for him in the warehouse where they then were, and Chauncey directed him so to do, and the goods were left in the said warehouse with the agent of said company, together with other goods described in the trust, and both Chauncey and the agent of said company considered them as stored for Chauncey,

and charged him storage thereon from that day, to wit, 29 December, 1892.

On 30 December, 1892, the plaintiffs demanded of the carrier company that the goods be delivered to them. The company, through its agent, disclaimed any property in the goods, and stated that it held them for and subject to the order of the defendant Chauncey. At the time of the demand the goods had not been removed from the warehouse in which they were first placed, and have not since been removed. On 31 December, 1892, the plaintiffs instituted their action of claim and delivery, and in their affidavit stated that the defendants were in possession of the goods and wrongfully detained them. The goods having been seized by the sheriff, they were replevied by the defendant Chauncey, who at the time of the trial held them in the warehouse of the carrier company.

His Honor adjudged the defendant Chauncey the owner of and entitled to the possession of the goods, and the plaintiffs appealed.

(38) *W. B. Rodman for defendants.*
No counsel contra.

SHEPHERD, C. J. The principles governing this case are fully discussed in *Farrell v. R. R.*, 102 N. C., 390, and it is well established that if there be an actual or constructive delivery of the goods to the purchaser before the demand of the vendor, the right of stoppage *in transitu* is at an end. In this case there was no actual delivery, but according to the statement of facts agreed there was an express agreement between the carrier and the assignee of the vendee that the former should hold the goods on storage as the agent of the latter. The goods were no longer *in transitu,* and the rights of the plaintiffs were, therefore, defeated. The doctrine that the goods must come to the "corporal touch" of the vendee, as was once said by *Lord Kenyon,* has long been exploded. "If the carrier, by reason of an arrangement with the consignee, or for any cause, remains in possession, but holds the goods only as an agent of the consignee and subject to his order, this is the possession of the consignee." 1 Pars. Cont., 603; 2 Benjamin Sales, sec. 1117; 2 Addison Cont., sec. 600; *Whitehead v. Anderson,* 9 M. & W., 517.

The judgment must be

Affirmed.

(39)

MOLLIE DAVENPORT v. W. L. GRISSOM, EXECUTOR OF ELIZABETH HYATT.

Practice—Appeal from Justice's Judgment when to be Docketed—Discretion of Judge.

1. An appeal from a judgment of a justice of the peace rendered more than ten days before the next ensuing term of the Superior Court should be docketed at that term, and an attempted docketing at a subsequent term is a nullity. In such case the court properly held that the appeal was not in the Superior Court, and that plaintiff appellant could not take a nonsuit.
2. Although, where an appeal from a justice of the peace is regularly docketed in due time in the Superior Court, and proper notice of the appeal has not been given, a judge may, in his discretion, permit notice of appeal to be then given, yet he has no discretion to revive an appeal lost by delay and to permit the same to be docketed at a subsequent term to the one to which it should have been returned.
3. The power given by chapter 443 of the act of 1889 to the appellee to docket a case at the first term of the Superior Court, if the appellant does not, and to have the judgment affirmed, is a privilege granted to the appellee only, and the appellant can draw no argument against appellee from his failure to use it.

APPEAL from a justice of the peace, heard at the May Term, 1893, of BEAUFORT, by *Bynum, J.*

The defendant, through his attorney, Charles F. Warren, who had entered a special appearance only, moved to dismiss the plaintiff's appeal, on the ground that the same should have been docketed at May Term, 1892, of the Superior Court, which was the next term after the action was tried before the justice of the peace, whereas it was not docketed until November Term, 1892, of said court. Upon hearing of the motion, the clerk of the court testified as follows:

"The term of the Superior Court next after the trial of this action before the justice of the peace, on the twelfth Monday after the first Monday in March, being 30 May, 1892, no return to the notice of appeal from the justice was delivered to me until after the expiration of the time. Consequently the case was not docketed at said time. After the expiration of the time, and before the beginning of the next Fall Term, which began twelfth Monday after first Monday in September, 1892, the plaintiff caused his appeal to be docketed, and it appeared on the docket for said Fall Term, 1892."

In reply, plaintiff's counsel stated that the facts were, as could be made to appear by affidavit of the justice of the peace who tried the case, that both plaintiff and defendant appealed; both appeals

(40) were taken in apt time; that he made up the returns to both notices of appeal prior to the May Term, 1892, of the Superior Court; that, according to his recollection, the papers were misplaced in his office and could not be found by him until after the May Term, 1892; that the plaintiff had no knowledge of the papers being misplaced. Upon this the plaintiff insisted the court had a discretion to refuse the motion to dismiss. The court held that he had no such discretion, and that he would dismiss the appeal as a matter of law, and the plaintiff excepted. Plaintiff, after the motion to dismiss was made, and before the same had been decided by the court, asked to be allowed to take nonsuit. The court refused this motion, and the plaintiff excepted. The court thereupon gave judgment dismissing the appeal, and the plaintiff excepted and appealed.

J. H. Small and W. B. Rodman for plaintiff.
Charles F. Warren for defendant.

CLARK, J. The judgment by the justice having been rendered more than ten days before the next ensuing term of the Superior Court, the appeal should have been docketed at that term. The Code, secs. 876, 877, 880 and 565; *Ballard v. Gay,* 108 N. C., 544.

The attempted docketing at a subsequent term was a nullity, and the Judge properly held that the case was not in the Superior Court, and that the plaintiff appellant could not take a nonsuit. To permit such course would have been to allow the appellant to avoid the effect of his delay in bringing up the appeal in proper time, and to institute a new action. The policy of the law, as said by AVERY, J., in *Ballard v. Gay,* 108 N. C., 514, is to "require litigants to be diligent in prosecuting appeals from justices of the peace, and to prevent parties from (41) using such as a means of causing useless delay." This is cited and approved in *State v. Johnson,* 109 N. C., 852.

Nor did the Judge err in holding that he had no discretion to permit the appeal to be docketed at a subsequent term to the one to which it should have been returned. The appellant had his remedy (if in no default) by an application for a *recordari* at the first ensuing term of the Superior Court after appeal taken. *Boing v. Railroad,* 88 N. C., 62. It is true that when proper notice of appeal is not given in a case tried before a justice of the peace, if the appeal is regularly docketed in due time in the Superior Court, the judge may permit notice of appeal to be then given, though the exercise of the discretion is not encouraged. *State v. Johnson,* 109 N. C., 852; *Sondley v. Asheville,* 112 N. C., 694. But that is where the case is on docket, and the appellee has not been delayed. It does not recognize the right to revive an appeal lost by

delay, and to permit the same to be docketed at a subsequent term of the Superior Court.

The Act of 1889, ch. 443, permitting the appellee to docket the case at the first term of the Superior Court, if the appellant does not, and have the judgment below affirmed, merely extends to that court the provisions of Rule 17 in the Supreme Court. It is a privilege to the appellee, and the appellant can draw no argument against appellee from his failure to use it. *Ballard v. Gay, supra; Wilson v. Seagle,* 84 N. C., 110.

No error.

Cited: Pants Co. v. Smith, 125 N. C., 590; *Johnson v. Andrews,* 132 N. C., 380; *Johnson v. Reformers,* 135 N. C., 386; *Blair v. Coakley,* 136 N. C., 407; *Sutphin v. Sparger,* 150 N. C., 518; *McKenzie v. Development Co.,* 151 N. C., 278; *Peltz v. Bailey,* 157 N. C., 167; *Abell v. Power Co.,* 159 N. C., 349; *Jones v. Fowler,* 161 N. C., 355; *Tedder v. Deaton,* 167 N. C., 480; *Barnes v. Saleeby,* 177 N. C., 259.

((42)

ALFRED SAWYER v. C. W. GRANDY.

Practice—Testimony as to Transactions with Deceased Persons—Handwriting—Irrelevant Testimony.

1. Although, under section 590 of The Code, a party to an action may not testify to the actual execution, by the deceased person whose administrator is a party, of a paper-writing constituting a personal transaction between him and the deceased, yet he may testify to the handwriting of the deceased, if he can.
2. Where a paper-writing, alleged to be a contract between plaintiff and the intestate of the defendant, was introduced in evidence on the trial, it was error to allow the plaintiff to testify that he himself signed the paper.
3. Where a paper-writing, not ambiguous in its terms, alleged to be a contract between plaintiff and the intestate of defendant, was introduced on a trial, its construction was a question of law for the court, and evidence as to the declarations of the deceased tending to contradict or explain the same was incompetent and immaterial on either side.

ACTION, tried before *Bynum, J.,* and a jury, at Spring Term, 1893, of CAMDEN.

The plaintiff brought his action as surviving partner, alleging that at the time named the plaintiff and T. S. Berry were copartners, doing business under the firm name of T. S. Berry; that said firm had large dealings with defendants Grandy & Son, commission merchants, and that

said Grandy & Son now have in their possession the sum of $1,025, which is due and owing to the plaintiff as surviving partner of the said firm; that T. S. Berry is dead and plaintiff is winding up the business of the firm, and has made demand on said defendants for the payment of the said sum, and that said defendants have refused to pay the same to plaintiff.

The defendants Grandy & Son answer, denying all knowledge of the alleged copartnership, admitting the dealings between them and T. S. Berry, and that they have for the credit of T. S. Berry the sum of $1,-100.63, and averring their readiness to pay over the same to the
(43) persons entitled thereto. They allege further, that the fund in their hands is claimed by one O. G. Pritchard, as administrator of T. S. Berry, deceased, and that they are advised that said Pritchard should be made a party to this action. They admit demand and refusal.

Pritchard was permitted to make himself a party defendant, and the defendants Grandy & Son were allowed to pay into the court the fund in their hands to the credit of T. S. Berry. Pritchard filed his answer, alleging that he is the administrator upon the estate of T. S. Berry, deceased, denying the alleged partnership and claiming the fund.

So it appears that the contention is now between the plaintiff and O. G. Pritchard, administrator of T. S. Berry, deceased, and the question is whether plaintiff is the surviving partner of the alleged partnership; in other words, whether plaintiff and Berry were partners, as alleged in the complaint.

The plaintiff offered in evidence the following paper-writing:

NORTH CAROLINA—Camden County.

Agreement is this day entered into between T. S. Berry, of the one part, and Alfred Sawyer, Jr., of the other part, both of the county of Camden and State of North Carolina, as follows, to wit: The said T. S. Berry is now selling goods at Belcross, and has employed the said Alfred Sawyer, Jr., as a clerk to superintend the said store as long as the said Berry chooses to employ him; and the said Sawyer is to have for his services one-half (½) of all the profits the said store makes after paying all expenses of the said store; and further, the said Sawyer is to day one-half (½) owner of all the goods, moneys, accounts, notes, etc., that belong to the store; and further, the said Berry is not to make any charges as rent for said store, warehouse or dwelling house
(44) where the said Sawyer now lives. For this and his daily service his compensation is equal division of profits with the said Berry.

Witness our hands and seals, this 30 May, 1891.

T. S. BERRY. (Seal.)

32 A. SAWYER. (Seal.)

The plaintiff being then offered as a witness in his own behalf, was permitted to testify that he was acquainted with the handwriting of T. S. Berry, and that both the body of the paper and the signature referred to were in the handwriting of T. S. Berry. And to this defendant objected and excepted.

Witness was then asked who signed the name of A. Sawyer to the paper, and answered that he himself signed it. This question and answer were objected to by the defendant.

The plaintiff then offered several witnesses who testified without objection to the declarations made by T. S. Berry tending to show that he and plaintiff were partners.

The defendant Pritchard introduced as a witness one Wright, and offered to show by him declarations made by T. S. Berry after the date of the paper, denying the partnership, and tending to show his individual ownership, and that the plaintiff was only his clerk. The plaintiff objected. The objection was sustained, and defendant excepted.

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

Grandy & Aydlett for plaintiff.
J. Heywood Sawyer for defendant.

MACRAE, J. The Code, sec. 590, declares that upon the trial of an action a party interested in the event shall not be examined as a witness in his own behalf against the administrator of a deceased person, concerning a personal transaction or communication between the witness and the deceased person.

The paper offered as evidence of the contract of partnership purported to be the memorial of a transaction, or the transaction (45) itself, between the plaintiff and the deceased person, against whose administrator the action is now being pressed. It has often been held that while under this section the plaintiff is incompetent to testify to the actual execution of the paper by the deceased, he may testify to the handwriting of deceased, if he can.

In *Rush v. Steed,* 91 N. C., 226, the Court, while adhering to this construction of the statute, calls the distinction a very fine spun one, but the reason of the act as stated by *Mr. Justice Reade* in *Hallyburton v. Dobson,* 65 N. C., 88, seems to justify it: "There could never be a recovery against an unscrupulous party if he were permitted to testify where it would be impossible to contradict him; the statute ought to be construed in view of this mischief."

If plaintiff had been permitted to testify that he saw Berry sign the paper, it may have been impossible to contradict him, but he

simply swears to the handwriting of deceased, and the matter is entirely open to contradiction, if defendant can furnish it, by others who are acquainted with the handwriting of deceased.

We are unable to make the distinction between the testimony of the plaintiff as witness to the actual signing of the instrument by deceased and by himself, for the deceased might be the only person who could have testified to the contrary, if plaintiff had been permitted to testify to the fact of the signing; and we think, upon the authorities cited, that his Honor erred in admitting this testimony.

The plaintiff relying upon the paper-writing as the contract of partnership, evidence of declarations of deceased seems to have been incompetent and immaterial on either side, as tending to contradict or to explain a written instrument, the construction of which is a question of law for the Court.

Error. New trial.

Cited: Bright v. Marcom, 121 N. C., 87; *McEwan v. Brown,* 176 N. C., 252; *In re Saunders,* 177 N. C., 157.

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(46)

DANIEL MURRAY ET AL. v. WILLIAM BERRY ET AL.

Contempt—Summary Process for Enforcement of Rights When Another Remedy Exists—Discretion of Court.

1. Whenever the law affords any other adequate remedy by which a party can enforce his rights, the proceeding by attachment for a contempt is always in the discretion of the court, and a refusal to exercise it cannot be reviewed on appeal; therefore,
2. Where an alleged order of court is so binding on respondents in a summary proceeding for contempt that it enjoins them, under pain of being liable for contempt, from bringing suit to recover land, the refusal to issue the summary process of attachment will not be reviewed, since that same order of court will be effective, if pleaded, to bar respondents' recovery, and will protect complainants in their rights.

MOTION to attach defendants for contempt in disobeying an order of the court of Equity of HYDE, made in 1830, heard before *Bynum, J.,* at chambers in HYDE, June, 1892.

The rule was discharged, and plaintiff Windley, guardian, appealed.

The pertinent facts are set out in the opinion of *Associate Justice Burwell.*

W. B. Rodman and Chas. F. Warren for plaintiff.
W. W. Clark for appellees.

BURWELL, J. The law of contempt is regulated in this State by statute. The Code, ch. 14. Among the acts for which persons *may* be punished in this summary manner is "the wilful disobedience of any process or order lawfully issued by any court."

His Honor, upon consideration of the affidavit filed by the complainants and the answer of the respondents, adjudged that they had "purged themselves of and from any contempt" of that (47) court, and discharged the rule, and taxed the complainants with costs.

The errors assigned are that the judge erred (1) "In holding that the defendants had purged themselves from the contempt in the disobedience of the restraining order made in the original cause"; and (2) "In not holding that the restraining order was disobeyed, and in not finding the facts relative to the same."

In Repalje on Contempt, sec. 9, it is said: "The right of a party aggrieved by the act of the contemnor to have process issue against him is not absolute; on the contrary, whenever the law affords any other adequate remedy by which such party can enforce his rights, the proceeding by attachment for a contempt is always within the discretion of the court, and a refusal to exercise it cannot be reviewed on appeal or writ of error."

In *Wyatt v. Magee,* 3 Ala., 94, the Court dismissed an appeal from an order discharging a rule for an alleged contempt in disobeying an injunction, and pointed out the distinction between those cases where, as in decrees for specific performance, the surrender of title deeds, etc., the party has no method to enforce his rights, ascertained by the decree, except by the summary process of attachment in contempt (in which class of cases it is hardly to be supposed that any court would ever refuse to enforce obedience to its decree), and those cases where, the party having another means of redress, the principal object is the maintenance of proper respect for the tribunal. In this latter class of cases it is there said that it is certainly to be "permitted to the Chancellor to hesitate whether he ought not to refuse to commit for a contempt, and leave the parties to their remedies at law."

It was charged against the respondents that they had disobeyed an imperative order of the court of Equity of Hyde, made in 1830, in a cause to which their ancestor, Hosea Berry, then an infant (48) was respondent, by which order, it was alleged, the said Berry *and all persons claiming under him* "were enjoined from setting up

any claim" to certain land which the complainant there averred had been conveyed to him by the mother of Hosea Berry by proper deed, which deed, as well as the book in which it had been registered, had been destroyed. And the act of disobedience specially charged was that the heirs of Hosea Murray, respondents here, had, in 1889, instituted an action to recover a portion of said land, and in 1890 had begun proceedings to have partition made of another portion, they asserting title only as heirs of Hosea Berry, both in the action and the proceeding for partition.

The respondents insist in their answer that they have done nothing that in any way violates any order of court that is binding on them, and that there is no decree or order of the court of equity that prevents them from asserting, by proper action, their title to the land in question. They disavow any intention to defy the authority of the court, and set out with fullness and particularity the reasons that induce them to believe that there is no injunction order that has the force claimed for it by complainants.

Now it seems very clear that if there is any record that is so binding on the respondents that it enjoins them, under pain of being liable for contempt, from bringing suit to recover the land, that same order or decree will be effective, if pleaded, to prevent them from recovering the land, and will surely protect the complainants in their rights.

His Honor, in the exercise of his discretion, refused to attach the respondents for contempt. His refusal to exercise that power cannot be reviewed here. He has only determined that the very complicated controversy, the particulars of which are set out in the affidavit of complainants and the reply of respondents, should not be determined in this summary manner, and that the issue between the parties can be more properly tried in the action brought by respondents than in a proceeding such as this.

Let the appeal be

Dismissed.

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(49)

SAMUEL G. SPENCER v. GEORGE W. HAMILTON.

Breach of Contract—Measure of Damage—Evidence.

1. Where one violates his contract he is liable only for such damages as are caused by the breach, or such as, being incident to the act of omission or commission, as a natural consequence thereof, may reasonably be presumed to have been in the contemplation of the parties when the contract was made.

2. Where, upon the trial of an action to recover rent in which the defendant set up a counterclaim for damages caused by plaintiff's breach of contract, it appeared that as a part of the contract of leasing the land the lessor had agreed to have certain ditches cleared out, and by reason of his failure to do so the land was flooded and the crop lessened, evidence as to the effect which such failure had upon the crop and to what extent it was damaged thereby was competent as affording a basis to the jury for the measurement of the damages sustained by the defendant by the breach of contract.
3. In such case the true measure of damages is not what it would have cost the defendant himself to clear out ditches, but the defendant's loss by having to work an undrained instead of a drained farm.

ACTION to recover rent of a farm, heard before *Bynum, J.*, and a jury, at Spring Term, 1893, of HYDE.

The defendant set up a counterclaim for breach of contract on the part of the plaintiff to have certain ditches and canal on the land cleaned out.

Upon the trial the defendant proposed to ask of one witness what effect the failure to clean out the ditches and canal had upon the crop, and to what extent it was damaged thereby; and of another what was the difference in the yield of the land by reason of the failure to put the ditches and canal in order and the consequent flooding, and the yield if such ditches and canal had been put in order according to plaintiff's contract. The plaintiff objected to the question upon the ground that the measure of damages to which defendant was (50) entitled, if any, was not the difference between what he would have made had the ditches and canal been put in order and what he did actually raise, but what it would have cost the defendant to have them put in proper condition, according to the contract of plaintiff. The objections were sustained, and defendant excepted.

His Honor instructed the jury that if the plaintiff contracted with defendant to put the ditches in order, or to furnish money to have such work done, and he failed to do so, the measure of damages would be what it would have cost defendant to have the work done, and would not be the difference in value of the crop raised upon the land as it was, and the crop which would have been raised had such ditches and canal been put in order.

The jury, in their verdict, found that the plaintiff had failed to perform his contract in regard to the ditches and canal, and allowed defendant twenty-five dollars damages. From the refusal of this motion for a new trial, defendant appealed.

W. B. Rodman for plaintiff.
Chas. F. Warren for defendant.

CLARK, J. "Where one violates his contract, he is liable only for such damages as are caused by the breach, or such, as being incidental to the act of omission or commission, as a natural consequence thereof, may reasonably be presumed to have been in the contemplation of the parties when the contract was made. This rule of law is well settled, but the difficulty arises in making its application." *Pearson, J.*, in *Ashe v. DeRossett,* 50 N. C., 299. There was evidence that defendant leased the land for $100, and as a part of the contract of leasing, the lessor was to have certain ditches cleaned out, and by his failure to do so the land was flooded and the crop lessened. Here it was in
(51) contemplation of both parties that the cleaning out of the ditches was essential to the making a full crop, and that the failure to do so would lessen the production. The question, therefore, what effect the failure to clean out the ditches and canal had upon the crop, and to what extent it was damaged thereby, was competent, as giving some light to the jury in measuring the damages sustained by defendant by breach of the contract by lessor. The difference between the crop made and what would have been made if the ditches had been cleaned out, does not exactly measure the loss, as it would have cost something to house the additional yield. The true test is how much was the *net* yield of defendant's cropping for the year lessened by the failure to put the land in the condition stipulated for by the lessor. The decreased production was an important factor in arriving at that conclusion. The difference in profit and yield between land drained and not drained was clearly in contemplation of the parties in making the contract.

In telling the jury that the difference was what it would have cost defendant himself to clean out the ditches, the court below erred. It is true the defendant might have put the ditches and canal in order, and if so he could have charged the lessor with the costs thereof. This would have been the better course; but perhaps he was not able. At any rate, he was not legally called upon to do this. It was the lessor who contracted to rent a drained farm, and the defendant's loss by having to work an undrained farm instead is the measure of damages.

Sledge v. Reid, 73 N. C., 440, is not analogous. That was a case of tort for wrongfully taking a mule. The primary loss was the value of the mule, and that the taking him hindered the plaintiff in making a crop was purely incidental and the damage to the crop was too remote. This case is more like *Mace v. Ramsey,* 74 N. C., 11, but differs from it in that here the farm was rented and the enterprise proceeded with; but its profitableness was impaired by the failure of the lessor
(52) to do the draining after the lessee had proceeded with his farming operations relying upon the lessor's stipulation. As in *Mace*

v. Ramsey, we may say, "This case is easily distinguishable from *Foard v. R. R.,* 53 N. C., 235; *Ashe v. DeRossett, ib.,* 240; *Boyle v. Reeder,* 23 N. C., 607, and *Sledge v. Reid,* 73 N C., 440, and similar cases, in that in those cases the damage was incidental and unforeseen, or merely vague, uncertain and conjectural. And in this they are immediate, necessary and reasonably certain, and such as were in the contemplation of the parties to the contract."

Error.

Cited: Herring v. Armwood, 130 N. C., 181; *Williams v. Tel. Co.,* 136 N. C., 84; *Owen v. Meroney, ib.,* 478; *Machine Co. v. Tobacco Co.,* 144 N. C., 423; *Ober v. Katzenstein,* 160 N. C., 441; *Tomlinson v. Morgan,* 166 N. C., 561; *Guano Co. v. Livestock Co.,* 168 N. C., 451; *Carter v. McGill,* 510 N. C., 511; *Perry v. Kime,* 169 N. C., 541.

W. C. MARRINER v. JOHN L. ROPER LUMBER COMPANY.

Unaccepted Draft or Order—Agency—Exceptions to Charge.

1. No liability attaches on an unaccepted order in favor of payee or his assignee against the drawee or his principal.
2. J. & W., contractors for Roper Company, were in the habit of paying off their workmen with orders on one B., who would pay the same and charge them up to Roper Company. Books of blank orders were furnished J. & W. by Roper Company. In an action against Roper Company by an assignee of one of such orders which was unaccepted, it was error to instruct the jury that defendant was liable if the plaintiff had been moved to take an assignment of the order because of his knowledge that such orders had always theretofore been paid by the drawee acting as agent for the defendant, and that defendant had furnished to J. & W. a book of such blank orders to be filled in and signed by J. & W.
3. Exceptions to the charge, although not taken at the trial, can be set out by appellant by his case on appeal. The Code, sec. 412 (3), and Rule 27 of the Supreme Court.

APPEAL from justice of the peace, heard before *Bynum, J.,* and a jury, at Spring Term, 1893, of WASHINGTON.

There was a verdict for the plaintiff, and from the judgment thereon the defendant appealed. (53)

The facts are sufficiently stated in the opinion of *Associate Justice Clark.*

A. O. Gaylord for plaintiff.
W. D. Pruden for defendant.

CLARK, J. This is an action by the assignee of an unaccepted order against the alleged principal of the drawee. The drawee was one Blount, designated in the order as "Company Store." His habit was to pay in goods all orders drawn on him by Jewett & Wilson which contained the request in the body thereof, "charge to account of John L. Roper Co." At the end of each month these orders would be added up, and Jewett & Wilson would give Blount a draft for the sum thereof upon the defendant, who would be allowed by Blount a discount of twelve and one-half per cent for paying the same. These orders were given by Jewett & Wilson to such of their hands as they did not pay in cash. The orders did not purport to be signed by them as agents of the Roper Lumber Co. The only evidence from which such agency could be inferred was the request in the order to charge to said company, and the agency was expressly negatived by the evidence of both plaintiff and defendant, which was that the relation of the drawers, Jewett & Wilson, to the defendant was that of contractors sawing and shipping lumber to the said Roper Lumber Co., which was under no obligation to pay such orders, except when indebted to the drawers. It may be that Blount was agent for the defendant; but that is immaterial, as is also the inquiry, whether the defendant was indebted to drawers when the order was refused payment by Blount. The order not having been accepted, no liability in favor of payee or his assignee could attach to the drawee nor of course to his principal. The
(54) remedy was by an action against drawers, either on the dishonored order or upon the original count for work and labor done. The court told the jury that no contract had been shown between the assignee (or payee) of the order and the defendant. But it charged that the defendant was liable if the plaintiff had been moved to take an assignment of the orders because of his knowledge that such orders had always theretofore been paid by Blount, acting for the defendant, and that the defendant had also furnished a book of these printed blank orders, which were filled in and signed by the drawers, Jewett & Wilson. This could give neither the payee nor his assignee any greater claim upon the drawee Blount than the holder of a protested check would have upon a bank because it had always theretofore paid the checks of the drawer, which the holder had theretofore taken, believing it good. Nor would it make any difference that the check was filled in upon a printed blank taken from a check book furnished the drawer by said bank. Whether the Roper Lumber Co. was or was not the principal of the drawee, it cannot be made liable since the drawee was not.

As to the objection that exceptions to the charge were not taken at the trial, it has been held sufficient under the statute (The Code, sec. 412 (3), and under Rule 27 of this Court), if they are set out by appellant in preparing his case on appeal. *Lowe v. Elliott,* 107 N. C., 718; Clark's Code (2 Ed.), page 383, and cases there cited.

Error.

Cited: Howell v. Mfg. Co., 116 N. C., 813; *Bank v. Bank,* 118 N. C., 786; *Bank v. Hay,* 143 N. C., 336.

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(55)

W. W. LEWIS v. JOHN L. ROPER LUMBER COMPANY.

Constructive Possession—Boundaries of Land—Grant of Island, What Passes by—Low-water Mark—Evidence.

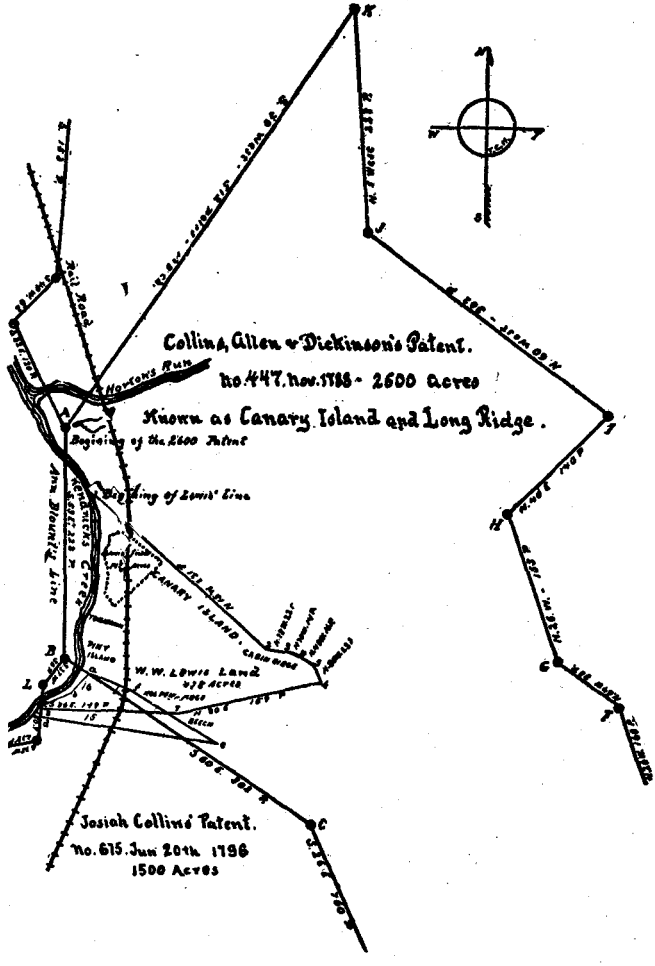
1. Where an island in an unnavigable stream or in a swamp is granted by the name by which it is generally known, it is not necessary to run or call for lines and corners, the low-water margin of the island being more durable and preferable, as a certain description, to courses and distances.
2. By the grant of an island, designated by the name by which it is generally known, all of the land surrounded by water at the low-water mark passes. Sudden accretions are not added to it, and when nature no longer marks the original line it is competent to prove by the testimony of living witnesses, or competent declarations of persons deceased, where the line was located when the land was granted.
3. The declarations of a deceased person as to the original low-water line of an island, made *ante litem motam,* and when declarant was disinterested (though an adjacent landowner), are competent evidence to show the location of the lines.
4. Where, in the trial of an issue relating to the location of the original margin of an island, there was testimony showing that trees had been marked, and one had disappeared, it was competent to show that another had been marked to show where the former stood.

ACTION to recover damages for trespass to realty, tried before *Hoke, J.,* and a jury, at Special Term, 1892, of WASHINGTON.

Plaintiff claimed under certain deeds introduced by him extending back to 1817, and connected himself with these. It was admitted title was out of State, being included in bounds of Grant No. 447, and also in the Ann C. Blount deeds, under both of which the defendant claims.

No lines, marks or corners are given in plaintiff's deeds, the description in said deeds being "Canary, 107 acres, more or less"; "Canary

Island, on east side of Kendrick's Creek"; "Canary tract, near head of Lee's mill-pond, containing 100 acres, more or less." Kendrick's Creek and Lee's mill-pond proved to be same stream. Plaintiff showed



(THE ABOVE MAP WAS INTRODUCED.)

(56) that he and those under whom he claimed had been in the actual possession and continuous occupation of fourteen acres of said land, having such amount under fence for the last fifty years, claiming to own same under his said deeds, and had during such time exercised various acts of ownership and possession upon other parts of the

locus in quo at different points from time to time, such as (57) cutting wood, building roads, selling and moving timber, etc., claiming to own property under his said deeds.

Defendant introduced Grant No. 447, dated November 20, 1788, admitted to cover *locus in quo,* and introduced a line of deeds to connect defendant with such patent.

Oral testimony was also offered by both plaintiff and defendant, which is sufficiently adverted to in the opinion of *Associate Justice Avery.*

The defendant made the following exceptions to rulings of court on questions of evidence:

1. On examination-in-chief, witness Abbott, the surveyor, testifies for defendant: Had stated in answer to a question by defendant that plaintiff Lewis had stated to him on survey that a certain cypress, claimed to be and now marked as a corner, had been so marked by said plaintiff. On cross-examination said witness was allowed to state that said plaintiff in said conversation, and as a part of same statement, had said he had so marked said cypress near location of an old corner now down, and to perpetuate its place.

Defendant's objection overruled, and defendant excepted.

2. A witness, Chesson, in testifying to the location of the Beach corner, had stated that it was pointed out to him by Jordan Volivay as a corner of Lewis's Canary tract. Jordan Volivay was admitted to be dead, and before litigation.

Defendant objected to evidence because it had appeared that said defendant owned land adjacent to *locus in quo.* Overruled, and defendant excepts.

Defendant requested court to charge jury as follows:

1. That plaintiff has had under fence about fourteen acres of the land claimed by him, and as to that land his rights are admitted. But plaintiff also insists that he is the owner of all the land within the boundaries claimed by him at the time of the alleged trespass—

(1) Because the possession of the said fourteen acres extends by construction the possession of the plaintiff to the entire land (58) within the boundaries named by him.

(2) Because the various acts of ownership and possession stated by him and his witnesses are sufficient to give him title and possession to the same. To establish these positions the plaintiff must show that he claimed up to known and visible boundaries, and the court charges you that the plaintiff has failed to show such known and visible boundaries as are required by law, and you must answer the first issue, "No."

The court, after stating nature of controversy and position of parties on matters excepted to, charged the jury as follows:

"Plaintiff shows no grant for land to him or those under whom he claims, but contends his title is perfected by continuous occupation under a deed and claim of right. When title out of State by grant, a title can be perfected by adverse possession for seven consecutive years under claim of right open and notorious, and under a deed having known and visible lines and boundaries.

"If jury believes evidence, plaintiff has been in possession of a house and field on said land under a deed since 1826, actually occupying house and cultivating field, and was so occupying under a deed describing land, in some of his deeds as Canary, and in some of his deeds as Canary Island. It is claimed by plaintiff that these terms in his deed as Canary and Canary Island give to his tract such definite description, and the boundaries, as proved by him, so define and mark out a claim as to be a tract of known and visible lines and boundaries, and covers claim in solid red lines 1, 2, 3, 4, 5, 6, 7 and 8. Defendant contends that Canary and Canary Island was the smaller tract in red dotted limits; that the term itself meant a smaller tract of fourteen or fifteen acres, under plaintiff's fence; and that beyond the fence there are no marks or boundaries to indicate extent of plaintiff's claim, nothing to
(59) warn the true owner that his limits were being occupied under an adverse claim, nor the extent of boundary of such claim.

"The usual terms of the law and requirements are that the deed should describe the land and boundaries—boundaries that would indicate to the true owners its nature, location and extent of the land claimed under the deed, and warn such owner that his lands were being trespassed upon. If the courses and natural boundaries of Canary were of such a character and sufficiently numerous so to define and point out the plaintiff's claim—sufficient to make the adverse claim and occupation open and notorious, open and visible to the true owners in the exercise of ordinary diligence—then the continuous occupation of the plaintiff or his father for seven continuous years, in such boundaries and under deed having such description, would perfect their title to the boundaries of the deed, and answer to issue should be yes. And this would be true even if the lines running from corner to corner were not marked. But if Canary or Canary Island was the smaller tract, or amount under fence, or if the outer boundaries of plaintiff's claim were not open and visible, not sufficiently plain and numerous to point out and mark this tract, informing the true owner of its nature and extent, then the ownership of plaintiff would be confined to his actual occupation, under fence, and answer of jury should be only of portion under fence."

There was verdict for plaintiff, and defendant moved for new trial—

(1) On his exceptions on questions of evidence above pointed out.

(2) Refusal of court to give instructions as requested by him.

(3) To the portion of charge as given and set out in case.

Motion refused, and judgment on verdict for plaintiff, and defendant appealed.

A. O. Gaylord for plaintiff.
W. D. Pruden for defendant. (60)

AVERY, J. It is admitted that the title to the land in controversy has passed out of the State, and that the plaintiff and those under whom he claims have had an actual possession, including about fourteen acres enclosed under fence, for about fifty years. In order to establish certain lines and corners claimed as the boundaries, and to show constructive possession up to them, the plaintiff, W. W. Lewis, offered the deed of his father, William Lewis, to himself, dated 7 May, 1854, conveying a tract of land described as "Canary, containing 127 acres"; the deed of Clarissa Leggett to said William Lewis, dated 20 September, 1827, and conveying a tract of land described as "Canary Island, East Kendrick Creek"; also a deed from Henry Hardy to William Lewis, dated 26 August, 1828, and conveying a tract of land described as "Canary Island, 100 acres, more or less." There were two older conveyances offered also—one describing the tract conveyed as "Canary," the other as the "East Lee Mill-pond Covant tract, 100 acres, more or less." The plaintiff contended that he had offered testimony tending to show that the tract of land was known both as "Canary" and "Canary Island," which were generally understood to mean the same tract; that it lay adjacent to Kendrick's Creek or East Lee mill-pond, which two names described the same body of water, and tending also to designate the known boundaries of the island and to point out corners, which, as points upon lines, would indicate the exact location of the boundary around the whole tract. The defendant admitted that the plaintiff had acquired title to his enclosure, but contended that he had not offered sufficient evidence to go to the jury upon the question of the location of the lines. The plaintiff testified that the description Canary or Canary Island was used to describe a tract of land which was more definitely designated in two ways—(1) by certain corners at different angles on the outside boundary; (2) by including "the high land surrounded by the dismal." It was in evidence also that the water (61) originally extended to some of these lines and corners, but had receded on account of the more recent drainage. The witness testified that one Volivay pointed out the lines that included the high lands bounded by the dismal. Though there was conflicting evidence as to the extent of the high lands, still there was testimony tending to show that the lines pointed out by Volivay, the owner of an adjacent tract,

was the original high land not covered by the water at its ordinary height, though it was in evidence that not more than one and a half acres, including the plaintiff's dwelling house, was above the high-water mark in great freshets. The plaintiff testified that the corners shown by himself to the surveyor were on the margin of the high land, as pointed out by Volivay, and marked angles on the original water-line. In the absence of any evidence as to corners, the court might have left the question of the location of the boundary lines claimed by the plaintiff upon the declaration of Volivay that it was governed by the original extent of the high lands or land not covered by the dismal.

When an island in an unnavigable stream or in a swamp is granted by the name by which it is generally known, it is not necessary to run or call for lines and corners. The low-water margin of the island is esteemed more durable and preferable, as a certain description, to courses and distances. Tiedman, sections 836 and 838.

The testimony of the plaintiff is clearly susceptible of the construction that the deceased declarant, Volivay, had pointed out the original low-water line, which is still indicated by corners marked at some of the angles along said marginal line, though subsequent drainage may have caused the water to recede and leave a larger area uncovered in the ordinary condition of the swamp. Such enlargement of the original island by artificial means was not an accretion that inured to the plaintiff's benefit, and, if not, it was competent as in all
(62) such cases to show the original low-water line as defining the limits of the island when granted. Tiedman, section 685 *et seq.;* Malone Real Property, 253. It is not necessary to cite authority to show that by the grant of an island, designated by the name by which it is generally known, all of the land surrounded by water at the low-water mark passes. When once it does so pass, sudden accretions are not added to it, and when nature no longer marks the original line man may prove by oral testimony of living witnesses or competent declarations of persons deceased where the land was located when the land was granted.

Without passing upon the sufficiency of the proof of course and distance offered, we think, therefore, that there was testimony upon which the jury might have located Canary or Canary island by the original extent of the high lands. The question whether the greater weight of testimony was upon the one side or the other was not one addressed to the court below, and is not to be considered by us. However, the boundaries of his deed may be ascertained, when located the law presumes that the plaintiff claimed up to them. *McLean v. Smith,* 106 N. C., 172; *Ruffin v. Overby,* 105 N. C., 78.

The plaintiff testified that the declarations of Volivay were made *ante litem motam* and when Volivay was disinterested, and this was not denied. Though he was an adjacent landowner at the time, his declarations were nevertheless competent. *Bethea v. Byrd,* 95 N. C., 309; *Dugger v. McKesson,* 100 N. C., 1; *Fry v. Currie,* 103 N. C., 203.

For the reasons given, we think that there was no error in submitting the question of the extent of the plaintiff's boundary to the jury. The testimony as to the marking of corner trees was competent, if for no other purpose, as corroborative evidence to show that marks were made to indicate the margin of the original island, and when one tree, originally marked, had disappeared, it was competent to show that another was marked to designate where it had stood. There was

No error.

Cited: Sullivan v. Blount, 165 N. C., 10; *Shannonhouse v. White,* 171 N. C., 20.

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(63)

THOMAS L. MITCHELL ET AL. v. R. M. BRIDGERS ET AL.

Trespass—Constructive Possession—Sufficiency of Description of Land —Errors in Certificate of Probate—Instructions to Jury.

1. A description contained in a devise of land as follows: "My Manner plantation and all the lands thereunto belonging, containing 520 acres, by deed, . . . and also all my right, title, and claim in and to a tract of land that I lately entered, bounding on the mill-pond, and adjoining sundry persons, agreeable to said entry or patent," is sufficiently definite.
2. "Constructive possession" is such a possession as the law carries to the owner by virtue of his title only, there being no actual occupation of any part of the land by anybody. And the fact that lands held under "deeds by metes and bounds" are "almost entirely covered by water" will not prevent the application of the doctrine of constructive possession.
3. Where a trespass was committed by cutting timber on a pond appurtenant to plaintiffs' mill, which had been used by them and those under whom they claimed for fifty years, under deeds embracing within their boundaries the land covered by the water, as well as that on which the mill was located, plaintiffs must be deemed to have actual possession of the whole, except such part as should be in the actual possession of another.
4. Requests for instructions to the jury not based on evidence are properly refused.
5. Where, in the certificate of probate of a deed, an error manifestly clerical occurs, such error will not render the probate insufficient to warrant registration of the deed.

6. No seal is necessary to the validity of a contract for the sale of land, but under section 26 of chapter 37 of the Revised Code such contract was required to be registered, and since by section 16 of said chapter, any instrument required or allowed to be registered may be given in evidence, the registry of such contract was properly received in evidence.
7. Where in an action of trespass there was judgment for plaintiffs, and some of the defendants were shown not to have committed any trespass on or to have asserted any claim to the land trespassed on, the judgment will be modified by excluding such defendants from the judgment.

(64) ACTION to recover damages for trespass on land, tried before *Hoke, J.*, and a jury, at May Term, 1893, of BERTIE.

Answer denied plaintiffs' title and denied the trespass.

The land was described in certain deeds by metes and bounds, and was almost entirely covered by the water of plaintiffs' mill-pond, and it was proved that the pond was appurtenant to the mill, which had been used by plaintiffs and those under whom they claimed for fifty years or more under the deeds exhibited. Some of them give definite metes and bounds, as will appear by the face of the deeds, the description running in an oblong direction up the swamp for a distance of nearly two miles or more above the mill.

The alleged trespass was committed by going on the pond and cutting and carrying off certain timber trees near the run of the swamp by defendants a short while before this action was commenced.

There was some evidence tending to show the survey as made would at one point of the plat run on the high land away from the swamp so as to take in an old field that had for many years been cultivated by defendants and those under whom they claimed. This was not at the point of the trespass and would not affect the right to recover for same, if land was located, but was used by defendants as a circumstance tending to show that plaintiffs had not properly located their land, and the same could not be located by the deeds and evidence offered.

There was also evidence tending to show that all the courses called for in the grant and deeds were gone, and none were found on the survey except two—a cypress stump and a gum at the upper end of the tract—and there was also evidence tending to show that these, the stump and gum, were known, marked and ascertained courses of the plaintiffs' grants and deeds.

There was also evidence tending to show where the begin-
(65) ning course was supposed to be, but nothing there to locate or identify it.

On cross-examination of one witness, defendants had shown some evidence as to the supposed location of the beginning corner, and that running past the gum as a corner the last call would fail to reach

the beginning by eleven poles, and contended that this failure to close would prevent the plaintiffs' deeds from covering this land.

Plaintiffs offered in evidence various deeds and wills in support of their title.

The description of the lands devised by the will of Joseph Eason to Jesse Eason was as follows:

"My Manner plantation and all the lands thereunto belonging, containing 520 acres, by deed, . . . also all my right, title and claim in and to a tract of land that I lately have entered, bounding on the mill-pond and adjoining sundry persons, agreeable to said entry or patent."

The description in the deed from Leonora T. Burden to T. L. Mitchell and others, referred to in the opinion of the court, was as follows:

"A certain tract or parcel of land in Bertie County, North Carolina, bounded by the lands of R. M. Burden, L. C. Garris . . . and others, and known as the Burden Mill, including the lands belonging thereto and embracing all land belonging therewith and adjoining, in which the said parties of the first part own any interest. This is intended to convey the mill, mill-pond land and the land on which the buildings stand, and any other land, if any, belonging thereto, containing 500 acres, more or less."

The defendants' exceptions were as follows:

First Exception.—Defendants objected to introduction of will of Joseph Eason, for the reason that it was too indefinite to convey the land. Overruled, and exception taken.

Second Exception.—The defendants objected to the introduction of the deed No. 3 (Exhibit C), because it professed to be a (66) deed to N. and W. Hinton, and the probate was of a deed to N. and W. King. Overruled, and exception.

Third Exception.—The defendants objected to the introduction of Exhibit H, because it was not under seal, and it was not such a paper as required registration, and the original should be produced. Overruled, and exception.

The defendants requested the court to charge the jury—

Fourth Exception.—That if the jury believed from the evidence that the land on which the timber is alleged to have been cut is covered with water, then the doctrine of constructive possession does not apply; and before the plaintiffs can recover in this action, it is necessary for the plaintiffs to satisfy the jury that they were in possession of said land, and if plaintiffs have failed thus to satisfy the jury, then the jury should find for the defendants. This was refused and not given, and the defendants excepted.

Fifth Exception.—That there is no evidence that the plaintiffs were in the possession of the land on which the timber was cut, and the jury should find the issue for the defendants. This was refused and not given, and defendants excepted.

Sixth Exception.—That if the jury believe that at the time said timber was cut the defendant R. M. Bridgers was in possession of the land where the timber was cut, claiming the said land as his own, then the plaintiffs cannot recover in this action, and the jury should find the issue for the defendants. This was refused and not given, and the defendants excepted.

Seventh Exception.—That if the jury should believe that at the time said timber was cut, the defendant R. M. Bridgers was in possession of the land where the timber was cut, claiming said land as his own, and continued in the possession of said land when this suit was commenced, then the plaintiffs cannot recover in this action, and the jury should find all the issues in favor of the defendants. This was refused (67) and not given, and the defendants excepted.

Eighth Exception.—That upon the whole evidence, the plaintiffs are not entitled to recover, and the jury should find all the issues in favor of the defendants. This was not given, and defendants excepted.

Ninth Exception.—That the plaintiffs cannot claim more than the land known as the mill-pond and mill-house land and land adjoining, and that they cannot recover for any land conveyed in their deed other than this, for the reason that the term "any other land" does not include anything, these words being used in the deed to Mitchell. This was refused and not given, and defendants excepted.

Tenth Exception.—That if the location of the lands called for in plaintiffs' deeds embraces any land that defendant R. M. Bridges has had fenced and cultivated for more than forty years before the commencement of this action, and claiming the same to be his, then the plaintiffs cannot recover that portion of the land, and the jury should respond to the first issue "Yes," except that portion included within Bridgers's fence. This was refused and not given, and defendants excepted.

Eleventh Exception.—That the plaintiffs cannot recover for the cutting of timber on any lands on which Bridgers has been in possession for forty years, claiming the same as his under visible metes and bounds. This was refused and not given, and defendants excepted.

Twelfth Exception.—That there is no evidence that the defendants, Junius Bridgers or Thomas R. Bridgers, ever claimed said land or cut

any timber therefrom, and the jury will not include them in any verdict they may return on the issues. This was refused and not given, and defendants excepted.

The court charged the jury that on the evidence, if believed, the plaintiffs had shown a line of title from the State for the land in controversy, provided the jury were satisfied that the plain- (68) tiffs had properly located these lands, and same included the place where the cutting was done, and that his line of deeds covered same. That the defendants contended that the plaintiffs had not properly located their deeds so as to cover the land, and that there was no satisfactory evidence that the plaintiffs' deeds would cover any land. That the rule for locating land of this character was that, if only one known corner was ascertained and identified as a corner of the tract, for the survey to commence at such corner and run according to the course and calls of the deed, unless some natural object would change these calls; and in this case, if the jury were satisfied that the gum spoken of was a known, marked, developed corner of the lands in plaintiffs' deed, the proper survey, if the beginning corner could not be satisfactorily placed, was to commence at the gum and run the course and calls of the deed. And if beginning at the gum, and this was a known, ascertained corner of the land, and running the course and calls of the deed and grant would include the land trespassed on, and plaintiffs were in possession when the action was commenced, jury should answer first issue "Yes."

That if the beginning corner was where defendants contended, and beginning at the gum as a known corner, the last call failed to reach the supposed beginning by eleven poles, and this was the only defect—this failure of distance—the survey should go to the beginning and so close the survey. The fact, however, that there was this gap of eleven poles was a circumstance for the jury to consider in determining whether this gum, where the surveyors commenced, was a proper, known corner called for in plaintiffs' deeds. The court then adverted fully to all the evidence and argument of plaintiffs' differing as to the location and the cypress and gum his courses called for.

That if defendants entered on the land covered by the plaintiffs' deeds, and cut and carried off timber therefrom, or directed (69) and hired others to do so as their agents and servants, or cut and carried off timber at the time and place testified by witnesses, jury should answer second issue "Yes."

There was no exception to charge on third and fourth issues.

Jury rendered a verdict for plaintiffs.

The defendants moved for a new trial for the errors of court on

questions of evidence as above pointed out, and for failure of court to give the instructions as prayed for. Motion overruled, and defendants excepted. Judgment on the verdict, and defendants appealed.

F. D. Winston for defendants.
No counsel contra.

SHEPHERD, C. J. The exceptions addressed to the sufficiency of the descriptions contained in the will of Joseph Eason and the deed of Leonora Burden and others to T. L. Mitchell, as well as to the charge of the court respecting the identification and location of the land upon which the trespass was committed, are plainly untenable. The principles sustaining the action of his Honor in these particulars are deemed to be too well settled to require an extended discussion or the citation of authorities.

Equally without merit is the exception to the refusal of the court to instruct the jury that if they believed that the land on which the timber was cut was covered by water, "the doctrine of constructive possession" would not apply, and that it would be necessary to show that the plaintiffs "were in possession" of the same. Constructive possession, says *Ruffin, C. J.*, in *Graham v. Houston*, 15 N. C., 232, is "such a possession as the law carries to the owner by virtue of his title only,
(70) there being no actual occupation of any part of the land by anybody," and we know of no reason or authority that excludes from the operation of this principle lands which are held, as in this case, under "deeds by metes and bounds," simply because they are "almost entirely" covered by the waters of a mill-pond. The case, however, discloses that the trespass was committed by going on the pond and cutting and carrying off certain timber-trees near the run of the swamp; that this pond was appurtenant to the mill which had been used by the plaintiffs and those under whom they claimed for fifty years or more under the deeds in evidence. It is very plain that if these deeds embrace within their boundaries the land covered by the water, as well as that upon which the mill is situated, the plaintiffs would have actual possession of the whole, except such part as might be in the actual possession of another. *Graham v. Houston, supra.* The exception, therefore, is overruled.

The exception respecting the enclosed land in the actual occupation of the defendants is without force. There was no evidence of a trespass except upon the waters of the pond, and in assessing the damages the jury were necessarily confined to the same. The refusal to charge as requested could not have prejudiced the defendants, and especially is this so, inasmuch as his Honor, it seems by consent of all parties, ex-

cluded from the judgment all the lands in the actual occupation of the defendants.

There was no evidence that the defendants were in the actual possession, as distinguished from acts of trespass, of the waters of the pond where the timber was cut, and the instructions based upon such an hypothesis were properly refused.

The defendants objected to the introduction of the deed from Jesse Eason to "Noah and William Hinton." The attesting witnesses to the deed were Thomas Ruffin and H. W. King. The certificate of probate is as follows:

"STATE OF NORTH CAROLINA—Bertie County. (71)
May Term, 1820.

"This deed from Jesse Eason to Noah and William King was proved in open court by the oath of Thomas Ruffin, one of the subscribing witnesses thereto. Let it be registered.

"Test: E. A. RHODES, *Clerk.*"

It is quite manifest that the name of King instead of Hinton was inserted by reason of a clerical error on the part of the clerk; and where it appears that the requirements of the law have been substantially complied with, we should be reluctant to hold upon so slight a ground that the certificate was insufficient to warrant the registration of the deed. "Acknowledgments are frequently taken before persons of limited skill and knowledge, and while all the rquirements of the law have been carefully and scrupulously complied with, yet errors will creep into the certificate which manifestly are clerical. To scrutinize these certificates with severity, and declare them insufficient for slight variations or evident errors, where they substantially comply with the statute, would subserve no desirable end." 1 Devlin Deeds, 514. In the absence of testimony to the contrary, we must assume that the certificate having been registered with the deed was either written on the deed or annexed thereto. Such being the case, the identification of the certificate with the deed of Eason to Noah and William Hinton is complete; for it is "this deed" which the clerk declares was proved in open court by Thomas Ruffin. The fact that Jesse Eason executed that particular paper was the essential thing to be proved, and this plainly appears from the certificate. There was no error in permitting the deed to be read in evidence.

In making out their title the plaintiffs introduced a contract, executed in 1855, for the sale of the land by one Freeman to James Burden. The defendants objected "because it was not under seal, and was not such a paper as required registration, and the original should be produced."

No seal is necessary to the validity of a contract for the sale of
(72) land, and we have been referred to no authority in support of the position that the registry or certified copy of the record of any such contract may not be received in evidence. The Revised Code, ch. 37, sec. 26, which was in force when this contract was executed, required that it should be registered, and in section 16 of said chapter it is provided that the "registry or duly certified copy of the record of any deed, power of attorney, or other instrument required or allowed to be registered or recorded, may be given in evidence," etc. The case of *Edwards v. Thompson,* 71 N. C., 177, decided that these provisions did not put a contract for the sale of land on the same footing as an unregistered mortgage, but it was by no means held that such a contract was not allowed to be registered, and therefore its registry inadmissible in evidence. The objection to the admission of the registry was properly overruled.

In looking over the entire record we have been able to discover but one error on the part of the court. The defendants, Junius and Thomas Bridgers, asked the court to instruct the jury that there was no evidence that they had ever cut any timber or otherwise trespassed upon the land. This instruction was refused, and as we can find no such evidence in the record, we must hold that there was error in the refusal. As these defendants do not claim the land, and are only concerned about the judgment against them for the damages assessed by the jury, the erroneous ruling will not necessitate a new trial, but may be corrected by striking the names of these parties from the judgment.

Modified and affirmed.

Cited: Robinson v. Daughtry, 171 N. C., 202; *Vaught v. Williams,* 177 N. C., 85.

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(73)

GEORGE W. ROOKER v. W. B. CRINKLEY.

Removal of Cause from State Court—Alien Resident.

A suit pending in a court of this State between a citizen of this State and an alien resident in this State is not removable under the act of Congress relating to the removal of causes.

MOTION for removal of cause to the Federal Court, heard at March Term, 1893, of WARREN, before *Hoke, J.*

"Your petitioner, the defendant, respectfully requests the court to remove the above-entitled action for trial into the Circuit Court of the

United States for the Eastern District of North Carolina, which will be held in the city of Raleigh on the first Monday in June, 1893, for the following reasons:

"(1) That defendant is not a citizen of the State of North Carolina, but is an alien and is the subject of her Majesty Victoria, Queen of England.

"(2) That it appears from the complaint that the amount in dispute and claimed of the defendant by the plaintiff is more than $500, and is for the sum of $5,000."

Affidavit of Defendant.—W. B. Crinkley, the defendant, being duly sworn, says that he is, and always has been a citizen and subject of Victoria, Queen of England, and though he resides in North Carolina, and has resided in said State for more than ten years past, he is an alien and has never become a naturalized citizen of the United States of America, having been born in England.

The motion was denied, because the affidavit does not show that the defendant is a nonresident as well as an alien, and order was made that the cause be proceeded with in the State Court, and the defendant appealed.

W. A. Montgomery and W. H. Day for defendant.
No counsel contra.

MACRAE, J. We concur with his Honor that the affidavit and (74) petition of defendant shows no removable cause. The act of Congress governing removals of causes from the State to the Federal Courts, and which is applicable to these cases, is that of 3 March, 1887, and embraces (1) suits arising under the Constitution and laws of the United States, and treaties made in pursuance thereof; (2) suits in which the United States are plaintiff; (3) suits between citizens of different States; (4) suits between citizens of the same State claiming lands under grants from different States; and (5) suits between citizens of a State and foreign States, citizens and subjects.

Section 2 provides, among other things: "Any other suit of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought in any State Court, may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein being *nonresidents of that State.*" *Cudahy v. McGeoch,* 37 Fed., 1; *Walker v. O'Neal,* 38 Fed., 374. These are suits between a citizen of this State and an alien resident in this State, and are not removable under the act of Congress.

No error.

THOMAS P. OUTLAND ET AL. v. ELIJAH OUTLAND ET AL.

Practice—Misjoinder of Causes of Action.

Where the devisees of land charged with the support of a lunatic agreed to pay plaintiffs for the support and maintenance of the lunatic, and plaintiffs brought suit against such devisees to recover the amount due under such agreement, and also to have the land so charged subjected to the payment of such sum and to secure the payment for the future support by plaintiffs of the lunatic under said contract: *Held*, that there was no misjoinder of causes of action. *Quere*, whether the charge on the land could be enforced in favor of plaintiffs.

(75) ACTION heard on complaint and demurrer, before *Bynum, J.*, at August Term, 1893, of NORTHAMPTON.

From the judgment sustaining the demurrer on the ground that there was a misjoinder of causes of action, the plaintiffs appealed.

R. O. Burton for plaintiffs.
No counsel contra.

CLARK, J. This action is brought upon the allegation that Thomas Outland devised certain lands to his sons, Elijah and Cornelius, charged with the support of another son, Thomas, who was *non compos mentis;* that "said Thomas has lived with and been supported by the plaintiffs, under an arrangement entered into between said Cornelius and Elijah and these plaintiffs that said Cornelius and Elijah should pay for his support and maintenance." Payment not having been made the plaintiffs ask for judgment for the amount and to subject the land of Elijah and also of Cornelius, now partly in hands of heirs and partly in the hands of purchasers (who are made defendants), to the payment thereof. The only question presented by the appeal is whether this is a misjoinder of causes of action. We think not. The Code, sec. 267 (1); *Hamlin v. Tucker,* 72 N. C., 502; *Glenn v. Bank,* 72 N. C., 626; *McMillan v. Edwards,* 75 N. C., 81; *Young v. Young,* 81 N. C., 91; *Bank v. Harris,* 84 N. C., 206; *King v. Farmer,* 88 N. C., 22; *Heggie v. Hill,* 85 N. C., 303.

Whether the devise is a charge upon the land, and if so, whether the plaintiffs are subrogated to the right to enforce it, are interesting questions, but are not before us. In ruling that there was a misjoinder of causes of action there was

Error.

Cited: Chemical Co. v. Floyd, 158 N. C., 462.

(76)

H. B. TALIAFERRO & CO. v. W. A. SATER & CO.

Chattel Mortgage—Conflicting Liens—After Acquired Property.

R., being indebted to H., conveyed to the latter by way of mortgage all the lumber owned by him at his sawmill and at certain railroad sidings, etc., and also all such lumber as he might thereafter purchase and saw at said mill between the date of the mortgage (March 16, 1890) and August 1, 1891. On April 15, 1891, R. made with one J. a contract whereby the latter agreed to sell him certain timber trees then standing on certain designated lands. On 20 April thereafter R. and S. formed a copartnership as S. & Co.; and, being indebted to T. & Co., conveyed to them by way of mortgage all the lumber owned by them, sawed or unsawed, at their mill, as well as lumber which they owned uncut, and bound themselves to ship to T. & Co. all the lumber they might thereafter saw at their said mill, the proceeds of the sale of the same to be credited on their note which T. & Co. held. The evidence tended to show that what timber was cut on the land of J. was cut by the firm of S. & Co., paid for by them, and hauled by them to the mill which they (and not R. individually) were operating. In an action relating to the lumber cut from the land of J. the court below instructed the jury that if the lumber in controversy was sawed from timber purchased by R. in his own name for himself before the formation of the firm of S. & Co., and was sawed by S. & Co. at the mill owned and operated by R. at the time of his mortgage to H., the same would be covered by H's mortgage, although the timber from which the lumber was sawed was paid for out of the copartnership funds: *Held*, such instruction was erroneous since, assuming the evidence to be true, the lumber was never subject to the mortgage given by R. to H., because it was not purchased and sawed by R. but by the firm of S. & Co., but was subject to the mortgage of T. & Co., because it was legally and equitably the property of the firm of S. & Co.

ACTION, tried at November Term, 1892, of HALIFAX, before *Shuford, J.*, and a jury.

The appellees, who are interpleaders in this action, claim the property in dispute under a mortgage made to them on 16 March, 1890, by the defendant, S. J. Rawls, to secure a debt due from him individually to them. In that mortgage the property assigned is de- (77) scribed as "all the lumber owned by said Rawls at his mill now on the land of Mrs. Virginia Grizzard, in Halifax County, N. C., near the town of Halifax, both sawed and unsawed, and also all the lumber owned by him at his siding at the junction of the Wilmington and Weldon and the Scotland Neck Railroads, said siding being on the main line, both sawed and unsawed, and all such lumber as the said Rawls may hereafter purchase and saw at said mill between the date hereof and 1 August, 1891." On 15 April, 1891, defendant Rawls made with one Jackson a contract, by the terms of which Jackson agreed to sell

him certain pine timber-trees then standing on designated tracts of land, at the price of seventy-five cents per thousand feet for all trees cut by him, payment to be made "at the expiration of every four weeks while engaged in cutting timber on said premises." And this contract provided that Rawls should execute a bond in the sum of three thousand dollars to secure his faithful performance of its stipulations, and it was further provided that without this bond the contract should be of no effect.

This bond was not made till 20 April, 1891, on which date the defendants, Rawls and Sater, formed the copartnership of W. A. Sater & Co., and this firm, being indebted to plaintiffs, executed and delivered the following instrument:

"Whereas, W. A. Sater and S. T. Rawls, partners as W. A. Sater & Co., are indebted to H. B. Taliaferro & Co. in the sum of $576.85 (less amount of freight not charged on bill of said Taliaferro & Co.), and they desire to secure the same:

"Now, therefore, the said W. A. Sater & Co. do hereby convey to said H. B. Taliaferro & Co. all the lumber now owned by them, either sawed or unsawed, at their mill on the land of Mrs. V. S. Grizzard, or
(78) at their railroad siding, and all lumber they now own which is uncut. And the said W. A. Sater & Co. hereby do agree and bind themselves to ship to said H. B. Taliaferro & Co. all the lumber that they may hereafter saw at their said mill, to be sold by them and applied to the payment of said debt until the same is fully paid off, and until all indebtedness hereafter incurred to said Taliaferro & Co. by reason of any advance and supplies they may hereafter furnish said mill are paid in full. And the said W. A. Sater & Co. do hereby give to said H. B. Taliaferro & Co. a lien on the lumber they may hereafter saw at said mill, to secure them for any advances the said Taliaferro & Co. may hereafter make said W. A. Sater & Co. for the running of said mill.

"S. T. RAWLS. (Seal.)
"W. A. SATER. (Seal.)

"Witness: S. M. GARY.
"This 30 May, 1891."

The following issues were submitted to the jury:

1. Are the plaintiffs the owners and entitled to the possession of the property described in the complaint?

2. Are the defendants, Hale Brothers, the owners and entitled to the possession of said property or any part thereof? And if only a part, what part?

3. What was the value of said property at the time of seizure?

4. What amount is now owing on the mortgage debt from S. T. Rawls to Hale Brothers?

The plaintiffs asked the court to charge the jury:

"That although Rawls may have agreed to buy the lumber in his individual name, if a jury shall believe that it was paid for with partnership funds, it became partnership property if the contract for the purchase was not perfected till after the partnership began."

The court declined to give this instruction as prayed for, and charged the jury in lieu thereof as adverted to in the opinion (79) of *Associate Justice Burwell.*

The plaintiffs also asked the court to charge the jury:

"That if the jury believe that Hale Brothers took possession of the sawmill and cut the lumber under the contract of Rawls, then they were mortgagees in possession, and any profits they made must be credited on their debt from Rawls."

The court gave this instruction *verbatim* as requested, but added that if the jury should find from the evidence that the defendants, Hale Brothers, took possession of a part of the Jackson timber which was purchased by S. T. Rawls, or any other timber purchased by him, and made a sufficient profit therefrom to discharge the mortgage debt due them by the said Rawls, then the jury should find whether said defendants took possession thereof as mortgagees or not; that if Hale Brothers took possession under the lease from Jackson to Rawls as mortgagees, or under this bond to Andrew T. Jackson to secure themselves against loss thereon, and realized sufficient profit to pay their mortgage debt, the jury should find the fourth issue "Nothing." But if Hale Brothers did not take possession of said timber under the said lease from Jackson to Rawls as mortgagees, or under their bond to Jackson to secure themselves against loss, but took possession thereof without regard to the mortgage or bond, and under a separate and distinct contract with Jackson, then what they may have made therefrom cannot be applied to the discharge of the mortgage to them from Rawls, and the jury will find what amount is due them from the evidence.

To this charge as given, plaintiffs excepted.

The plaintiffs also asked the court to charge the jury:

"That the Hale Brothers mortgage does not cover the Jackson contract if the same was made after the partnership began, the contract not going into effect until the bond was given."

The court declined to give this instruction as asked, and charged the jury that the mortgage of Hale Brothers does not (80) cover the Jackson contract, 15 April, 1891, if the same was made,

before the partnership began, by S. T. Rawls in his own name, for his own benefit, although he may not have executed bond pursuant to said contract until after his copartnership with W. A. Sater, provided he executed said bond on his own responsibility and without making W. A. Sater & Co. parties to the same.

To this charge the plaintiffs excepted.

The jury responded to the first issue, "No"; to the second, "Yes, all of it"; to the third, "$500," and to the fourth, "$286.91."

The plaintiffs moved for a new trial. Motion overruled, and plaintiffs excepted, and after judgment for Hale Brothers the plaintiffs appealed.

R. O. Burton and E. L. Travis for plaintiffs.
T. N. Hill and W. H. Day for defendants.

BURWELL, J. (after stating the main facts). In the argument before us, no question was made as to the validity of the mortgages described in the pleadings, nor is it necessary for us to pass upon them, as the case is now presented to us.

The mill spoken of in this latter instrument was the mill of Rawls mentioned in his mortgage to the interpleaders heretofore set out, and it was operated by the firm of Sater & Co. during the existence of the copartnership.

The mortgage made by Rawls to Hale Brothers did not at all affect the right that he acquired by his contract with Jackson to cut timber on the latter's land. It put no lien on that timber or on his right to cut it. If he had himself caused any of that timber to be cut, and had himself caused the logs to be carried to the mill and to be sawed into lumber, that lumber and any unsawed logs, being his individual property and answering to the description contained in the mortgage,
(81) would be liable for his individual debt to the interpleaders, Hale Brothers. But the evidence on the trial tended to show that what timber was cut on the Jackson land was cut not by Rawls, but the firm who paid Jackson for the trees, hauled them to the mill which the firm, not Rawls, was operating, and there the logs were sawed into lumber, not by Rawls, but by the firm who paid all the expenses of converting the standing timber, upon which the interpleaders, as we have said, had no lien, into lumber at the mill.

If these facts are true, it seems that the property in dispute—the lumber at this mill—was never subject to the mortgage given by Rawls to the interpleaders, because it was not purchased and sawed by him, and that it is subject to plaintiffs' mortgage because it is both legally and equitably the property of the firm of Sater & Co.

We therefore hold that his Honor erred when he charged the jury "that if they found from the evidence that the lumber in controversy was sawed from timber purchased by Rawls in his own name for himself, before the formation of his copartnership with W. A. Sater, and was sawed by the mill owned and operated by said Rawls at the time of the execution of the mortgage by him to Hale Brothers, after the date of said mortgage and before 1 August, 1891, whether the same was sawed by Rawls alone or by him and Sater as partners, the same would be covered by the description of property contained in the mortgage from Rawls to Hale Brothers, and the title passed from him unto Hale Brothers under that clause in their mortgage, conveying all such lumber as said Rawls may hereafter purchase and saw at said mill between the date hereof and 1 August, 1891, and this would be true although the timber from which the lumber was sawed may have been paid for with the copartnership funds of W. A. Sater & Co."

If it were true, as the interpleaders seem to insist, that their lien covered the Jackson timber, or rather Rawls's right to take (82) timber from that land, then it would follow, as plaintiffs insist, that whatever clear profit they made out of sawing this timber must be applied on their mortgage debt, for a mortgagee who acquires possession of the mortgaged property must in all cases account for it, and he will not be allowed to say, when called upon to settle, that his possession was not under the mortgage, but will upon the accounting be credited by such sums as he may have properly paid out to perfect his title, to protect his possession or to render the property available for the payment of the mortgage debt. But since we hold that the interpleaders had no mortgage or lien on the Jackson timber, it is of no avail to consider questions concerning the application of profits made by a mortgagee in possession, which are raised by plaintiffs' second exception.

For the error pointed out above there must be a

New trial.

Cited: Furgerson v. Twisdale, 137 N. C., 417.

(83)

R. S. WELLS v. H. B. BOURNE ET AL.

Failure of Sheriff to Take Proper Replevin Bond—Liable Only when Property Cannot be Found or Execution is Returned Unsatisfied—Measure of Damages—Secondary Evidence.

1. In delivering property to a defendant when seized in claim and delivery proceedings, without taking a proper undertaking and requiring the same to be justified, a sheriff becomes liable as a surety thereon.
2. In such case the measure of liability is the delivery of the property to the plaintiff (if such delivery be adjudged), with damages for its deterioration or (failing delivery) the value of the property; and to subject the sheriff as surety, it is necessary to show that execution has been returned unsatisfied.
3. Returns on execution being required to be in writing, oral evidence in relation thereto will not be allowed when the nonproduction, by reason of loss or destruction, is not properly accounted for.
4. Where plaintiff, in an action against a sheriff to recover damages for his failure to take a proper undertaking for the return of property seized by him at the instance of plaintiff and adjudged to be returned, failed to show that execution issued for the property and against the sureties on the undertaking had been returned unsatisfied, he failed to show, and cannot recover, actual damage against such sheriff.

ACTION, tried before *Hoke, J.,* Spring Term, 1893, EDGECOMBE, against the defendant Bourne, Sheriff, and his sureties, for breach of his official bond, and consequent damage to the plaintiff.

It was in evidence that the plaintiff, R. S. Wells, instituted an action in the Superior Court of Wilson County against one Joshua Hines and wife for the recovery of certain personal property situated in the county of Edgecombe. That claim and delivery papers with the usual mandate from the clerk were issued to the defendant Bourne, Sheriff of Edgecombe County. That under and by virtue of said papers and mandate, the said Bourne seized and took into his possession certain of the personal property therein described, and upon the defendants, Hines and wife, executing and delivering to him an undertaking with two sureties in the sum prescribed by law—within the time prescribed by law after the seizure of said property—the defendant Bourne surrendered said property to the defendants. That the said undertaking was not in the form required by the statute, and was not justified as to either surety thereto. The record of said suit from the Superior Court of Wilson County was put in evidence by plaintiff, down to and including the judgment—no execution was offered. That it appeared therefrom that judgment was rendered therein in favor of plaintiff Wells for

the recovery of said property at ------ dollars, and judgment on bond in case property could not be found. The plaintiff offered to show by F. A. Woodard, attorney for plaintiff in the suit against (84) Hines and wife, that execution had issued upon the judgment in that court, and that nothing had been realized thereby, and that same had been returned *nulla bona*; the execution was not offered. To this evidence the defendant objected. Objection sustained, and plaintiff appealed.

The court held, that on the evidence, there was a breach of defendant's bond, and in the absence of any evidence that the property could not be found or that the sureties were insolvent, the damages were only nominal.

There was verdict for breach of bond and for five cents damages.

Plaintiff moved for a new trial for error in rejecting the above evidence, and appealed from the refusal of such motion.

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

SHEPHERD, C. J. The defendant, Sheriff, in delivering the property to the defendant without taking a proper undertaking and requiring the same to be justified, became "responsible for the defendant's sureties" (The Code, sec. 327), or, in other words, became liable himself as a surety to such undertaking. The measure of liability upon such an undertaking is the delivery of the property to the plaintiff (if such delivery be adjudged), with damages for its deterioration, or, if such delivery cannot be had, then for the value of the property. The Code, sec. 326. It was necessary, in order to subject the sheriff as surety, to show that execution had been returned unsatisfied. The execution issued to the sheriff of Wilson County, and his return of *nulla bona* was not introduced, nor its non-production accounted for, and his Honor properly excluded oral evidence thereof. The law requires such returns, etc., to be in writing, and public policy requires that such evidence shall not be dispensed unless it has been lost or destroyed. The (85) return in this instance is not within the principle of *Pollock v. Wilcox,* 68 N. C., 46, and other cases cited, in reference to the exception, where the fact sought to be proved is collateral to the writing. The evidence being properly excluded, there was nothing to show any actual damage sustained by the plaintiff, and the judgment below must therefore be

Affirmed.

ZELL GUANO COMPANY v. THOMAS L. EMRY AND WIFE.

Contract—Composition Among Creditors—Void Agreement.

1. When a creditor, at the solicitation of a debtor, agrees to enter into a compromise—provided the other creditors will also do so—nothing less than the strictest compliance with the terms of the proposed composition on the part of the debtor, and on the part of the other creditors also, can bind him, and any preference of one creditor over another, whether it relates to the amount to be paid him, the time of payment, or the manner of securing the prompt payment, taints the whole contract and renders it void. Therefore,
2. Where, in an action on a note, the defense was that plaintiff had agreed to compromise the debt at 50 per cent of its face (the payment of the compounded sum to be secured by mortgage on real estate)—provided all the other creditors should accept the same terms of settlement, and such defense was established by a verdict, and it was admitted by the debtor on the trial that different and more advantageous terms had been allowed other creditors, such verdict and admission established the essential fact that there was no contract binding on the plaintiff to accept 50 per cent of the debt in full satisfaction, and judgment should have been entered for the plaintiff for the whole debt.

ACTION, tried at November Term, 1892, of HALIFAX, before *Shuford, J.*, and a jury.

The following issues were submitted to the jury by the court, without objection, as the issues between the parties:

1. Did the plaintiff agree to compromise the debt sued on with
(86) the defendant, Emma J. Emry, for fifty cents on the dollar, to be secured as alleged in the answer?

2. Were the other creditors of the said Emma J. Emry induced by such an agreement to compromise their claims against her at fifty cents on the dollar?

3. Did the said defendant comply with her part of said agreement to compromise?

4. Was the said defendant able, willing and ready to comply with her part of said agreement, and did she offer to comply with the same?

5. Was it part of the agreement that plaintiff should send or come to select and investigate security?

The jury responded, to the first issue, "Yes, provided other creditors accepted the same terms of settlement"; to the second, fourth and fifth issues, "Yes"; and to the third issue, "Yes, except giving mortgage."

Judgment was thereupon rendered for the plaintiff for fifty per cent of the amount claimed, and plaintiff appealed.

The facts necessary to an understanding of the opinion of the Court sufficiently appear in the opinion of *Associate Justice Burwell.*

Battle & Mordecai for plaintiff.
W. H. Day and J. M. Mullen for defendants.

BURWELL, J. The answer of the *feme* defendant sets up as a defense a composition agreement, entered into by the plaintiff and certain of her other creditors to whom she was indebted for fertilizers. The plaintiff denied that it had made any such compromise.

The jury, responding to the first issue, have found that the plaintiff did "agree to compromise the debt sued on with the defendant, Emma J. Emry, for fifty cents on the dollar, to be secured as alleged in the answer, provided other creditors accepted same terms of (87) settlement."

Turning to the answer to ascertain how the "fifty cents on the dollar" was to be secured, we find it was to be done "by mortgage or deed of trust on real estate, each creditor to pass upon the sufficiency offered for his respective debt, and if, upon investigation, the same proved not satisfactory, she (defendant) pledged herself to make it so." And from the same source we ascertain that the terms of settlement, so far as they related to the *time* of settlement, were that the payment should be made in the fall of 1890.

It therefore became necessary, in order that the plaintiff might be defeated in the recovery of its entire original debt, that it should be established that the other creditors did accept the same terms of settlement. There was no composition agreement as far as plaintiff was concerned, unless this condition which, according to the verdict, was annexed to its acceptance of the proposition of settlement made to it, was fulfilled.

Instead of proving its fulfillment, we think the defendants have admitted its non-fulfillment.

Among the creditors to whom this proposition was made by defendants, and who were to be parties to the composition agreement, were the Goldsboro Oil Company, Lister's Agricultural Works, and H. S. Miller & Co., the last named being the creditor through whose agent the proposition was submitted to the plaintiff.

We find in the record that on the trial it was admitted "that the defendants settled with Lister's Agricultural Chemical Works on the terms testified to by W. E. Daniel; that they settled with H. S. Miller & Co. on the terms set out in their deed of trust (Exhibit 'B'), and with the Goldsboro Oil Company, after judgment was taken for the debt in full, on the terms testified to by the defendant T. L. Emry, on his cross-examination."

The "terms testified to by W. E. Daniel" were that if the
(88) fifty per cent was not paid at the time agreed upon, to wit, in November, 1890, "the whole debt was to remain due." The terms of the settlement with H. S. Miller & Co., which were incorporated in the deed of trust made to secure the note given to represent the sum due according to the compromise, were that those creditors (Miller & Co.) should continue to hold their original notes and should not surrender or cancel them until the new note for one-half the debt was actually paid, and if the latter note was not paid at maturity (15 November, 1890) then the original debt was to be in full force against the defendant "without any offset except what may be paid thereon."

Concerning the settlement made with the Goldsboro Oil Company, the defendant, T. L. Emry, testified that when notified by the agent of Miller & Co., to whom the negotiations with that company and with the plaintiff had been entrusted, that the Goldsboro Company would not accept the proposition made to it, he opened negotiations with them himself; and, stating what took place as the consequence of these latter negotiations, on his cross-examination he said: "They sued and took judgment at May Term, 1890, of Goldsboro Court, with the understanding, which was inserted in the judgment, that they would accept fifty per cent within a certain time."

We must assume that the terms upon which these three several settlements were made were agreed upon by the parties concerned in each, and that these settlements carried into effect the only agreements made with these particular creditors.

The terms of these settlements differed very materially, we think, from the terms of that settlement which was offered to the plaintiff, and which it conditionally accepted. It is true that in each the ratio of proposed payment to the entire debt is the same, to wit, fifty
(89) per cent; but to two of these creditors it was allowed to make only a conditional compromise. They were not required to surrender or cancel the original indebtedness and accept in lieu thereof absolutely a new promise to pay one-half of the surrendered debt in the fall, but were allowed to retain their original claims against the defendant, they promising to surrender them if the payment of one-half the sum was promptly made as agreed; otherwise, the original claim was to be in full force. This was not the proposition made to the plaintiff by the agent of the defendant (as testified to by him in their behalf), nor is it the composition agreement set out in the answer. The retention of the old debt under such condition was an advantage not offered to plaintiff.

We think it even more evident that the Goldsboro Oil Company did not accept the same terms of settlement which were tendered to the

plaintiff; that it demanded and received a settlement by cash before the fall of 1890. If it had accepted in good faith the terms offered to the plaintiff, and afterwards—but not because of any secret understanding —payment had been anticipated merely for the accommodation of the debtor, no complaint could reasonably be made. But such are not the facts of this case. Here we have a proposition on the part of the debtor to enter into a certain composition agreement with a certain class of her creditors and an agreement on the part of one creditor that he will enter into that composition, provided the other creditors will also do so. Nothing less than the strictest compliance with the terms of the proposed composition on the part of the debtor, and on the part of the other creditors also, can bind him. The most perfect good faith is required of all. Any preference of one creditor over another, whether that preference relates to the amount to be paid him, to the time when it is to be paid, or to the manner of securing its prompt payment, taints the whole contract and renders it void.

From what has been said, it seems to follow that the facts admitted by defendants on the trial, coupled with the finding of (90) the jury on the first issue, establish the essential fact that there is no contract binding the plaintiff to accept one-half of its debt against the *feme* defendant in full satisfaction of it, and the other issues and the findings of the jury thereon become of no importance in determining the rights of the parties. The very foundation of the defense was destroyed by the verdict and the admissions, and plaintiff was entitled to a judgment for the whole debt, according to the prayer of the complaint. The cause is remanded, to the end that judgment may be so entered.

Error.

CLAUDIA REDMOND v. F. L. PIPPEN, ADMINISTRATOR OF J. H. PIPPEN, AND M. H. PIPPEN, EXECUTRIX OF W. M. PIPPEN.

Action on Sealed Note—Surety—Statute of Limitations.

1. The lapse of three years between the maturity of or last payment on a sealed note and the commencement of suit thereon is a bar to the action as against a surety thereto.
2. Section 153 (2) of The Code, prescribing seven years after the qualification of the executor or administrator as the time within which a creditor of a deceased person shall bring his action, does not put a stop to the operation of the three years statute, which has begun to run; therefore, where the statute began to run in favor of a surety on 23 March, 1888, the surety died on 6 June, 1889, and his executrix qualified on 8 June, 1889, an action commenced on 5 April, 1892, was barred as to such surety.

3. Section 153 (2) applies to actions against a personal or real representative instituted to compel the performance of some duty incumbent on the representative, such as the sale of land for assets, and not to actions brought simply to ascertain the debt and reduce it to judgment.

ACTION, tried before *Hoke, J.*, and a jury, at Spring Term,
(91) 1893, of EDGECOMBE, to recover the amount of a sealed note for money.

Defendants admitted liability to plaintiff for the balance due on the note, as to the defendant F. L. Pippen, administrator of J. H. Pippen, the principal thereto, but contended that as to the executrix of W. M. Pippen, the surety to the note, the cause of action was barred by the statute of limitations protecting sureties in three years.

It was admitted that the note was executed much more than three years before commencement of this suit by J. H. Pippen as principal and W. M. Pippen as surety, and summons in the action was issued on 5 April, 1892.

It was also admitted that J. H. Pippen died in June, 1888, and defendant F. L. Pippen qualified as his administrator on 15 October, 1891. That W. M. Pippen died 6 June, 1889, and defendant, his executrix, was qualified as such on 8 June, 1889.

It was proved further that J. H. Pippen, the principal to the note, paid the interest thereon continuously as same became due, down to and including 23 March, 1888, which was the last payment made by him, and such payments were duly entered as credits on the note.

There was no evidence offered that claim had been presented to either administrator or executrix. The court being of the opinion, on the facts admitted, that the cause was barred as to the surety by the statute of limitations, so instructed the jury, who returned a verdict on the evidence in favor of the defendant surety. Plaintiff excepted.

Judgment for plaintiff for amount of note against principal, and that the defendant surety go without day. Appeal by plaintiff.

John L. Bridgers for plaintiff.
Gilliam & Son for defendants.

MACRAE, J. Since *Welfare v. Thompson*, 83 N. C., 276, it
(92) has been firmly established that three years is a bar to actions upon sealed notes as against the sureties thereto. Clark's Code, section 152 (2).

As to the surety W. M. Pippen himself, there is no question but that the statute of limitations would bar an action against him in three years after the last payment. It is contended, however, that, as he died before the action was barred as to him, by virtue of section 153 (2) the time is

extended, or, as said in the plaintiff's argument, "that his death puts a stop to the running of the statute and brings to an end all limitations in favor of the dead man's estate. Upon the qualification of the personal representative, a new and different statute of limitations begins to run, to wit, the statute governing the bringing of actions against the personal representatives of decedents (The Code, sec. 153 (2)," and that notwithstanding the fact that the statute had begun to run during the life of the surety, and had been merely suspended upon his death until the qualification of his executor, after such qualification an action may be brought upon the note at any time within seven years.

This is the first time, as far as we know, that this construction has been sought to be put upon the section last named. The statute of limitations, Title 3 of the Code of Civil Procedure, is comprised of several chapters and many sections, and in the interpretation of any one section thereof, regard must be had to its harmony with the whole.

While section 153 (2) standing alone would extend the time "by any creditor of a deceased person against his personal or real representative within seven years next after the qualification of the executor or administrator," etc., we must take it in connection with section 155, which restricts "within three years an action upon a contract, obligation or liability arising out of a contract express or implied, except those mentioned in the preceding sections" (which especially referred to contracts under seal, section 152 (2), *Joyner v. Massey,* 97 N. C., (93) 148), and with section 164, which provides "if a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his personal representative after the expiration of that time, and within one year after the issuing of letters testamentary," etc.

The last section has been held to be an enabling and not a disabling statute, and to apply only in those cases where, but for its interposition, a claim would be barred in less than one year from the grant of letters. *Benson v. Bennett,* 112 N. C., 505.

It will be found upon examination of the cases wherein the seven years statute has been held to apply, that they were brought against the personal, and where necessary, the real representatives, for the enforcement of some right of which the debt itself was but the foundation, as in *Lawrence v. Norfleet,* 90 N. C., 533, and *Worthy v. McIntosh,* 90 N. C., 536, which were brought by the administrator *d. b. n.* against the administrator of a former representative to recover the unadministered assets which were or ought to have been in his hands; or as in *Cox v. Cox,* 84 N. C., 138, which was an action for a legacy; or as in other instances which might be named, upon a devastavit, or to compel the

sale of land to pay the debts of the decedent. This is the more reasonable, as the result of an action against the personal representative upon an ordinary obligation of the deceased, is simply to ascertain the amount of the debt and fix it in a judgment.

It is impossible by any other construction to reconcile the provisions of the section cited.

This action then as it appears was barred at the time of its commencement.

No error.

Cited: Hughes v. Boone, 114 N. C., 57; *Lee v. McKoy,* 118 N. C., 526.

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(94)

M. L. T. DAVIS v. B. J. SMITH & CO.

Assignment for Benefit of Creditors—Partners—Reservation of Homestead and Personal Property Exemptions—Fraudulent Intent—Burden of Proof.

1. The reservation of personal property and homestead exemptions allowed by law for both of the assignors in a deed of assignment for the benefit of creditors is neither conclusive nor presumptive evidence of a fraudulent purpose.
2. One partner, with the consent of the other member of a partnership, may dispose of the company's effects for his individual use, and a creditor cannot interfere to prevent the application. Therefore the reservation by assignors in a deed of assignment for the benefit of creditors of homestead and personal property exemptions out of the partnership effects did not raise any presumption, rebuttable or otherwise, of a fraudulent purpose on the part of the assignors, but was a circumstance to be left to the jury.
3. Where, in the trial of an action to set aside a deed of assignment as fraudulent, it was admitted that the assignors attempted to secure a larger amount of indebtedness to one of the preferred creditors than was actually due, this fact did not shift the burden of proof of fraudulent intent from the plaintiff to the defendant in such action; nor was such admitted fact such presumptive proof of fraud as to justify the judge in declaring the deed void without the intervention of a jury, but it was some evidence of a fraudulent purpose, and was properly submitted to the jury upon an issue relating to the fraudulent intent of the assignors.
4. The designation of an irregular method of either setting apart the homestead or appraising personal property reserved by assignors in a deed of assignment does not vitiate the instrument or taint it with fraud. Therefore, where the assignors reserved from the operation of a deed of assign-

ment the exemptions "allowed by law," the use of the words "To be set apart by the party of the second part" was neither conclusive nor presumptive evidence of fraud.

ACTION to set aside as fraudulent a deed of assignment made by the defendants to E. H. Meadows, and to recover the indebtedness due the plaintiff by the defendants, tried before *Hoke, J.*, and a jury, at May Term, 1893 of CRAVEN.

The assignee, E. H. Meadows, and J. A. Meadows, a prefer- (95) red creditor, were made parties defendants.

The complaint, after setting out the indebtedness of the defendants to the plaintiff at the time of the assignment, alleged:

"5. That neither B. J. Smith & Co. nor D. W. Smith owed to the defendants named in Class II of preferences in said deed the sums directed to be paid.

"6. That in pursuance of the provisions in the deed, and as intended therein, the assignee selected three persons, who set aside to defendants D. W. Smith and B. J. Smith five hundred dollars worth of goods, each according to their valuation, from the stock of B. J. Smith & Co.; and also set aside to D. W. Smith his homestead exemption including all the real estate described in the said deed of assignment, which they valued at the sum of $100—said three persons acting for the said E. H. Meadows, assignee.

"7. That according to the valuation so made, and in fact, both B. J. Smith & Co. and D. W. Smith were insolvent.

"8. That said deed of conveyance was made with intent to hinder, delay and defraud their creditors, and the said E. H. Meadows and J. A. Meadows had notice of such fraudulent intent.

"9. That E. H. Meadows under said deed has taken possession of personal property of the value of $900, or thereabouts, and has the books and notes of said B. J. Smith & Co., and of D. W. Smith and B. J. Smith for debts of large amounts, the value of the same being unknown to the plaintiff, but the same is largely in excess of their debts.

"10. The allegations made herein, except as to the existence of the debts, are made upon information derived from the public records, and from our attorney, who gained his knowledge from conversations with the defendants, B. J. Smith and D. W. Smith, and received by us.

Wherefore, they demand judgment that the said deed of assign- (96) ment is fraudulent and void, for the payment of their just debts, and costs thereon accrued, for the costs of this action, and such other and further relief as they may be entitled to."

The defendants denied the fifth and eighth articles of the complaint, and in answer to ninth article thereof said that the debts due the said

B. J. Smith & Co. and D. W. Smith and B. J. Smith, which came into the possession of the defendant E. H. Meadows, amounted to about twenty-three hundred dollars, of which only a small amount could be collected by law.

The deed of assignment reserved to each of the partners the personal property exemptions of five hundred dollars to be assigned and set apart, if they should so elect, out of the goods, wares and merchandise owned by them as partners; a homestead was also reserved for D. W. Smith, one of the partners. The deed provided that the personal property exemptions and the homestead should be set apart and assigned by assignee. The assignee was directed to pay, first, attorney's fee, and second "to apply the balance to the payment of the sum of $2,900 due to E. H. & J. A. Meadows Company, and the sum of $900 due J. A. Meadows, *pro rata.*" There were subsequent classes of preferred debts.

Upon the examination of the defendants, J. A. Meadows being sworn, said: "B. J. & J. W. Smith owed me nothing except as appears upon my ledger at the time of the assignment. I am one of the stockholders and directors of the E. H. & J. A. Meadows Company (which is a corporation), and one of the managers."

E. H. Meadows, being duly sworn, said: "I am the assignee of B. J. Smith & Co. and D. W. Smith. I am one of the stockholders and directors of the E. H. & J. A. Meadows Company, and one of the managers. At the time of the assignment B. J. Smith & Co. owed to J. A. Meadows $432.63, with interest. D. W. Smith owed to J. A.
(97) Meadows, including interest, $350.68. D. W. Smith owed to E. H. & J. A. Meadows Company $861.52. B. J. Smith owed J. A. Meadows $18.09. This is all the indebtedness between the parties except the cotton account. We were advancing money to B. J. Smith & Co. to buy cotton, which was to be shipped to us to secure the money. At the time of the assignment they owed us $1,879.01. We had the cotton at that time. None of the cotton had been sold at that time. Upon a sale of the cotton, in the spring following, and a settlement of the cotton account, there was a balance to the credit of B. J. Smith & Co. of about $136. About $500 worth of this cotton had been sold on 10 December, 1891, and applied to the debt, which left a balance of about $1,300, which balance was paid by the spring sale as stated above. At the assignment I went out to Vanceboro and took an inventory, and laid off the exemption and homestead. I selected three parties; they took an inventory of the goods in the store, which amounted to about $1,120. There was $120 in excess, which I sold to Mrs. Smith, the wife of D. W. Smith; left the balance of stock, $1,000 by inventory, as the exemptions of B. J. Smith and D. W. Smith; the estimate of the assessors was at the actual value. The same three men laid off the homestead and per-

sonal property exemptions. My recollection is that they gave D. W. Smith the property on which he resided as his homestead. I was present. They reported in writing to me. I accepted the report and acted upon it. My mind is not clear as to the allotment of the homestead. I have received no money from the lands, and have done nothing with the lands as assignee. Part of the land was sold under mortgage to Nancy Coward. Since the assignment I bought the land at $450."

Examined by the Defendants' Counsel.—"The personal property sold to Mrs. Smith, amounting to $120, was sold for its full value. I was present at the time the assignment was drafted. D. W. Smith was present at the time it was drawn. B. J. Smith was not. I (98) gave D. W. Smith information as to the indebtedness due E. H. & J. A. Meadows Company and J. A. Meadows, which is preferred in the assignment. I did not have my books present. I had asked the bookkeeper as to the amount of the indebtedness. The $2,900 due E. H. & J. A. Meadows Company was intended to cover the general account; the $900 was intended to cover the individual account of J. A. Meadows. I received the book accounts and notes, besides the $120 sold to Mrs. Smith. I mean by this, that there was no assets left after the assignment of the homestead and personal property exemption. I applied the cash ($120) to the payment to the first preferred creditor, and the expenses. I have received nothing from the books; most of them are worthless. There may be $300 or $400 collectible, but there are controversies on these about payments, etc.; sixteen hundred and odd dollars has been paid on the preferred debts of J. A. Meadows Company and J. A. Meadows. That was the amount that I ascertained subsequent upon examination of my books. I turned over the books and book accounts to Mrs. Holland Smith, the wife of D. W. Smith, and took a mortgage on the homestead, payable in one, two, three, four years. The mules were included in the transfer to Mrs. Holland Smith; in fact, the entire assets. I received the full market value for assets turned over to Mrs. Smith. The mortgage referred to above was taken by E. H. & J. A. Meadows Company and J. A. Meadows in satisfaction of the debts due them and preferred in the assignment."

The following issues were submitted to the jury:

1. Was the assignment made with intent to delay, hinder and defraud creditors of assignors? Answer: No.

2. What was amount of indebtedness from B. J. Smith to J. A. Meadows, existing at the time of assignment and intended to be secured? Answer: $18.09.

3. What was amount of indebtedness from B. J. Smith & Company to J. A Meadows, existing at time of assignment and (99) intended to be secured? Answer: $432.63.

4. What was amount of indebtedness from D. W. Smith to E. H. & J. A. Meadows, existing at time of assignment and intended to be secured? Answer: $861.80.

5. What was amount of indebtedness from D. W. Smith to J. A. Meadows, existing at time of assignment and intended to be secured? Answer: $350.68.

6. What amount has the trustee realized from the assignment since action commenced? Answer: $1,600.

All the issues except the first were answered by consent. His Honor charged the jury, reviewing the evidence, that the circumstances were submitted to them from which to determine the intention of the assignors, B. J. Smith and D. W. Smith, and that they were to say whether the assignments were made with the honest purpose of paying their debts or for the purpose of delaying, hindering and defrauding their creditors, and that the burden of proof was upon the plaintiffs.

To this issue, the first, the jury responded "No." The plaintiffs moved to set aside verdict and for a new trial, which was overruled, and plaintiffs excepted.

The plaintiffs moved for judgment as demanded in complaint. Motion denied. Plaintiffs excepted.

Plaintiffs moved for judgment against defendants for costs. Motion overruled. Plaintiffs excepted.

The court rendered judgment against the defendants, B. J. Smith & Co., for the debts due the plaintiffs, but refused to set aside the deed, and plaintiffs appealed, assigning as error:

1. That there was no evidence that should have been submitted to the jury upon the first issue.

2. That there was no evidence upon which the finding of the jury upon the first issue can be supported in law.

3. That his Honor erred in charging that the burden of proof (100) was upon the plaintiffs, and failing to charge that by the admission of the defendants and their testimony, as introduced by the plaintiffs, the burden was put upon the plaintiffs.

4. The refusal of the judgment as prayed by plaintiffs.

W. D. McIver, for plaintiffs.
W. W. Clark for defendants.

AVERY, J. The exceptions raise three questions—(1) whether there was any evidence to support the finding upon the first issue, which alone was submitted to the jury; (2) whether the admitted facts shifted the burden of proof from the plaintiffs to the defendants by raising a pre-

sumption that the deed of assignment was fraudulent; (3) whether there was error in refusing the motion of the plaintiffs for judgment upon the verdict.

If it plainly appears upon the face of a deed of assignment that it was executed not in good faith, but for the purpose of securing the ease and comfort of the debtor, the court is empowered to declare it void without the intervention of a jury. *Woodruff v. Bowles,* 104 N. C., 197; *Brown v. Mitchell,* 102 N. C., 347; *Hardy v. Simpson,* 35 N. C., 132. Is the reservation of personal property and homestead exemptions for both of the assignors conclusive evidence of a fraudulent intent on their part? We think not. The reservation of the right to the personal property exemption and the homestead "allowed by law" was neither conclusive nor presumptive evidence of a fraudulent purpose. *Barber v. Buffaloe,* 111 N. C., 206; *Eigenbrun v. Smith,* 98 N. C., 207; *Bobbitt v. Bodwell,* 105 N. C., 236.

While "it is well settled that each member of a partnership has a right to require the application of the joint effects to the joint debts before any portion of them can be directed to the satisfaction of the individual debts," it is a rule of law, as firmly established (101) that, "with the assent of the partners, any one of them is free to dispose of the company's effects for his individual use, and a creditor cannot interfere to prevent the application." *Allen v. Grissom,* 90 N. C., 90; *Clement v. Foster,* 38 N. C., 213; *Rankin v. Jones,* 55 N. C., 169. If there is no lien in favor of the creditors of the firm, we fail to see the force of the contention that the reservation of the exemptions out of the partnership effects, as the law permitted them to do, by agreement among themselves, raised a rebuttable, if not a conclusive, presumption of a fraudulent purpose on the part of the assignors. The late *Chief Justice Smith,* in *Allen v. Grissom,* conceding that there was conflicting authority as to the right of partners, under an agreement among themselves, to apply partnership funds, by assignment or otherwise, to the payment of individual debts, says: "This is the doctrine established by repeated recognitions in this court, from which, whatever may be the decisions elsewhere, we are not at liberty to depart, and it commends itself to our approval."

Admitting, therefore, that the research of the industrious counsel for the plaintiff has enabled him to array much authority from text-writers and courts which have adopted different views, we are not required to again renew the discussion of questions so long ago settled by our learned predecessors.

The admitted fact that the plaintiffs in the deed attempted to secure a larger amount of indebtedness to any of the preferred creditors than was actually due, while it fell as far short of presumptive proof, was

evidence of a fraudulent purpose, which, as we understand the case, was submitted to the jury as bearing upon the first issue. The weight of the testimony, in view of all accompanying circumstances shown, was to be determined by them.

After reserving the homestead and personal property exemp-
(102) tion "allowed by law," the use of the subsequent language, "to be set apart by the party of the second part," constitutes neither conclusive nor presumptive evidence of fraud. Having reserved only such exemptions as the Constitution and laws recognized, the designation of some irregular method of either setting apart the homestead or appraising personal property would not vitiate the instrument or taint it with fraud. It would be simply evidence that the assignors were ignorant of the law or misunderstood the method of proceeding prescribed by statute while it was still permissible for any aggrieved creditor, who should obtain judgment and sue out execution, to pursue the proper remedies to enforce his own judgment.

We can see no error in the charge of the court, that the burden still rested upon the plaintiffs to prove the fraud which they alleged to the satisfaction of the jury. We find no testimony which in law would have shifted the burden of proof, but only circumstances bearing upon the inquiry involved in the issue submitted, the weight of which was properly submitted to the jury. There was

No error.

Cited: Armstrong v. Carr, 116 N. C., 501; *Thomas v. Fulford,* 117 N. C., 689; *Joyner v. Sugg,* 132 N. C., 588; *Kirkwood v. Peden,* 173 N. C., 462.

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(103)

K. R. COGGINS ET AL. v. JESSE R. FLYTHE ET AL.

Action on Guardian Bond—Competency of Witnesses—Liability of Guardian—Negligence of Guardian.

1. In an action on a guardian bond executed before 1 August, 1868, in which a reference has been ordered to state an account, the guardian is a competent witness.
2. The sworn returns of a guardian are admissible, in a proceeding before a referee to state an account of the guardianship, in corroboration of the testimony of such guardian.
3. Where the inventory and account of sales by an administrator, showing assets, are followed by a sworn statement of disbursements, accompanied by vouchers, such statement is *prima facie* correct, and the burden of

showing that the assets have not been duly administered is upon him who alleges that fact. Therefore, in an action on a guardian bond, in which the plaintiff sought to hold the guardian liable for failure to collect moneys alleged to be due from an administrator of an estate in which the ward was interested, it appeared that the administrator, now deceased, had filed his account in 1866, which had been audited by the clerk: *Held*, that the burden of showing that the administrator did not apply the assets of the estate for its benefit rested upon the plaintiff.

4. Where an administrator received moneys in 1862, 1863, and 1864—a large proportion thereof in January, 1862—and paid debts of the intestate in 1862, 1863, 1864, and 1865, it was proper to apply to the balance on hand at the close of the war the scale of Confederate currency of January, 1863, being an average, instead of applying to each item of debit and credit the scale fixed for the respective dates thereof.

5. Where there is no evidence that an administrator appropriated to his own use the funds of his intestate, he is not chargeable with interest on receipts.

6. Where in a guardian's account a balance was struck at the end of every year, and interest computed according to the rule in guardian accounts, and the receipts and expenditures were both in Confederate money, the scale was properly applied at the end of the war upon the balance then found to be due.

7. Where the account and vouchers of an administrator showed disbursements from time to time during the period of administration, it is to be presumed, in the absence of proof to the contrary, that the money was paid out as it was received.

8. During the war an administrator paid with Confederate currency certain simple contract debts instead of debts of higher dignity which were charges on the land of decedent, and by emancipation the estate of decedent became insolvent, so that the land had to be sold: *Held*, that in view of the general financial disturbances of the period and the unwillingness of holders of debts generally to accept payment in Confederate money, the guardian of the children of decedent is not liable on his bond for failure to bring an action against the administrator as for a *devastavit*.

9. It was not negligence in a guardian in 1865 to rent land and hire out slaves for cash in Confederate currency.

10. A guardian is not personally liable for the necessary expenses of resisting a proceeding to remove him.

11. Where, by one clause of his will, a testator devised certain property to certain named children of his brother, and by another clause gave certain lands to his brother for life, at his death to descend to "his children," a child of such brother born after the date of the will, but before testator's death, has an interest in the land.

12. Where a guardian allowed the administrator of an estate in which his wards were interested to take charge of the real estate, he is liable to his wards for the rents up to the time the land was sold to pay decedent's debts.

13. A guardian is liable to his ward for negligence in failing to sue on a note due the ward until the parties thereto become insolvent.

ACTION on guardian bond, heard by *Brown, J.,* upon exceptions to referee's report, at April Term, 1892, of NORTHAMPTON.

From the judgment both parties appealed.

The facts are sufficiently stated by *Associate Justice MacRae* in the consideration of the several exceptions filed by the parties.

R. B. Peebles for plaintiffs.

T. W. Mason, Willis Bagley and W. W. Peebles & Son for defendants.

MACRAE, J. This was an action upon the bond of Flythe, guardian of the relators, heard upon exceptions to the referee's report at April Term, 1892, of Northampton. It is proper to say that while the case comes up upon appeals of both plaintiffs and defendants from the judgment of his Honor *Judge Brown,* the exceptions to be considered are from the rulings of *MacRae, Judge,* at a previous term of said court.

We will first consider the plaintiffs' appeal: Exceptions 1, 5, 6 and 7 involve the admissibility of the testimony of Jesse Flythe and William Grant, two of the defendants, being exceptions to certain findings
(105) of fact based wholly or in part upon the testimony of the said defendants.

It is contended by the learned counsel for the plaintiffs that the defendants are incompetent to testify by reason of the proviso of section 580 of The Code, that "no person who is or shall be a party to an action founded upon a judgment rendered before the first day of August, 1868, or on any bond executed prior to said date, . . . shall be a competent witness on the trial of such action."

It will appear, however, by an examination of the record, that this action was brought upon two bonds of defendant Flythe, as guardian, one executed before and the other after 1 August, 1868, and that there was an amendment of the complaint allowed by the referee, striking out all reference to the bond executed since that date; but all of the testimony of defendant Grant and nearly all of that of defendant Flythe was admitted before the amendment and while the action was upon the two bonds.

But we are not prepared to hold that the testimony was incompetent under section 580, even when the action is based upon the bond executed prior to 1 August, 1868, alone. There has been much legislation upon the subject of evidence of late years in North Carolina. Before 1866, generally speaking, no party in interest was a competent witness on the trial of an action. By chapter 43, Laws 1866, styled "An Act to Improve the Law of Evidence," the door was opened to all, and now, by section 589 of The Code, "no person offered as a witness shall be excluded by reason of his interest in the event of the action." It will not

be necessary to advert to section 590, which provides certain exceptions to this general rule.

In the C. C. P. of 1868, under the head "A party may examine his adversary as a witness," section 333 provided "A party to an action may be examined as a witness at the instance of the adverse party, or of any one of several adverse parties, and for that purpose may be compelled in the same manner and subject to the same rules of ex- (106) amination as any other witness, to testify either at the trial or conditionally or on commission." This section is the basis of section 580 of the present Code, and is the first paragraph thereof.

The Act of 1879, chapter 183, added a proviso that "no person who is a party to a suit now existing, or which may hereafter be commenced, . . . that is founded on any . . . bond under seal for the payment of money, or conditioned to pay money, executed prior to the first day of August, 1868, shall be a competent witness," etc. This act was construed not to apply to official bonds. *Morgan v. Bunting,* 86 N. C., p. 66.

There was a material change in this proviso by the Acts of 1883, ch. 310, in which the words *any bond* are used, and the words, "for the payment of money or conditioned to pay money," are omitted; and the plaintiff contends that the effect of the last-mentioned amendment was to make incompetent any party to an action upon any bond, official or otherwise, executed prior to 1 August, 1868.

Section 580 of The Code is composed of section 333, C. C. P., with the proviso introduced by the Act of 1879, as amended by the Act of 1883.

A subsequent Act, chapter 361 of 1885, enables defendants who are administrators or executors to testify in actions upon bonds executed before 1 August, 1868, where there is a reference to state an account. This Act, it seems to us, was passed out of abundant caution and to exclude such a conclusion in regard to executors and administrators, as is sought by the plaintiff in the case of a guardian, for it is impossible that section 580 could be made to apply to the examination of a defendant upon a reference to state an account. The present action is in the nature of a bill in equity for an account. The very nature of the action makes it a bill of discovery, the object of which is to have the defendant guardian to answer upon oath, and to make discovery of his deal- (107) ings as guardian. 1 Story Eq. Jur., sec. 447; 2 Story Eq. Jur., sec. 689.

While the Act of 1879 was amended by the Act of 1883 so as to strike out the words "for the payment of money," etc., and make it read "upon any bond," to give it the construction called for by the plaintiff, and to hold that the defendant guardian could not testify nor be compelled to

testify upon the taking of the account, would take away the equitable jurisdiction of the court to require a discovery and accounting by a fiduciary, the essence of which is the examination of the defendant and the discovery of him under oath. It is to be noted that this action is not the old action for discovery in aid of the prosecution or defense of another action, which was abolished by section 579 of The Code, having been rendered useless by the changes in the law of evidence.

The proceeding in which the testimony of these defendants was given was upon the taking of the account demanded by the plaintiff, before the referee, and not upon the trial of the action.

Exception 2 is to finding No. 8, "That there is no evidence that the administrator used any of the money received by him on account of said estate for any other purpose than for the payment of the debts and expenses of administration of said estate, or that he did not pay out in satisfaction of such debts and expenses the same money which he received on account of said estate."

The administrator and estate referred to above are S. J. Calvert, administrator upon the estate of Newitt Harris, deceased.

The contention of plaintiffs is that the defendant guardian and the sureties on his bond are liable for the failure of the guardian to hold the said administrator to account for a *devastavit* alleged to have
(108) been committed by him in the said administration to the damage of the wards of said guardian, the present relators.

The said Calvert, administrator, died before the commencement of the present action; there has been no final settlement of the estate of his intestate, and no administrator *de bonis non* has ever been appointed for that purpose.

The administrator filed his inventory and account of sales at March Term, 1862, of Northampton County Court, and an account of his administration was stated by the clerk of the Superior Court of said county in some action pending in said court and the vouchers are now on file in said clerk's office.

From these data the referee has made up the account of said administration.

Plaintiffs contend that from this account there is evidence that the said administrator did use the money which came into his hands as administrator; that by June, 1862, he had received $5,219.21, and up to January, 1863, he had paid out only $2,271.24; and, further, that it appears by said account that he paid a part ($407) of one of the bonds which he ought to have paid in full before paying any simple contract debt. As to the contention that this account furnishes in itself some evidence that the administrator used the funds of his intestate for his own benefit, we think that it requires more than an admission that the ad-

ministrator had the money in his possession to prove that he appropriated it to his own use. It was not always easy to pay the debts of an estate considered fully solvent in Confederate money, and this is a matter of general information.

It would seem that the burden in this case should be upon the plaintiff, for the account filed or taken before the Clerk, with the vouchers, was presumably under the oath of the administrator, and therefore *prima facie* correct. *Grant v. Hughes,* 94 N. C., 231. It would be a hard measure to put upon the defendants in this action the burden of disproving the allegations of plaintiff as to the mismanagement of the estate, the administrator of which is now deceased. The find- (109) ing, we think, is in accordance with the evidence. It is true that an action against an executor or administrator, when the plaintiff shows by the inventory and account of sales that assets came into the hands of the personal representative, the burden is upon him to show that they have been duly administered; but when, in addition to the inventory and account showing assets, there is the further statement under oath of his disbursements, this is *prima facie* evidence, subject to attack, but it stands if no evidence is offered to dispute it.

In *Villines v. Norfleet,* 17 N. C., 167, where it was sought to surcharge a settlement of an executor's account by commissioners appointed by the court, it was held that said settlement, while not a bar to a future action, did rebut a presumption of fraud.

Exceptions 3 and 9.—These exceptions involve the correctness of the referee's finding, and the ruling of the judge below on the fourth, fifth and sixth exceptions, relating to the finding of the referee that Newitt Harris was indebted to S. J. Calvert on open account $1,200. The point is whether the account filed by the administrator is *prima facie* evidence of its truth, or is it necessary, when it is denied in the complaint that the guardian should offer proof to sustain it? This is the same question which we have just discussed.

Section 16 of the complaint alleges that the administrator rendered the account in December, 1866. This action, as we have said, is not for an accounting by the administrator, but it is an action against the guardian and the sureties upon his bond, alleging that the guardian negligently permitted an estate in which his wards were interested to be squandered; it was alleged that S. J. Calvert, administrator of Newitt Harris, had rendered an account in 1866 in which he retained $1,200 to pay an allegal debt to himself, which debt was in fact not owing to him. There was no question about the account having been rendered; (110) it was as to the correctness of the $1,200 alleged debt; it appeared in the account, that plaintiff had a right to attack it.

It may be that, as was said in *Finch v. Ragland,* 17 N. C., 137, the

court presumes against an administrator dealing with the estate for his own benefit; but in the same case it was said by the elder *Ruffin:* "It may be said that the defendant ought to discharge himself by proof. In such case the answer is proof. If an administrator inventory a debt as desperate he cannot be charged with it but by proof on the other side that it was collected or might have been. Here the plaintiffs have sought to charge the defendants upon their oath. They must take their answer, subject, indeed, to be disproved." That action was brought directly against the administrator for an account, etc. How much more strongly does his Honor's reasoning apply to the present case, where it is sought, in a suit against a guardian, to falsify an account rendered by the administrator of an estate in which his wards were interested, the administrator having rendered an account and died long ago? This will apply to the $1,200 retainer, where no voucher was filed, as well as to the $556.13 item, alleged to have been paid to Samuel Calvert, administrator.

Exception 4 relates to finding 11 of the referee, which is the same as finding 13 of the judge, and it is as follows: "The estate of said Drewry Harris was amply able to pay all the debts owing by said Drewry Harris as principal, and but for the two surety debts aforesaid it would not have been necessary to sell the lands devised by said Drewry to Thomas, Mary, Martha and Addie Harris."

The contention is that Drewry Harris's estate was amply able to pay *all* his debts without recourse to his lands, had the executor properly applied the proceeds of the personalty. And this contention is correct,

but the sale of the land became necessary by reason of the two
(111) surety debts, which remained unpaid after the payment of legacies in Confederate money by the executor, and as it appeared that the executor was insolvent, and nothing could have been made out of him by an action by the guardian, the result has not been affected by this finding.

Exception 8 relates to the overruling of plaintiffs' third exception, which was in these words: "For that he admitted the guardian returns offered by defendants."

These returns were referred to in the testimony of defendant Flythe and were testified by him to be correct; they were admissible as part of testimony and as a sworn statement in corroboration of his testimony, which we have held to be competent.

Exception 10 is first to the application of the scale in the administration account and second to the application of the scale in the guardian account by the referee; that it was error to have applied the scale of Confederate currency to the balance found to be in the hands of the administrator at the end of the war. The administrator appears by the account to have reduced the personal property of his intestate to money

in 1862, 1863 and 1864—a large proportion thereof in January, 1862—and to have paid the debts of his intestate during the years 1862, 1863 and 1865. The balance on hand at the end of the war was $2,084.08—this sum was scaled at $3 for $1, the scale value of January, 1863—being an average—instead of an application of the scale to each item of debt and credit in the account. This seems to have been in accordance with the practice in North Carolina, and to be sustained by the decisions of this Court. *Francis v. Wilson,* 74 N. C., 368; *Drake v. Drake,* 82 N. C., 443; *McNeill v. Hodges,* 83 N. C., 504.

The exception is further to a failure on the part of the referee to charge the administrator with interest on his receipts. Having sustained the finding that there was no evidence of the appropriation by the administrator to his own use of the funds of his in- (112) testate, we see no good reason for charging him with interest.

The same exception alleges error in the application of the scale in the guardian account. This account appears to have been closed and a balance struck at the end of every year, and interest computed according to the rule in guardian accounts. And the receipts and disbursements being both in Confederate currency, the scale was applied at the end of the war upon the balance as then found. In the account with the ward Addie Harris the balance was against the guardian, and in that with the ward Mary it was in his favor. We hold that the scale was properly applied upon the authorities already cited, and upon reason.

Exception 11 alleges error in overruling plaintiff's thirteenth exception to the report of the referee, for his finding that S. J. Calvert, administrator of Newitt Harris, did not use (as his own) the money belonging to the estate of his intestate.

The account and vouchers showed disbursements from time to time during the period of the administration, which would indicate, in the absence of evidence to the contrary, that the money was paid out as it was received, and the plaintiff has offered no evidence to the contrary.

Exception 12 alleges error in overruling the fifteenth and sixteenth exceptions to the referee's report that the defendants ought to be held liable for what the guardian might have collected by suit upon the bond of the administrator, including the proceeds of sale by him for assets, of the Powell and Tisdale lands.

Undoubtedly the general principle is that it is the guardian's duty to protect the interests of his wards, and that if they suffer by reason of his negligence, he and his sureties should be liable therefor. It appears that the administrator paid and retained on simple contract debts a sum which should have been applied to the payment of debts of higher dignity, and so have relieved the land devised to the wards (113) of defendant Flythe. These two debts of higher dignity were bonds

on which the intestate Newitt Harris was principal and Drewry Harris was surety, and by the failure of the administrator of Newitt Harris to pay them before he retained and paid the simple contract debts, and by the subsequent insolvency of the estate of his intestate by reason of the emancipation of the slaves, a sale of the land devised by Drewry Harris to the relators became necessary and was decreed in order to pay these bonds. At the time of the payment and retainer of the debts of lower degree by the administrator, the estate of Newitt Harris was solvent, and it became insolvent by reason of the forced emancipation of the slaves.

The general rule, both at law and in equity, is that it would be a *devastavit* if an executor or administrator should give preference to a debt of lower class over those duly presented of a higher dignity (*Moye v. Albritton*, 42 N. C., 62; Schouler on Executors and Administrators, sec. 435), just as the general rule with regard to the acceptance and management of Confederate money is that trustees should be held to that degree of care and circumspection which prudent men exercise under similar circumstances in the conduct of their own business affairs. *Patton v. Farmer*, 87 N. C., 337. But it is common knowledge that there was a hesitation on the part of holders of solvent securities to receive payment of the same in Confederate money, and that after January, 1863, or at the farthest, 4 July, 1863, it was not the act of a prudent fiduciary to accept such payments.

In the little light we have upon this administration there is nothing to show us any willingness on the part of the holders of these bonds to accept payment of the same in Confederate currency except as to the payment of $407 on one of them in 1862. It may be that if the administrator were alive to testify, the reason for the payment of the simple contract debts first would be made to appear to be the
(114) refusal of the holders to accept payment of bonds, then entirely solvent, in a depreciated currency.

We are also affected with the knowledge common to all that soon after the close of the war there was such uncertainty as to the solvency of persons and estates, and such embarrassment in the collection of debts, as well might have deterred a prudent man, in the management of his own affairs, from incurring expense of litigation in doubtful cases; and while there was no statute to that effect before the Act of 1869 (section 1496 of The Code), we cannot say that fitting the principles of law and equity, which never change, to the circumstances of this case, where the estate was amply solvent at the date of the retainer and payment, and became insolvent afterwards, without fault of the administrator but by the overpowering effect of the war and its incidents, that in the spirit of liberality which the law exercises towards executors and administra-

tors (Schouler on Exrs. & Admrs., 385, note 1), the courts would then have held that there was no *devastavit* and that the administrator and his sureties were not liable. Under these circumstances, we are of the opinion that the guardian, in view of all the evidence, was not negligent in failing to bring an action against the administrator of Newitt Harris.

The conclusion arrived at in the consideration of the last exception will dispose of all other exceptions based upon the theory that the guardian and his sureties ought to be held liable for such failure. It was clear the guardian could have made nothing for his wards by a suit against Isaac Peele, executor of Drewry Harris, as he was insolvent immediately after the war, and has remained so ever since. The other exceptions above referred to as virtually disposed of are 15, 18, 19 and 20, involving the question whether the defendant guardian, by due diligence, could have prevented the sale of the Potecasi land, and the exceptions to the supplemental report as to alleged errors in the statement of the account of S. J. Calvert, administrator. (115)

Exception 13 is, first, to a failure to credit Addie Harris with the balance due her on 1 January, 1866, with compound interest, etc., and that such balance should have been $30.90 instead of $10.01, as found. This balance was not charged against the guardian, because it appeared that he had the funds on hand at the close of the war, and they became of no value. Second, the failure to credit Mary Harris with her share of the rents of land and hire of slaves for 1865, on the ground that it was negligence to have hired for cash. It appears that the guardian rented the land and hired the slaves for 1865 for cash, in Confederate currency, and that the same remained in his hands at the close of the war. Was it negligence to have taken cash in the currency of the country under the circumstances? Would a prudent man have preferred to take notes just at that juncture? As was held below, ordinary rules ought not to be applied to transactions of that date, when everything was in such confusion and uncertainty in the section where these transactions occurred that all prudent men, in the management of their own affairs, and fiduciaries in those of others, were at a loss to know what to do. The sequel showed that many solvent securities were soon to lose all value.

Exception 14 is for error in overruling in part exception 25—"For that in stating said account, he erred in allowing the guardian the following items, to wit, $3.38 paid sheriff bill of costs, 1 March, 1873; no charge against wards. Motion was made to remove him as guardian, and dismissed *at his* costs. Voucher 58, 2 April, 1874, $10 fee paid attorney W. Bagley to resist motion to remove him." We have been pointed to no judgment against the guardian for the costs. If a motion was made to remove the guardian, which was dismissed or denied, it would seem

that he ought not to be held personally liable for the necessary expenses of resisting the motion.

This exception is also to the allowance of the items $325, 1 (116) March, 1864, and $1,200, 1 March, 1865, upon the ground that there was no evidence to support them. They appeared in the account of the guardian, which he swears to be true; they were open to attack, and in our opinion were not successfully repelled. While apparently large items, the scale applied to the balance as of 1 January, 1865, reduced them to very small sums.

Exception 16 was withdrawn and 17 is admitted to be well taken. It is to an evident error of *Judge MacRae* in writing the word "sustained," instead of "overruled," to the defendants' tenth exception, and was so treated throughout the subsequent proceedings and, therefore, did not affect the result to the prejudice of the plaintiff. There is

No error.

DEFENDANT'S APPEAL.

MACRAE, J. The first and fourth exceptions of defendants involve a construction of the will of Drewry Harris. The clauses of the will bearing upon the point are as follows:

"*Item 2.* I give and bequeath unto Thomas C., Mary and Martha, children of my brother Newitt Harris, sixteen negroes (naming them) to be equally divided between the said children of my brother, to them and their heirs forever."

"*Item 6.* I lend unto my brother Newitt Harris during his natural life my negro man 'Big John,' also all my land and improvements thereon, on the south or west side of Potecasi creek, and at the death of my said brother I give the said land and the negro to his children, to them and their heirs forever."

The children of Newitt Harris were the present relators, Thomas, Mary, Martha and Addie. It is contended by the defendants that the said Addie Harris is not entitled to a share with the other children of Newitt Harris in the land devised in the above-recited Item 6 (117) of Drewry Harris's will, because, although said Addie was living at the death of the testator, she was not in being at the time of the making of his will, having been born afterwards, and that the true construction of said will would include only those children who were living at the time of the execution of the will, and because the intention of the testator can be collected from Item 2, taken in connection with Item 6, to have been in favor only of the children who were then living.

The principle, as stated in Williams Executors, sec. 981, is: "Generally speaking, every one who at the time of the testator's death falls

within the described class of children will be entitled. But where it appears from express declaration or clear inference upon the will that the testator intended to confine his bequests to those only who answered the description at the date of the instrument, such intention must be carried into effect. A court of Equity, however, is always anxious to include all the children in existence at the time of the death of the testator." Defendants rely upon *Lockhart v. Lockhart,* 56 N. C., 305, where it is said that, "Where a testator in one part of a will uses words descriptive of a class, and in another part uses the same words of the same persons, the presumption is that in both cases the words are used in the same sense."

The application of the above-stated principle was to a very different state of facts than is presented to us. The question was whether certain children took under the will of Sarah Lockhart *per stirpes* or *per capita.* By Item 2 there was a specific bequest "unto the children of my son John." Item 5, being the residuary clause, gives all other property undisposed of in former items of the will "to the children of my deceased son John, and my sons Benjamin and Joseph." The Court found no difficulty in arriving at the conclusion that the children of John, being named as a class in the second item, and the same words of description being used in the fifth item, took there also as a class. In the present case there can be no room for construction.

Item 2 gives sixteen slaves to certain persons, naming them and describing them as "children of my brother Newitt," the en- (118) joyment to be immediate upon the death of the testator. By the subsequent item he gives the land to his brother for life, "and at the death of my said brother, I give the said land . . . to his children." It would be a very strained construction which would limit this devise to the children living at the execution of the will. By all rules it would take in children born after the death of the testator, and living at the death of their father, Newitt. In this case, however, Addie was living at the death of the testator, and was entitled to share in the devise.

"In a bequest to a class of persons, as to children, courts will effectuate the intention of the testator by including as many persons answering the description as possible." *Meares v. Meares,* 26 N. C., 192.

Second Exception.—It appears from the referee's report that on 25 November, 1861, Newitt Harris died intestate, leaving a considerable personal property and two tracts of land known as the Tisdale and Powell places; that S. J. Calvert qualified as administrator on his estate in 1861, and gave bond, which bond remained solvent up to January, 1874. Until the emancipation of the slaves the estate of Newitt Harris remained solvent, but the said administrator took charge of the real estate of his intestate, and declined to surrender it to the guardian on

the ground that Confederate money was depreciating so rapidly he could not tell what would be the condition of the estate. The guardian made no demand for possession until two years after the qualification of the administrator, under an apprehension that the administrator was entitled to hold the land for two years. The guardian was requested by the administrator, however, to rent out the land for 1865, and he rented the Tisdale tract for that year, and the rent appears in his account.

He could not rent the Powell tract. After the emancipation said
(119) estate became insolvent, and on the _____ day of _____, 18____, said administrator began proceedings to sell said lands for assets for the payment of debts, and said Flythe and Mary, Martha and Thomas were duly made parties defendant. Said lands were sold on the ____ day of _____, 18____, and the prices obtained for them appear in the account.

Upon the foregoing facts the referee declined to charge the guardian with the reasonable rents of said lands, but stated an account of what said reasonable rents would be. The plaintiff excepted to the refusal of the referee to charge the guardian with said rents. This exception was sustained by the judge, and defendants excepted, and this constitutes the matter now involved in Exception 2. The defendant does not except to the finding of the referee as to the value of the rents, if the guardian is chargeable with them at all.

The administrator has no concern with the real estate of his intestate until it becomes necessary to sell the same for assets, when the statute provides the proceeding by which he may subject the same to sale for the purposes indicated. The Code, sec. 1436, *et seq.;* Schouler Executors, secs. 212, 213, 509.

The guardian was invested with full power and authority over the estate of his wards. They were the heirs and the owners of the land of their ancestor, subject to the payment of his debts. Before the Act of 1846-47 the procedure to subject the lands to the payment of debts was at the instance of the creditor and against the heirs. After this act the personal representative was required to take proper proceeding for that purpose, but until this proceeding was had it was the duty of the guardian to take charge of the land and rent it out or use it for the benefit of the heirs. If the administrator had collected the rents and paid debts with it, there being a deficiency of personal assets, a court of Equity would not hold the guardian accountable. *Hinton v. Whitehurst,* 71 N. C., 66; *Moore v. Shields,* 68 N. C., 327. The order of sale
(120) for assets ascertains that it was necessary to sell the land, but not that the rents which ought to have been collected by the guardian had been appropriated to the payment of debts. There is no evidence that the administrator collected any rents. The guardian is al-

ready charged with the rent for 1865 of one tract, and if he has shown that the other tract could not be rented for that year he is not chargeable therefor. He should be held liable for the rents which he ought to have collected for the heirs.

Third Exception.—Newitt Harris, the father of the relators of plaintiff, died intestate in November, 1861, leaving considerable personal property and two tracts of land. His estate was solvent up to the emancipation of the slaves. Drewry Harris died in 1860, leaving a will by which he devised a tract of land to Newitt for life, and after his death to his children, the relators.

Newitt Harris as principal, and Drewry Harris as surety, owed two bonds—one to Summerill and the other to Phillips. S. J. Calvert was administrator on the estate of Newitt Harris, and retained $1,200 on a simple contract debt to himself, and paid Samuel Calvert $556.13 on a simple contract debt, leaving unpaid the two bonds above described.

The estate of Newitt Harris was amply able to have paid these specialty debts. The executor of Drewry Harris filed a petition to sell the lands of his testator, and sold the land to pay the two bonds aforesaid, on which Newitt Harris was principal and Drewry was surety.

Plaintiff charges that the administrator of Newitt Harris was guilty of a *devastavit* in paying the simple contract debts of his intestate before the specialty debts, thus exhausting the personalty, as it turned out, by reason of the subsequent emancipation of the slaves, and making it necessary for the executor of Drewry to sell the land which had been devised to the relators, the wards of defendant Flythe; and that said defendant should have sued the bond of the administrator of Newitt. The referee found that an action by the guardian against the administrator would have availed the wards nothing, except that (121) it would have revealed the *devastavit* in paying simple contract debts in preference to specialties, by reason whereof he failed to pay the bonds upon which Newitt was principal, and made it necessary to subject to the payment of the same the lands of Drewry, which had been devised to the wards.

Plaintiff excepted to this finding by referee, and insisted that an account of the estate of Newitt would show that plaintiff's relators were greatly damaged by a failure on the part of their guardian to bring this action. Defendants excepted to all of this finding, except that such suit would have availed nothing. *MacRae, J.*, sustained defendants' exceptions on the ground that the estate of Newitt was solvent at the time of the payment of the simple contract debts, and was rendered insolvent afterwards without fault of the administrator. Upon plaintiff's exception, the same judge held that upon a recasting of the account it will appear whether this exception is well taken. Defendants except to this

ruling upon the ground that it was hypothetical and inconsistent with his rulings upon defendants' exception. Upon such recasting it is made to appear that the said estate was solvent at the time when the payments were made; and, as we have held, upon consideration of the plaintiff's appeal, that the defendants ought not to be held liable as for a *devastavit,* on account of the circumstances of this case, it follows that the recasting of the account worked no harm to the defendants.

Exception 5 is to the ruling of *MacRae, J.,* whereby the guardian was charged with the bond of T. W. Jordan, A. J. Jordan and F. S. Faison for the rent of the Potecasi land for 1873, due 1 January, 1874.

Flythe, the guardian, rented the Potecasi land for 1873 to T. W. Jordan, and took his note, with A. J. Jordan and F. S. Faison as sureties,
for $200, due 1 January, 1874. At the time of the execution of
(122) the note the sureties were reputed to be solvent, but in 1872 and
1873 large judgments had been taken and docketed against said Faison. The guardian found it necessary to sue these same parties in 1872 and 1875 in order to collect other rent notes out of them, but he failed to sue upon the note in question until 1876, when all the parties thereto were insolvent. A guardian is not an insurer, but he is required to use reasonable diligence. He had notice in this instance, for he had found it necessary to sue the same parties in 1872 and again in 1875; but he waited two years before taking legal steps to collect this note, and then the parties were insolvent. If he had acted with reasonable promptness he could have made the money. He should be held liable for its loss for the want of the exercise of ordinary care.

Exceptions 6 and 7.—The referee filed the *post-bellum* accounts of the guardian, showing a balance due Addie Harris 1 January, 1881, of $551.07, and a balance due Mary L. Coggins of $63 on 1 June, 1877.

The defendants excepted to this finding, for that in fact Mary L. received one-third instead of one-fourth of the rents of the Potecasi land. In this account the guardian was charged with one-fourth of said rents as that which should have been paid to Mary, but by some inadvertence the counsel for the guardian excepted upon the ground that he should have been charged with one-third of said rents, and the exception, by the same inadvertence, was sustained. The defendants' counsel, after the supplemental report, proposed to withdraw this exception and let the account stand as originally made by the referee. As it evidently was a mistake, this ought to have been allowed. There is no analogy between this and paying money under a mistake of law. These exceptions should be sustained.

The eighth exception is to errors in the account stated by the referee of S. J. Calvert, administrator of Newitt Harris. As we have held on the plaintiffs' as well as the defendants' appeal that the defendant

ought not to be held liable for a failure to sue the administration (123) bond on account of the alleged *devastavit,* this exception should be sustained upon the fifth ground.

All the exceptions having been disposed of, it follows that the defendants are not liable for the sum of $186.86 each and interest, the sum found to be in the hands of S. J. Calvert, administrator; that the plaintiffs' relator, Mary, is not entitled to recover of defendants the sum of $151.39, but that the defendant, Jesse Flythe, ought to have judgment against Mary L. Coggins for $17.21, with interest from 1 January, 1877, and that the relator, Addie, should have judgment against the defendants for the amount of their bond, to be discharged on the payment of $643.10, with interest thereon from 1 January, 1881.

Modified.

Cited: Shell v. West, 130 N. C., 173; *Rich v. Morisey,* 149 N. C., 49.

BRITISH AND AMERICAN MORTGAGE COMPANY v. W. W. LONG ET AL.

Description in Deed—Reformation of Deed—Cloud upon Title—Injunction.

1. Where the proper construction of the description of land in a deed gives the grantee all the land to which he lays claim, the reformation of the deed to correct a supposed misdescription will be denied.
2. When a deed or will once sufficiently identifies the thing by its known name or other means, and then superadds, unnecessarily, to the description, such further description, though inaccurate, will not vitiate the previous and perfect description; therefore, where the owners of a large body of land sold off two small tracts so as to divide it into three separate tracts and subsequently conveyed the remainder, describing it as "those tracts or parcels of land *lying in one body,*" and the boundaries following such description clearly show the intention of the parties to include in the deed the three tracts remaining unsold: *Held,* that the description in the deed will cover all the land within the boundaries, although there are *three* tracts instead of one.
3. Under chapter 6, Laws of 1883, to determine adverse claims to land, the owner of land is entitled to an injunction, pending the action, to restrain a judgment creditor of his vendor from selling the land under a judgment asserted to be a lien upon it.

APPEAL from an order continuing a restraining order to the (124) hearing, made in chambers at HALIFAX, by *Whitaker, J.* Defendants appealed.

The plaintiff complained that in February, 1890, the defendants, Long

and wife, made a deed of trust to secure plaintiff for money loaned, conveying certain lands in Halifax and Warren counties by the following description: "All the following described real estate, lying in the counties of Warren and Halifax and State of North Carolina, to wit: All those tracts or parcels of land lying in one body in the counties of Warren and Halifax, of which the late Samuel A. Williams was seized and possessed at the time of his death, bounded on the north by the lands of Henry Wallett and G. Branch Alston; on the west by the lands of John Neal, Dudley Neal, Transberry Neal and LaFayette Williams; on the south by the lands of W. H. Shearin, W. G. Shearin, Mrs. Ruina T. Alston and S. W. Hamlet; and on the east by Big Fishing Creek and the land of T. C. Williams; containing in all seven thousand acres, more or less."

The plaintiff has recently discovered by an actual survey of the land that the same does not lie *in one body,* as described in said deed of trust, but by reason of the sale by former owners of two small tracts off of the said body, it is now divided into three separate tracts, about 4,506 acres in one, about 1,344 acres in another, and about 82 acres in the third.

Plaintiff further complains that the misdescription above named occurred by the mutual mistake of all the parties to the deed of trust; that certain judgment creditors of defendant Long, who are also defendants in this action, and whose judgments have been docketed since the registration of said deed of trust, were making efforts to sell said lands under execution upon their judgments, and thereby to cast a cloud upon (125) plaintiff's title to the land.

Some of the answers admit that judgment creditors are making efforts to sell the 1,344 and 82-acre tracts, and deny that they are covered by the deed of trust to plaintiff or subject to the same.

The prayer is for a reformation of the deed, if in the opinion of the court it is necessary to be done, and for other relief, and for an injunction to prevent further proceeding on the part of judgment creditors, parties defendant, until the determination of this action. This in brief is the contention of the parties.

R. O. Burton for plaintiff.
Thos. N. Hill and E. W. Timberlake for defendants.

MACRAE, J., (after stating the facts). We see no necessity for a reformation of the deed of trust in the manner desired by the plaintiff, because in our opinion the description of the land in the deed of trust will cover all of the land which belonged to the said Long and wife within the boundaries set out in the deed, although it should turn out that there were three tracts instead of one body of land.

The rules laid down by *Taylor, C. J.*, in *Cherry v. Slade,* 7 N. C., 82, have been frequently quoted and approved, as will be seen by reference to the above case in Womack's Digest, No. 1597:

"1. That whenever a natural boundary is called for in a patent or a deed, the line is to terminate at it, however wide of the course called for it may be, or however short or beyond the distance specified.

"3. Where the lines or corners of an adjoining tract are called for in a deed or patent, the lines shall be extended to them without regard to distance, provided these lines and corners be sufficiently (126) established, and that no other departure be permitted from the words of the patent or deed than such as necessity enforces or a true construction renders necessary."

According to the contention of the plaintiff, all of the land, formerly in one body, now separated into three tracts by the sale of a small portion thereof, is bounded as described in the deed of trust; the lines of the adjoining tracts called for will not fit either of the three tracts apart from the other two, but the said lines will bound the three tracts together, except as to the small tract which was sold.

Here there are two descriptions, or rather a qualification of one description: "All those tracts or parcels of land . . . in the counties of Warren and Halifax of which the late Samuel Williams was seized and possessed at the time of his death, bounded," etc. . . . There would be no trouble in the description embracing the three tracts, for they are described as *tracts* (plural), but the words of qualification, "lying in one body," have given rise to this contention.

When a deed or will once sufficiently identifies a thing by its known name, or other means, and then superadds, unnecessarily, to the description, such further description, though inaccurate, will not vitiate the previous and perfect description. *Simpson v. King,* 36 N. C., 11.

But it is also a general rule that the deed shall be supported, if possible, and if by any means different descriptions can be reconciled, they shall be; or if they be irreconcilable, yet one of them sufficiently points out the thing so as to render it certain that it was the one intended, a false or mistaken reference to another particular shall not overrule that which is already rendered certain. *Proctor v. Pool,* 15 N. C., 470.

Upon any other principle we should be at a loss to determine which tract of the three was that intended to be conveyed, for a part of the boundaries will take in either of the tracts, while all of them, if plaintiff is right in its contention, are necessary to fill the space between the different boundaries. This being the case, there being no (127) necessity for a reformation of the deed, if plaintiff's contention be correct that all three tracts are comprehended within the boundaries set out in the deed of trust, it will be unnecessary for us to consider the

effect upon subsequent judgment creditors of a reformation of the deed and correction of mistakes therein.

While the action would not lie to remove a cloud upon plaintiff's title, the trustee being in possession and having adequate relief at law *(Peacock v. Scott,* 104 N. C., 154, and cases there cited), Laws 1893, ch. 6, entitled, "An act to determine conflicting claims to real property," provides that an action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims. The purpose of the present action, which was begun since the passage of the act above referred to, being to determine the conflicting claims of plaintiff and the defendant judgment creditors, there is no reason why the plaintiff is not entitled to the ancillary remedy of injunction pending the action, the irreparable damage being the sale of part of the land under execution, and the consequent effect upon the sale, by the trustee, and prevention of the land selling for its value at said trustee's sale.

Affirmed.

Cited: Bostic v. Young, 116 N. C., 770; *Puryear v. Sanford,* 124 N. C., 282; *Tucker v. Satterthwaite,* 126 N. C., 959; *Smith v. Parker,* 131 N. C., 472; *Lumber Co. v. Lumber Co.,* 169 N. C., 94, 103; *Little v. Efird,* 170 N. C., 189.

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(128)

D. C. MOORE v. COMMISSIONERS OF PITT COUNTY.

Board of Justices of the Peace—Meetings—Proceedings of Irregular Meetings.

1. The justices of the peace of a county can lawfully meet, organize and act only at the time of their regular annual meeting (first Monday in June) and on such days as the board of commissioners may appoint for special meetings, not oftener than once in three months; therefore,
2. A meeting of the justices of the peace of a county held on a day other than the first Monday in June, and called, not by the commissioners, but by the chairman of the board of justices, was not a lawful meeting, and its proceedings were unauthorized and without force.

SHEPHERD, C. J., did not participate in the decision of this case.

ACTION, heard before *Hoke, J.,* at Sept. Term, 1893, of PITT.

The plaintiff sought a writ of *mandamus* to compel the commissioners of Pitt County to accept his official bond and induct him into the office

of clerk of the inferior court of said county, which the complaint alleged had been established by the justices of the peace of the county. The defendants contended that the court had not been regularly constituted. A jury trial was waived and it was agreed that his Honor should find the facts. The finding was substantially as follows:

That one G. T. Tyson, chairman of the board of justices of the peace of the county, published in a weekly newspaper in Greenville in its issues of 1, 8 and 15 February, 1893, a call for a meeting of the justices of the peace of the county to be held in Greenville on 18 February, 1893, for the purpose of considering the advisability of establishing an inferior court in said county, copies of the several issues of said newspaper containing notices of said call being mailed to each justice of the peace in the county.

That on 18 February, 1893, there were forty-seven justices of the peace in Pitt County, the county being entitled by law to (129) sixty-two. On that day twenty-seven justices assembled in obedience to the call, and the meeting was organized by G. T. Tyson, as chairman, and the plaintiff as deputy register of deeds as secretary or clerk. A quorum was announced, and resolutions establishing the inferior court and providing for its sessions, were adopted by a vote of twenty in favor of and six against them. The plaintiff received a majority of the votes of the justices present for the office of clerk, and was declared elected to the office. A solicitor and three justices of the court were also declared elected.

The plaintiff, D. C. Moore, appeared before the board of commissioners of said county on the first Monday in July last, and tendered to said body his official bond as clerk-elect of the inferior court. That said Moore asked the consideration of his said bond, that the same be accepted, and that he be regularly inducted into said office. Being of the opinion that the said inferior court had not been regularly constituted, the said board of commissioners declined to consider or accept the bond of the plaintiff or to induct him into the said office.

That a written demand, signed by the said officers, claiming to have been elected as aforesaid, was then submitted to the said board of commissioners, among other things demanding that a jury be drawn according to law for the August Term following of said inferior court, which demand was in all respects denied.

Upon consideration of the facts his Honor denied the application for a *mandamus* and dismissed the action, and plaintiff appealed.

Don Gilliam for plaintiff.
T. J. Jarvis for defendant.

BURWELL, J. Whatever may have been the provision of law (130) in regard to the meetings of the justices of a county before the adoption of The Code, it seems very clear that, since it was enacted, they can lawfully meet, organize and act only at the time of their regular annual meeting, which is fixed by statute on the first Monday in June, and on such days as the board of commissioners may appoint for special meetings, such meetings not, however, being allowed to take place more than once in three months. The Code, sec. 717. If the justices come together at any other time than the first Monday of June, except at the call of the commissioners, it is not a lawful meeting, and the proceedings of such an assembly can have no force. The Legislature has committed to the justices of the several counties most important functions, but it has seen fit to allow them to meet in special session only when called together by the commissioners.

What is said above disposes of the matter of this appeal, and renders it unnecessary that we should determine what number of justices would have made a quorum if the meeting had been called according to law.

Affirmed.

Cited: Rogers v. Powell, 174 N. C., 392.

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(131)

WINNIE YOUNG v. JOHN R. ALFORD, ADMINISTRATOR OF SIMON ALFORD.

Statute of Limitations—Indorsement of Credits on a Note Barred by Lapse of Time—Payment by Specific Articles—Evidence.

1. The mere indorsement of a credit on a note by the holder (even though supported by a counterclaim in favor of the debtor) will not have the effect of reviving the liability on a note barred by the lapse of time, but only an actual payment made and received as such.
2. To make specific articles a payment they must be received as payments or, by subsequent agreement, applied as payments.
3. In the trial of an action on three bonds it appeared that plaintiff, some years after they were barred by lapse of time, got a quart of brandy of the defendant's intestate and offered to pay him for it, but he said, "No, he owed her; let that go on, as he already owed her more than he could ever pay"; no price was named for the brandy, and no request was made to apply its value to any indebtedness, and no specific indebtedness was mentioned. There was an indorsement of a credit of twenty-five cents upon each of the bonds of a date within ten years before suit was brought, but there was no evidence that the debtor directed or assented to such indorsement, nor any evidence *aliunde* such indorsements that they were

put on the notes the day they purported to have been, nor any as to the handwriting of such entries: *Held*, that there was no evidence sufficient to go to the jury to prove a payment.

ACTION, tried at April Term, 1893, of FRANKLIN, before *Shuford, J.*, upon three bonds for money alleged to be due the plaintiff, aggregating $1,067. There were various credits on the bonds, but only one within ten years before suit brought, and that for twenty-five cents indorsed upon each.

The defendant admitted the execution of the bonds by his intestate, but denied the credits and the dates thereof as alleged. A concise and sufficiently explicit statement of the plaintiff's testimony is contained in the opinion of *Associate Justice Clark*.

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

E. W. Timberlake for plaintiff.
F. S. Spruill for defendant.

CLARK, J. The evidence adduced by plaintiff to prove a payment was not sufficient to go to the jury, and it was error to refuse the defendant's ninth prayer for instruction to that effect. According to that evidence—putting out of view the defendant's testimony—the plaintiff, some years after the bonds were barred by the lapse of time, got a quart of brandy of the defendant's intestate and offered to pay him for (132) it, but he said: "No, he owed her; let that go on, as he already owed her more than he could ever pay." There was no price named for the brandy, no request to apply its value to any indebtedness, and no specific indebtedness mentioned. This was either a refusal to accept any payment for the brandy, under the circumstances, or, at most, a sale on credit. There was nothing to indicate that the brandy was to be credited as a payment on the three bonds, nor to authorize the plaintiff to estimate the value of the brandy herself, and dividing it into three parts to credit the bonds with twenty-five cents each with the view of bringing them back into date. This was solely the act of the plaintiff, while payment, if made at all, could only have been made by the debtor. There is no evidence of any kind that he directed or assented to this crediting the three several bonds, aggregating over $1,000, or any one of them. Nor was there any evidence, *aliunde* the credits themselves, that they were put on the bonds the day they purported to have been, nor was there any evidence as to the handwriting of such entries. "It is not the mere indorsement of a credit upon the note, even when supported by a counterclaim, by the holder, which will have the effect of re-

viving the liability, but an *actual payment* made and received as such." *Bank v. Harris,* 96 N. C., 118, citing *Woodhouse v. Simmons,* 73 N. C., 30; 2 Greenleaf Ev., sec. 444.

A case exactly in point is *Locke v. Andres,* 29 N. C., 159, in which it is held by *Ruffin, C. J.,* that to make specific articles a payment they must be received as payments, or, by subsequent agreement, applied as payments, and that the court below properly refused to submit to the jury the question of payment, when the evidence was simply that the debtor had at several times let the creditor have small quantities of bacon.

The plaintiff cited several authorities to the effect that if the debtor make no application of a payment, the creditor can make it. But
(133) that is when there is a payment. A set-off or counterclaim is not a payment. *White v. Beaman,* 96 N. C., 122, relied on by plaintiff, differs from this case. There the creditor asked for a payment; the debtor offered to make a payment in whiskey, which was accepted. The creditor thereupon stated that he would enter it as a credit on the note, and did so enter it.

Error.

Cited: S. c., 118 N. C., 222.

J. A. KELLY v. E. L. FLEMING, JR., ET AL.

Bill of Sale—Chattel Mortgage—Privy Examination of Wife—Description in Bill of Sale—Sale by Parent to Child—Effect of Attachment on Property Sold, but not Delivered—Instructions—Verdict of Jury.

1. The statute (sec. 1 of ch. 91, Acts of 1891) provides that "Wherever household or kitchen furniture is conveyed by chattel mortgage or otherwise as allowed by law in this State, the privy examination of married women shall be taken as is now prescribed by law in conveyance of real estate: *Provided,* that all such conveyances of household and kitchen furniture, except as herein provided, shall be ineffectual to convey a title to the same": *Held,* that the act does not apply to an absolute *sale* of such property, but only to a conveyance by chattel mortgage or other way by which a lien can be fixed thereon, as by deed of trust or conditional sale.

(*Quere:* Whether the provisions of the act could be made to apply in case of a chattel mortgage, etc., by a husband, of *his own* household and kitchen furniture, at any rate, of such as was owned by him before the passage of the act.)

2. An instrument of writing conveying all the household and kitchen furniture and all other property of every description belonging to the grantor at a certain house is sufficiently definite where there is no difficulty as to the identification of the property by parol evidence.
3. A conveyance by a parent to a child is not presumptively fraudulent except in case of a voluntary conveyance or one upon an insufficient consideration, the parent being in embarrassed circumstances.
4. Where there is no evidence to support a prayer for an instruction to the jury, it is not error to refuse to give it although it contain a correct proposition of law.
5. A bill of sale absolute, and not intended as a security, is not invalid as to creditors of the grantor, although the delivery of the property conveyed by it is made after the levy of an attachment by such creditors.
6. In answer to an issue, "Is F. the owner of the property described in the pleadings, or any part thereof? If so, what part?" the jury responded, "Yes": *Held*, that the response was sufficiently intelligible, and properly understood to mean that F. was the owner of *all* the property.

ACTION, tried at February Term, 1893, of VANCE, before *Shuford, J.*, and a jury, upon appeal from justice's court by E. L. Fleming, Jr., and Fanny Fleming, interpleading defendants.

The plaintiff sued to recover a debt against defendant E. L. Fleming, Sr., who was a nonresident of the State, and caused an attachment to be levied on certain furniture, alleging the same to be the property of E. L. Fleming, Sr., and recovered judgment, from which E. L. Fleming, Sr., did not appeal.

At the trial of the cause before a justice of the peace, E. L. Fleming, Jr., filed an affidavit, asking to interplead, as appears on the record. The defendant E. L. Fleming, Jr., offered in evidence upon the trial, to support his title, a paper-writing, purporting to be a bill of sale, as follows:

"In consideration of $500 in cash to me paid by E. L. Fleming, Jr., I hereby bargain, sell, convey and deliver to E. L. Fleming, Jr., all the household and kitchen furniture and all other property of every description belonging to me, and at the house and lot in Henderson, N. C., owned by W. D. Horner, and occupied by my family.

"Witness my hand and seal, this 13 July, 1892.

"E. L. FLEMING." (Seal.)

The plaintiff objected to the introduction of the alleged bill (135) of sale:

1. Because the privy examination of Fanny Fleming, wife of E. L. Fleming, Sr., was not taken, nor did she sign the said instrument as prescribed by law, and the same is therefore ineffectual to convey the title to the property.

2. Because the description of the property in the instrument is not sufficient, and the said paper is void for uncertainty.

The objection was overruled, and the plaintiff excepted.

Defendant E. L. Fleming, Jr., offered in evidence a check for $500, payable to and indorsed by his father, and admitted to have been paid by the bank on which it was drawn. Fleming, Jr., testified that he let his father have the money to accommodate him, as he, the father, was going to Texas. A few days afterwards his father said to him that he had no way to secure the advance of the $500, except by the furniture, and the son thereupon said he would take a bill of sale. Witness said, "I did not take possession of the property until after it was attached. When I drew the check it was not drawn in payment of the furniture. I let my father have the money to accomodate him, and did not have the furniture in mind. He afterwards let me have the furniture to secure me." Upon being recalled, witness said, "I did not give my father the $500 as the consideration for the furniture, but he gave me the furniture in consideration of the $500. I do not mean to say that the property was conveyed to me as a security, but that it was conveyed to me absolutely in settlement and payment of the $500, and was to be my property."

The property attached was in the house of W. D. Horner, and covered and included all the property owned by E. L. Fleming, Sr., there.

The plaintiff requested (in writing) his Honor to charge the jury as follows:

1. Conveyances from a parent to his child are, in law, presumptively fraudulent, although the child is twenty-one years of age. And the transaction must be shown by E. L. Fleming, Jr., to have been
(136) in good faith, and without any fraudulent purpose.

2. If the jury are satisfied, from the evidence, that the transaction was a trick or contrivance to secure the continued use and benefit of the property to E. L. Fleming, Sr., or his family, and to prevent its seizure and application by law to the debts of E. L. Fleming, Sr., then it would be fraudulent, and the jury will answer the issue "No."

3. That the paper-writing, offered as a bill of sale, is inoperative, because the privy examination of Mrs. Fleming was not taken, and because no specific description of the property is given, and no evidence offered to show what property was referred to therein.

His Honor declined to instruct the jury as above set forth, stating that there was no evidence to support the second prayer, and plaintiff excepted.

Plaintiff also requested his Honor, in writing, to charge the jury:

"If the bill of sale was made, as alleged, on 13 July, 1892, but there

was no delivery of the property until after the levy of the attachment, then the same would be invalid as to creditors."

His Honor refused to give the instruction as requested, but charged the jury that the same would be true if the bill of sale was given as a security, but that it would not be true if bill of sale was intended as an absolute conveyance.

Plaintiff excepted, because his Honor declined to instruct the jury as requested.

The court submitted the third issue to the jury, stating, among other things, that if the bill of sale was intended to secure the loan of the $500, then it is a mortgage, and, being unregistered, it is inoperative against creditors, and the jury should answer the third issue "No." But if it was intended as a bill of sale absolute, and not as a mortgage, and if it was a *bona fide* conveyance, the jury should answer the third issue "Yes." (137)

The court further charged the jury that the burden was on the interpleader to prove title to the property claimed by him by a preponderance of the testimony.

The following issues were submitted to the jury, who answered the same as follows:

1. Is the defendant Fannie Fleming the owner of the parlor furniture described in the interpleader? Answer: "No."

2. Are the said Fannie Fleming and E. L. Fleming, Jr., the joint owners of the piano described in the interpleader? Answer: "No."

3. Is the said E. L. Fleming, Jr., the owner of the property described in the said interpleader, or any part thereof? If so, what part? Answer: "Yes."

Plaintiff moved the court to set aside the verdict on the third issue, and to grant a new trial, upon the ground that the verdict was not a proper response to the issue and was unintelligible, and no judgment could be rendered thereon.

The court declined this motion, because it was of the opinion that the answer to said issue was intelligible and included all the property described in the bill of sale.

There was judgment for the interpleader, and plaintiff appealed.

A. C. Zollicoffer and Pittman & Shaw for plaintiff.
T. T. Hicks for defendant.

MACRAE, J. His Honor instructed the jury to respond to the first and second issues "No," and to this instruction and the finding of the jury in response thereto there was no exception. This eliminates from

the case any question which might have arisen if a part of the property conveyed by the husband had been found to belong to the wife.

The first exception brings before us for construction ch. 91, (138) Laws 1891, entitled "An act regarding chattel mortgages."

"Section 1. That whenever household or kitchen furniture is conveyed by chattel mortgage or otherwise as allowed by law in this State, the privy examination of married women shall be taken as is now prescribed by law in conveyance of real estate; provided that all such conveyances of household and kitchen furniture, except as herein provided, shall be ineffectual to convey a title to the same."

The question presented is whether, upon a true construction of the statute above cited, it is necessary for the wife to join the husband in a conveyance and sale of *his* household and kitchen furniture, and be privily examined touching her free execution of said conveyance in order to make the same effectual in law. The act is not drawn with that precision and clearness which will enable us to reach without difficulty a conception of the will of the Legislature.

The words "household and kitchen furniture" may comprise not only that species of property which is in actual use, but also that which is on sale in shops, yet no one will contend that this statute should be construed so literally as to embrace articles of this kind of the latter class. The word *"convey,"* in its broadest significance, might embrace any transmission of possession, but we are restrained to its legal meaning, which, ordinarily speaking, is the transfer of property from one person to another by means of a written instrument and other formalities. Repalje & Lawrence Law Dict., "Convey, Conveyance." According to Webster a conveyance is "an instrument in writing by which property or the title to property is conveyed or transmitted from one person to another."

The meaning of this word being well understood at common law, it must be understood in the same sense when used in a statute. *Smithdeal v. Wilkerson,* 100 N. C., 52.

The statute refers to the manner of conveyance, i.e., by chattel mortgage, and proceeds, "or otherwise as allowed by law." It is (139) a very familiar principle in the construction of statutes, that when there are general words following particular and specific words the former must be confined to things of the same kind. Southerland Statutory Construction, sec. 268.

To aid us in reaching the meaning of the words of a statute we may, when necessary, now resort to the preamble, or even the caption or title of the act. Southerland, *supra,* sec. 210; *Randall v. R. R.,* 107 N. C., 748; *Blue v. McDuffie,* 44 N. C., 131. And this we find to be an act regarding chattel mortgages. The law as it was before the passage of this

act permitted the wife to convey her real and personal property with the written assent of her husband (Constitution of North Carolina, Art. 10, sec. 6), but as to her personal property no privy examination was necessary.

The evident mischief sought to be overcome by this act is the facility with which these necessary articles for the comfort and convenience of every household, however humble—the household and kitchen furniture —may be conveyed away, notwithstanding the protection which the law throws around them by the personal property exemption, at least during the life of the husband, by the chattel mortgage, or other lien, now almost the only basis of credit for the poor man.

The remedy proposed was to protect the wife, as in case of lands which were hers, or in which she had an inchoate interest, such as dower, from force or compulsion, by requiring her privy examination to be taken before the law would recognize the validity of such conveyance.

The act could not apply to those methods of conveyance of personal property by sale and delivery where no writing was used, for then the privy examination of the wife would have been impracticable. Nor to the sale by the husband of the personal property of which he was the sole owner, because, in this instance it was not necessary that (140) the wife should join. But it was intended to prevent the conveyance by chattel mortgage, or in any other way by which a lien could be fixed thereon, of the property named, as by deed of trust or conditional sale, without a writing signed by husband and wife, and the privy examination of the wife, as in sales of real estate; and this may be applicable to such property whether it belong to the husband or to the wife.

We do not think it was made to appear by the evidence, though the defendant so contends, that the property in controversy had belonged to the husband before the passage of this act; indeed, it will not affect our conclusion, as we have held the act not to apply to an absolute sale by the husband, such as is evidenced by the bill of sale offered in evidence.

In case of a chattel mortgage or other like conveyance of his own household and kitchen furniture by the husband, the serious question would arise as to whether the provisions of the act could be made to apply—how far the Legislature may restrain the *jus disponendi* of private property, where no rights of others are to be preserved, or whether it may do so at all. *Bruce v. Strickland,* 81 N. C., 267; *Hughes v. Hodges,* 102 N. C., 236; or at any rate, whether it might be made to apply to such property as was owned by the husband before the passage of the act in question. *Sutton v. Askew,* 66 N. C., 172.

We see no force in the exception that the description of the property in the instrument is not sufficient. It was intended to and did cover all

of the personal property of the grantor, which was then in the house or upon the lot described. There was no difficulty as to the identification thereof, which might be done by parol. *Goff v. Pope,* 83 N. C., 123.

The plaintiff excepted to the refusal of his Honor to instruct the jury that "conveyances from a parent to a child are in law presumptively fraudulent, although the child is twenty-one years of age. And the transaction must be shown by E. L. Fleming, Jr., to have been (141) in good faith and without any fraudulent purpose." We think that this prayer was too broad and sweeping in its terms, and that the instruction could not have been given. It was said in *Jenkins v. Peace,* 46 N. C., 413: "Nor is a parent forbidden to sell to his child. The only difference would be that the latter would be held to fuller and stricter proof of the fairness of the transaction."

In case of a voluntary conveyance or one upon insufficient consideration by parent to child, the parent being in embarrassed circumstances, such presumption would arise. The evidence in this case would not have warranted the instruction. *McCanless v. Flinchum,* 89 N. C., 373.

The second prayer for instruction was a correct proposition of law, but there was no evidence to support it. The evidence, if believed, was all to the contrary.

We have already disposed of the third prayer and exception, and we agree with his Honor in his refusal to instruct the jury: "If the bill of sale was made, as alleged, on 13 July, 1892, but there was no delivery of the property until after the levy of the attachment, then the same would be invalid as to creditors." 1 Benjamin Sales, sec. 330.

We think that the response to the third issue was properly understood by his Honor. If the jury had found the interpleader to be the owner of part only of the property, it would have been necessary to qualify the answer, but its only meaning must be that he was the owner of it all. There is

No error.

Cited: Merritt v. Kitchen, 121 N. C., 150; *Walton v. Bristol,* 125 N. C., 431; *Jennings v. Hinton,* 126 N. C., 54; *Harvey v. Johnson,* 133 N. C., 356; *Vann v. Edwards,* 135 N. C., 666

(142)

A. & W. B. CRINKLEY v. E. J. EGERTON ET AL.

Jurisdiction—Action to Recover Crops—Crop Lien—Description of Land—Power of Sale in Agricultural Lien.

1. The Superior Court has jurisdiction of an action not based on contract, but for the recovery of property alleged to exceed $50 in value, and if the value is less than $50 the Superior Court has concurrent jurisdiction with a justice of the peace. (The Code, sec. 887.)
2. In an action for the recovery of crops, and for the value of part of the same alleged to have been wrongfully converted by the defendant, instituted by plaintiff, who had advanced supplies to the maker of the crops, against defendant, who claimed such crops as landlord (which relation was denied by plaintiff), a motion to dismiss the action on the ground that the defendant being entitled as landlord to the possession of the crops no action would lie against him, was properly refused; for, aside from the controversy as to the defendant's relation as landlord, he would be liable, if landlord, to account to plaintiff for the value of the crops in excess of his lien.
3. An instrument giving a lien upon crops raised "upon Opossum Quarter tract of land in Warren County, known as the tract M. W. is buying from Egerton, or any other lands he may cultivate during the present year," sufficiently described the lands upon which the crops were to be raised, and was effective as to the crops raised on the land described, but void as to those raised on "any other lands."
4. A power of sale upon default in paying advances, inserted in an instrument giving a lien upon crops, does not invalidate the instrument, though prescribing a different remedy from that allowed by the statute.

ACTION, tried before *Hoke, J.*, and a jury, at Spring Term, 1893 of WARREN.

Plaintiffs claimed the proceeds of a certain crop grown by Major Williams on a tract of land in Warren County for the year 1891, or a sufficiency thereof to pay their debt due from him, and which said crop passed into the possession of defendant Egerton, who had converted the same, claiming the right to do so as landlord of Williams, and for rent and advances for said year, due him as landlord.

Plaintiffs claimed to own the crop by virtue of two instruments, which were duly registered, by which Williams gave to them for (143) supplies advanced a lien upon the crop to be raised upon "Opossum Quarter (joining poorhouse) tract of land in Warren County, known as the farm Major Williams is buying from Egerton Brothers, or any other lands he may cultivate during the present year 1891." The instruments, in addition to the power to take possession of the crops after maturity, etc., conferred a power of sale of the crops in case of default in the payment by Williams of the indebtedness by a designated day.

Plaintiffs introduced evidence to show that the crops were grown upon the land referred to in the instruments, being the land that Williams held under contract from Egerton, and being the only land so held by Williams and farmed and controlled by him for the year 1891. There was evidence tending to show that the crops grown by Williams on the land for 1891 were worth between $100 and $200, and that the debt due plaintiffs, under the instruments, was $79.48.

Defendant Egerton admitted converting crops grown by said Williams, claiming and offering evidence that the amount was not near so large as alleged by plaintiffs.

Defendant Egerton further claimed that he was landlord of said Major Williams by virtue of an instrument or contract existing between said defendant and Major Williams, which was as follows:

"Contract made 30 December, 1887, by and between B. I. Egerton, of Macon, Warren County, N. C., of the first part, and Major Williams (a colored man), of Warren County, N. C., of the second part:

"Witnesseth, That said B. I. Egerton has leased to the said Major Williams for a term of ten years (beginning from this day) his tract of land lying in Warren County, N. C., known as the William and John Powell tract, adjoining the lands of S. P. Arrington, Mrs. Emma Egerton's heirs and others, and containing sixty-six acres; the said (144) Major Williams to pay the said B. I. Egerton, on or before 1 November of each year, beginning 1 November, 1888, and continuing to the termination of this lease, three bales cotton (lint), to weigh each 400 pounds, making a total of 1,200 pounds lint cotton, to be paid as rent for each of the ten years.

"The said B. I. Egerton agrees to and with the said Major Williams, *and as an inducement* for the said Williams to pay the rent promptly each year as it matures, that whenever he has been paid as much as six hundred dollars ($600), with interest on the same from this day at eight per cent, as rent on the said tract of land, that this lease is to terminate, and that he will make to the said Major Williams a good and sufficient deed in fee simple to the said tract of sixty-six acres of land, but the said Major Williams shall lose the above option if he fails to pay the said B. I. Egerton the rent of 1,200 pounds lint cotton each year. In order to ascertain when the said $600 and interest has been paid, the said B. I. Egerton is to keep a correct account of all rents paid to him by the said Williams.

"This paper-writing is to be considered as a rent bond, and all crops that may be made on the said tract of land are bound for the said rent of 1,200 pounds lint cotton, as in case of other agreements for rent between landlord and tenant."

Defendant testifies that he had advanced said Williams as his tenant supplies to make the crop of 1891, both directly and also by paying off a prior mortgage on the stock of said Williams, due and owing to one Pleasants & Son. That defendant had paid off this mortgage to Pleasants & Son to amount of $60, and such payment was necessary to release the stock of Williams for year 1891, and was so an advancement, for which said Egerton had a preferred lien as landlord. That the balance of the rent due defendant Egerton for the year 1891, together with the advancements made direct to Williams and in paying off the Pleasants & Son mortgage, which antedated the liens of plaintiffs, were much more than sufficient to absorb the crops for the year 1891.

Defendant further contended and offered evidence tending to show that Major Williams, his tenant, had failed to pay up the stipulated rent for two or three years before 1891, and that there was a balance of rent due for said years. (145)

1. Defendant moved to dismiss the plaintiffs' cause of action, for that it appeared upon the face of the complaint that the action is one of contract, and the amount claimed being under $200, the Superior Court has no jurisdiction. Motion overruled by his Honor, and defendant excepted.

2. The witness W. G. Egerton testified (and it was not contradicted) that Major Williams paid the rent (1,200 pounds of cotton) the first year (1888); the second year (1889) he only paid 800 pounds of cotton; the third year (1890) he paid only 400 pounds of cotton, and the fourth year (1891), the crop which is now litigated, a balance of $90.91 is still due, after applying the proceeds of such part of the crop as has been paid to the defendant.

The defendant insisted that as the rent for 1891 had not been paid, the title to the crop still remained in him as landlord, and that the plaintiffs could not maintain an action against him, and moved his Honor to dismiss the action upon that ground. Motion overruled, and defendant excepted.

3. The defendant asked the court to charge the jury that the plaintiffs obtained no title to the crops raised by Major Williams by reason of the paper-writings marked Exhibits "A" and "B," for that (1) said paper-writings fail to sufficiently describe the land upon which said crops were to be grown; (2) that said paper-writings fail to comply with the provisions of the statutes creating an agricultural lien, in that they prescribe a different remedy than that allowed by statute (section 1800 of The Code), which instructions his Honor refused to give, but charged that the land was sufficiently described, and that said paper-writings did comply with the agricultural lien law. Defendant excepted.

There was verdict for the plaintiffs and judgment thereon in favor of the plaintiffs against defendant Egerton for $29.50, being the
(146) difference between the value of the crops held by him and the amount due him for rent and advancements for the year 1891, and from this judgment defendant Egerton appealed.

T. T. Hicks for plaintiff.
Batchelor & Devereux for Egerton.

CLARK, J. *Exception 1.*—The action is not based on contract, and is for the recovery of property which it is averred in the complaint exceeds fifty dollars in value. The court rightly held that the Superior Court had jurisdiction. Even had the value of the property been less than fifty dollars, the Superior Court had concurrent jurisdiction. The Code, sec. 887.

Exception 2.—The action being not only for the recovery of the crops, but for the value of part of the same, alleged to have been wrongfully converted by the defendants, the court properly refused the motion to dismiss the action made, on the ground that the landlord being entitled to possession of the crops no action would lie against him. Whether he was landlord or not was a controverted point, and if landlord he was liable to account to plaintiffs for value of crops in excess of his lien.

Exception 3.—The court properly held that the paper-writings put in evidence by plaintiffs "sufficiently described the land upon which the crops were to be raised, and were a sufficient compliance with the statute creating an agricultural lien, though prescribing a different remedy from that allowed by statute. The Code, sec. 1800." On the first point, the mortgage on the crops to be raised on the farm described and "on any other lands he may cultivate during the present year 1891" was held effective in *Woodlief v. Harris,* 95 N. C., 211, as to the crops on the lands described (which is the case here), though void as to those raised on "any other lands." *Gwathney v. Etheridge,* 99 N. C., 571. As to the second point, the insertion of a power of sale upon default
(147) made did not invalidate the instrument as an agricultural lien. As to the Pleasants & Sons lien assigned to Egerton, the jury, in response to the issue, find that nothing was advanced thereunder.

No error.

Cited: Hurley v. Ray, 160 N. C., 379.

DENNIS SIMMONS v. THE NORFOLK AND BALTIMORE STEAMBOAT COMPANY.

Corporation—Abuse of Powers—Place of Business—Forfeiture—Dissolution at Suit of Stockholders.

1. It is a tacit condition of a grant to a corporation that the grantees shall act up to the end or design for which they are incorporated; and hence, through neglect or abuse of its franchises, a corporation may forfeit its charter as for condition broken or for breach of trust.
2. Unless provided otherwise in the charter, it is the duty of a corporation to keep its principal place of business, its books and records, and its principal officers within the State which incorporated it, to an extent necessary to the fullest jurisdiction and visitorial power of the State and its courts and the efficient exercise thereof in all proper cases which concern said corporation.
3. The persistent failure of a corporation chartered in this State to maintain its principal place of business within the State as required by its charter, and the withdrawing of all its agencies from the State, will authorize the courts to decree a dissolution of such corporation upon the suit of a stockholder, under section 694 (ch. 16) of The Code.
4. Where a summons in a special proceeding was improperly made returnable to the Superior Court in term, it was proper for the judge to remand the proceeding, with directions that the summons be amended so as to make it returnable before the clerk on a day certain.

ACTION commenced by summons issued to September Term, 1892, of MARTIN, for the purpose of dissolving the defendant company, a corporation formed in 1880, under Laws 1871-72, and for a receiver to take possession of the property of the defendant and wind up (148) the affairs. At said term plaintiff filed his complaint, and ninety days were given to the defendant to file answer.

Using his complaint as an affidavit, the plaintiff applied to the judge at chambers, and obtained an order for the defendant to show cause before the judge at chambers, in Greenville, on 22 September, 1892, why a receiver of the defendant company should not be appointed as prayed. The said order was served on the defendant, and was heard by the judge upon complaint of plaintiff, used as affidavit, and the affidavits of John D. Briggs and J. A. Teel, on the part of the plaintiff, and the answer of the defendant not filed in court, but used on the hearing of the order to show cause as on affidavit, and the affidavit of Thomas Skinner, and exhibit of the treasurer of the company on the part of defendant, all of which are in the records of this action. Among other causes assigned by the defendant why a receiver should not be appointed were that the motion was made in an action of which the judge did not have jurisdic-

tion, the summons therein being returnable before the judge at term, and not before the clerk as a special proceeding, as appeared from the complaint used on this hearing as an affidavit, and that the parties required by The Code had not been made, and that not only should a receiver be denied, but the proceedings should be dismissed. This was resisted by plaintiff and no motion to remand or amend was made. After argument the judge took the papers by consent for consideration and decision. On 4 October, 1892, one of the attorneys for the plaintiff filed in the clerk's office of Martin County the order of the judge, which was as follows:

"The cause is remanded to the clerk of the Superior Court of Martin County, with directions to amend the summons so as to make it (149) returnable before him on the first Monday of November, 1892. As the summons has already been served on the defendant corporation, and it has filed an answer, it will take notice of the amendment and file any other answer, if it is so advised, on or before that date. The clerk is directed to have a copy of the amended summons posted at the courthouse door in said county for three successive weeks, and in addition have the same published for three successive weeks, as required by section 695 of The Code, in manner and form as therein stated.

"After the said return day the clerk is directed to certify the issues and papers in the cause and put said cause upon the civil issue docket for trial at ensuing December Term of Martin Superior Court. As this is a cause where delay might be seriously injurious to the interests of plaintiff and his associate stockholders, it may be set for trial on Monday, the first day of said term. As I see no immediate danger in so doing, I will continue the motion for a receiver until said term, without prejudice. The clerk will see that the summons is duly published and proof of publication made by said return day.

"G. H. BROWN, Jr., *Judge, etc.*"

Thereupon, the clerk made the following order:

"The order of his Honor G. H. Brown, Jr., Judge of the Superior Court, having been filed in this court with the other papers in the cause, it is ordered, in obedience and in accordance with said order, that the summons originally issued herein be and the same is hereby amended by making the same returnable before the undersigned clerk of the Superior Court of Martin County on Monday, 7 November, 1892, at his office in the town of Williamston, county and State aforesaid; and further, that in said amended summons the plaintiff be made to declare or sue in behalf of all other corporators, creditors, dealers and others interested in the affairs of the defendant company, who will come in and

make themselves parties to this proceeding. It is further ordered that a copy of said amended summons be posted for three weeks (150) at the courthouse door in Williamston, and that service of the same be made upon all corporators, creditors, dealers and others interested in the affairs of the defendant company, by publication of a copy of said summons for three weeks in the *State Chronicle,* a newspaper published in the city of Raleigh, State aforesaid. It is ordered that all parties hereto shall have until 7 November to file pleadings herein."

Within ten days after notice of said orders the defendant appealed therefrom, assigning as grounds that the judge should have dismissed the motion for a receiver, and that he had no jurisdiction or authority to make said orders, or either of them.

The substance of the complaint is set out in the opinion of *Chief Justice Shepherd.*

Don Gilliam for plaintiff.
Batchelor & Devereux and J. E. Moore for defendant.

SHEPHERD, C. J. This proceeding is brought for the purpose of obtaining a decree of dissolution against the defendant company, and the most important question to be considered is whether the complaint sets forth facts sufficient to entitle the plaintiff to the relief prayed for.

The defendant was incorporated under the general act for the formation of corporations (The Code, ch. 16), and it is therein provided, among other things, that all corporations so created may be dissolved by "special proceedings" instituted by any corporator "for any abuse of its powers to the injury of the plaintiff or of the corporators, or of its creditors or debtors." Section 694.

The articles of incorporation provide that the business of the defendant shall be the "transportation of produce and merchandise and all other kinds of freight and passengers to and from the various (151) landings on the Roanoke river in North Carolina to and from the cities of Norfolk in Virginia and Baltimore in Maryland, and to and from said cities to the said landings, and to and from all other points intermediate between said river and said cities, and its principal place of business shall be at Williamston" in this State. The plaintiff, who is one of the corporators, alleges that in 1887 the control and management of the defendant corporation passed into the hands of nonresident stockholders, "since which time the original aim and purpose of said corporation has been departed from, the value of the company's property greatly depreciated, the business fallen away and its general affairs gradually but steadily grown worse." It is further alleged "that for more than a year now past the defendant company has altogether ceased

to operate said ports or any of them within this State; that no single agency or place of business has been maintained within this State, and that the town of Williamston has been absolutely discontinued as the principal place of business of said company, as required by said articles of incorporation."

"It is a tacit condition of a grant to a corporation that the grantees shall act up to the end or design for which they are incorporated, and hence, through neglect or abuse of its franchises, a corporation may forfeit its charter as for condition broken, or for breach of trust. The duties assigned by an act of incorporation are conditions annexed to the grant of the franchises conferred" (Angell & Ames. Corp., sec. 776), "and duties implied are equally obligatory with duties expressed, and their breach is visited by the same consequences." *Attorney-General v. R. R.*, 28 N. C., 456; Field Corp., 456*n*.

It has been held, without reference to any express provision of law or specific requirement of the charter, that it is the duty of a corporation to keep its principal place of business, its books and records and its principal officers within the State which incorporated it, to an extent necessary to the fullest jurisdiction and visitorial power of the (152) State and its courts, and the efficient exercise thereof in all proper cases which concern said corporation. *S. v. R. R.*, 45 Wis., 579. In commenting upon this decision, Mr. Morawetz (Pr. Corp., 361) says: "This doctrine is correct only provided the Legislature has expressed the policy of the State by some special enactment, or by a general system of legislation regarding incorporated companies. There is no such rule at common law. It is always implied in the grant of a charter of incorporation, where there is no indication to the contrary, that the company shall have its central office or place of management in a State under whose laws it was organized. This, however, is merely a rule applicable to the construction of charters in determining the intention of the corporators and of the State, and is not an arbitrary rule of law." Accepting the principle as thus modified, and applying it to a corporation doing business, like the defendant, exclusively under a charter granted in this State, it would seem very clear that by the policy of our laws, as indicated by "a general system of legislation," the duty referred to is imposed upon the defendant. We have many statutes which plainly contemplate that such a corporation shall keep its principal place of business, certainly some of its agencies, within the limits of the State. Of such are sections 362 and 363 of The Code, relating to the attachment of shares of stock in corporations and the interest and profits thereon, and authorizing the service of a certified copy of the warrant of attachment on "the president or other head of the association or corporation, or with the secretary, cashier or managing

agent thereof." Of such also are the provisions of section 694 of The Code, authorizing the dissolution of the corporation upon the return of an execution unsatisfied upon a judgment docketed in the Superior Court of the county "where it has its only or principal place of business." Reference may also be had to the visitorial powers conferred upon the board of railroad commissioners, which, together with other provisions of the law, clearly show that a corporation of this char- (153) acter cannot entirely withdraw all of its offices and agencies from the State.

The decision in *S. v. R. R.*, 45 Wis., 579, *supra,* was based, to some extent, upon similar statutory provisions, and the general principle of that case has been here discussed for the purpose of showing that the express provision of the charter of the defendant, requiring its principal place of business to be at Williamston in this State, may well be sustained by the general policy of our laws. The case is also direct authority that such a violation by a corporation of its charter is "an *abuse* and misuser of its corporate powers," and is within the spirit and meaning of our statute upon the subject. Without considering, then, the other causes assigned in the complaint, we are of the opinion that the persistent violation of the charter in withdrawing, as alleged, the principal place of business from Williamston, and all of its agencies from the State, would authorize the court to decree a dissolution of the defendant corporation. *Attorney-General v. R. R., supra.*

The summons in this proceeding was improperly made returnable to the Superior Court in term, and his Honor remanded the proceeding with directions that the summons be amended so as to make it returnable before the clerk on a day certain. This order, together with the other directions to the clerk, is fully sustained by the principle laid down in *Epps v. Flowers,* 101 N. C., 158. The judgment must be

Affirmed.

Cited: Roberson v. Lumber Co., 153 N. C., 122.

(154)

W. T. GRIMES v. GEORGE E. BROWN ET AL.

Practice—Reference to Arbitration—Notice of Hearing by Referee.

1. Where a referee was appointed to determine all matters growing out of a copartnership, and by the same order was required as receiver to sell the property, collect the assets, and pay out the proceeds according to the

rights of the parties as determined by himself as referee, and to report his action to the next term of the court to be entered as the judgment of the court, and such order was by consent of parties: *Held*, that such order was a reference to arbitration instead of a reference under The Code; and as the findings of fact would be final under the terms of the order, all parties were entitled to the notice of the time and place of hearing.

2. Whether notice was duly given of the time and place of the hearing by a referee, and whether both parties appeared and were present at such hearing (as to which there were conflicting affidavits), was a matter for the decision of the judge below, in which he might, if he chose, have had the aid of a jury; and where the judge below made no finding of facts upon the question, but treated the reference as one under The Code, and set aside the report and account, refusing to remove the referee: *Held*, that there was error, and the case must be remanded in order that such question may be determined, for upon it depends whether the award of the referee shall stand or be set aside.

APPEAL by defendant from an order setting aside a report and account, made by *Shuford, J.*, at March Term, 1893, of MARTIN.

It will only be necessary to set out the consent decree in the cause made at chambers to reach a proper understanding of the questions involved.

The consent decree was as follows:

"This cause coming on to be heard on motion of plaintiff for the appointment of a receiver of the property described in the complaint, and for an order restraining the defendant H. Brown from selling
(155) the property embraced in the mortgage made to him by the plaintiff and wife, all parties consenting hereto, it is adjudged and considered that H. Brown be and he is hereby appointed receiver herein to take charge and possession of all the property, real and personal, belonging to the late firm of Brown & Grimes, including all money or local accounts due the said copartnership, and assets of every description, and hold the same according to the terms of this order. It is further ordered that the said receiver proceed at once to collect all the notes and accounts due said firm, and that on the 6 March, 1893, at the courthouse door in Williamston, Martin County, the said receiver will sell all the property, both real and personal, belonging to said copartnership, upon the following terms, to wit, the purchase-price to be paid in cash, less an amount equal to the sum due on the mortgage of Ward and Grimes to the company of Baltimore, Md., which sum shall be secured by note, to be approved by the receiver and payable according to the terms of said mortgage. The said receiver is authorized to operate said mill, if in his opinion the best interests of said firm will be promoted thereby.

"It is further ordered that H. Brown be appointed referee to state the account and determine all matters between said G. E. Brown and the plaintiff, growing out of their copartnership dealings, and to pay out the proceeds of said property and collections according to the rights of the parties, as determined by the said referee. The receiver shall execute deeds to the purchasers for the property sold by him upon the payment of the purchase-money. The receiver and referee shall report his action in the premises to the next term of the Superior Court of Martin County, to be entered as the judgment of the court in the action. The receiver is required to file bond in the sum of two thousand dollars, to be approved by the clerk of the Superior Court of Martin County. The receiver shall advertise said sale at the courthouse door and three other public places in Martin County. (156)

"GEO. A. SHUFORD,
"Judge Superior Court."

Jas. E. Moore for plaintiff.
Don. Gilliam for defendants.

MACRAE, J. It will be noted that the order appointing a receiver and referee has all of the elements of a submission to arbitration under order of court. The referee is to determine all matters between said G. E. Brown and the plaintiff, growing out of their copartnership dealings. In the same order he is required, as receiver, to sell the property, collect the assets, and pay out the proceeds according to the rights of the parties as determined by himself as referee. He is to report his action to the next term of the court, to be entered as the judgment of the court. The order is by consent of parties, and provides for a final determination and judgment accordingly. It is not unlike the reference in *Gudger v. Baird.* 66 N. C., 438, in which the order is in these words: "This case is referred to W. M. Cocke, who shall summon the parties before him and hear the case, and his award shall be a rule of court." This was held to be a reference to arbitration instead of a reference under The Code, the essential difference between which proceedings is pointed out in *Keener v. Goodson,* 89 N. C., 273, citing several other authorities. Whether it were a reference by consent under The Code or a reference to arbitration, the findings of fact would be final under the terms of this order. But in either case all parties are entitled to notice of the time and place of the hearing. Morse on Arbitration, 116 *et seq.*

It is contended on the one side that notice was duly given, and that both parties appeared and were present at the hearing, and this is strenuously denied on the other, and many affidavits are filed *pro* and *con.* This is a matter for the decision of the judge below, (157) in which he may, if he chooses, have the aid of a jury. There is

no finding of fact by his Honor upon this question. He treats the reference as under The Code, and sets aside the report and account, refusing to remove the referee. We think that in this there was error.

The case must be remanded, in order that the judge below may find the facts whether the parties were duly notified of the time and place of hearing, or whether they appeared, and the case was duly heard before the report of the arbitrator was filed, for upon this question it depends whether the award shall stand or be set aside.

Remanded.

W. L. JETER v. W. H. S. BURGWYN ET AL.

Partnership—Participation in Profits.

1. If persons who are not partners agree to share the profits and loss, or the profits, of one particular transaction or adventure, they become partners as to that particular transaction or adventure, but not as to anything else. Therefore,
2. Where, in an action against defendant, plaintiff sought to hold him responsible for a debt contracted by a partnership of which defendant was not a member and had not so held himself out to be, but plaintiff contended that by reason of an alleged agreement between defendant and the firm that defendant should share in the profits of a particular adventure defendant had become a *quasi* partner and liable for all debts of the firm: *Held*, that it was not error to charge the jury that plaintiff could not recover if they should find that the adventure in which defendant was alleged to be interested had terminated before plaintiff's debt was contracted.

ACTION, tried before *Shuford, J.*, and a jury, at May Term, 1893, of VANCE.

The plaintiff sought to charge the defendant Burgwyn, as a (158) partner of the Henderson Tobacco Company, for a debt due by the company to plaintiff. The issue submitted was as follows:

"Was the defendant W. H. S. Burgwyn a partner in the Henderson Tobacco Company at the time the plaintiff's debt is alleged to have been contracted?"

After the evidence was in, his Honor intimated that he would charge the jury in defendants' favor, and the plaintiff submitted to a nonsuit, and appealed.

The facts are sufficiently stated in the opinion of *Chief Justice Shepherd.*

W. H. Cheek and H. T. Watkins for plaintiff.
J. H. Bridgers for defendants.

SHEPHERD, C. J. The ruling of his Honor which is presented for review does not involve a consideration of the question suggested in *Fertilizer Co. v. Reams,* 105 N. C., 283, and *Cossack v. Burgwyn,* 112 N. C., 304, whether a loan to a partnership, to be paid out of the profits, does, in itself, without any holding out, impose upon the lender a partnership liability to third persons. In *Cossack's case,* after referring to the principle of the ancient English cases, that sharing in the profits was, with one or two exceptions, an absolute test of partnership, we stated that, even under the modern doctrine as declared by the House of Lords in 1860, in *Cox v. Hickman* (see Reams's case, *supra*), such sharing would, at least, make out a *prima facie* case as to the existance of that relationship. If, however, we should go further and concede that any participation whatever in the profits would be conclusive evidence of partnership as to third persons, we would still be unable to perceive any force in the exception to the charge of the court.

What constitutes a partnership is a question of law *(Jones v. Call,* 93 N. C., 170), and there is nothing in the various con- (159) tracts between the Henderson Tobacco Company and the defendant Burgwyn, nor in their dealings with each other, that indicates an intention that Burgwyn was to become an actual partner in the said company. The plaintiff, therefore, in order to recover of Burgwyn, must show such circumstances as would constitute a partnership as to third persons, or as it is sometimes termed in the text-books, a *quasi* partnership.

The Henderson Tobacco Company was, it seems, engaged in the manufacture and sale of tobacco, and had on 20 December, 1889, entered into a contract with one Blacknall to manufacture three hundred thousand pounds of certain brands of smoking tobacco during the next year, which the said Blacknall was to sell at a price which would net the company an estimated profit of thirty-nine thousand dollars. On the day above mentioned Burgwyn and the company entered into an agreement, reciting that the former had indorsed a note for the latter of five thousand dollars, and that Burgwyn was to advance to the company during the succeeding twelve months an additional five thousand dollars to enable the company to carry out the Blacknall contract. It was agreed that the company was to secure Burgwyn to the amount of ten thousand dollars, by conveying to him all of their stock of leaf and manufactured tobacco and their machinery, fixtures, etc., which conveyance was executed on the same day. In the aforesaid agreement it was further stipulated that the company should execute to Burgwyn a

note for five thousand dollars, which note was also executed on the same date. This note, it is conceded, was independent of the indorsement and advances just referred to, and was not secured by the conveyance of the property above mentioned. It was given in consideration of the indorsement and advances, and there was an apparent conflict in
(160) the testimony of Burgwyn and his statement on a previous trial in respect to the manner in which it was to be paid. The plaintiff contended that it was to be paid out of the profits of the Blacknall contract, and that its payment was entirely contingent upon such profits. The defendant Burgwyn insisted that the payment was not so contingent, but was an absolute engagement on the part of the company to pay at all events and without reference to profits.

Assuming the correctness of the plaintiff's view of the facts, and also his contention that such a view would constitute a *quasi* copartnership, yet it appears from the authorities that such a copartnership would relate only to the Blacknall contract. 1 Lindley Partnership, 49, says: "If persons who are not partners agree to share the profits and loss, or the profits of one particular transaction or adventure, they become partners as to that transaction or adventure, but not as to anything else." According to the contention of the plaintiff, the note was to be paid out of the profits arising from the Blacknall contract, and it is clear that if the said contract had terminated before the plaintiff's debt was contracted, the defendant Burgwyn, not having held himself out as a partner, would not be liable as such. This would be true, although no notice of a dissolution of the particular *quasi* copartnership was given. Lindley, *supra*, 213. There is no evidence that the said defendant ever so held himself out, or that plaintiff knew anything of the transaction in question. It must follow, therefore, that if the Blacknall contract terminated before 7 February, 1891, the date of the contract sued upon, the plaintiff cannot recover.

His Honor charged the jury that they must so find if they believed the testimony of Burgwyn and Daingerfield, which was explicit and uncontradicted on this point. In this there was no error, nor was there error in his instruction that clauses numbers 9 and 10 in the contract of 29 April, 1890, and the contract of 8 October, 1890, stating that Burgwyn's rights under former contracts should be continued,
(161) were no evidence that the contract with Blacknall had not terminated. The plaintiff upon this charge suffered a nonsuit and appealed. For the reasons given we think the nonsuit must stand.

Affirmed.

E. L. CHEATHAM v. J. R. YOUNG ET AL.

Evidence—Municipal Records—Location of Boundary Lines—Streets—Pleading—Color of Title.

1. Where it becomes material to prove the contents of a record of the proceedings of a municipal corporation the party relying upon it may identify or offer the original or introduce a copy properly certified.
2. Documents of a public nature and of public authority are generally admissible in evidence in proof of those matters, the remembrance of which they were called into existence to perpetuate, although their authenticity be not confirmed by the ordinary tests of truth—the obligation of an oath and the power of cross-examination of the parties on whose authority the truth of the document depends; therefore,
3. The records made by the mayor and commissioners of a town empowered to locate, open, or widen the public streets, naming and fixing the width of certain streets, and made *ante litem motam*, are competent though not conclusive evidence to locate the boundary line when the streets named or their points of intersection are called for in a deed upon which a party relies.
4. It is competent for a defendant to prove possession by himself and those under whom he may claim, for seven years, in support of a general denial, in an answer, that the plaintiff is the owner, without specially pleading the statute.

ACTION to recover land, tried before *Bryan, J.*, and a jury, at May Term, 1892, of VANCE.

The land in controversy was a strip about two and one-half feet in width, which both parties claimed under deeds introduced in evidence. The width of certain streets referred to in the deeds be- (162) came material in determining the location of the boundary lines.

The defendants offered in evidence the records of the commissioners of the town of Henderson.

The plaintiff objected because not proven, and further, that it was incompetent evidence if proven, plaintiff being neither party nor privy to the proceedings recited, and the proceedings not being such as were authorized by law and binding upon property holders in the town; and further, if the book is proved to be the record of the commissioners, it is not such a record as proves the truth of its recitals.

Thereupon, W. W. Young was introduced as a witness, who testified that he was a commissioner of the town in 1866, and that the book offered was the record of the proceedings of the town commissioners.

The plaintiff's objection was overruled, and the book containing the record was permitted to be read. The plaintiff excepted.

The following was read:

"HENDERSON, N. C., 26 May, 1866.

"At a called meeting, his Honor the Mayor, I. J. Young, Dr. W. W. Young, J. E. Clark, L. W. Kittrell and S. J. Parham, board of commissioners, were present.

"On motion, the street 190 feet northwest of Garnett and running parallel with Garnett shall be called, as formerly, Wyche alley. . . .

"On motion, the meeting adjourned.

"S. J. PARHAM, *Sec.*

"Recorded by J. A. C., 3 September, 1868."

"HENDERSON, 22 May.

"At a regular meeting, his Honor Capt. S. J. Parham, Mayor, present; Col. H. Harris, R. G. Moore, Dr. T. C. Debnam, George H. Yancey, W. W. Young, present.

"It was moved and carried that a committee of Dr. T. C. Deb-
(163) nam and George H. Yancey be appointed to assist the county surveyor, Mr. S. P. J. Harris, in widening Garnett street from John H. Young's corner to Breckenridge street, taking eight feet on the south side and twelve (12) feet on the north side, begin from the original street, making Garnett street eighty-six (86) feet wide instead of seventy-five feet, as it now stands, and the town attorney be instructed to obtain a deed of grant for said land to the town authorities. . . .

"Adjourned to meet Thursday night.

" W. W. YOUNG, *Secretary.*"

After the argument had commenced, counsel for defendants argued to the jury that plaintiff must show that he, or those under whom he claimed, had been in possession of the land sued for within seven years next before the commencement of this action.

Whereupon, plaintiff asked the court to charge the jury:

"It is no part of plaintiff's duty to prove possession within seven years. If the defendant wishes to take advantage of the statute of limitations he must plead it, and prove that he has been in possession seven years under color of title, and there is no such plea or evidence offered."

His Honor declined to give the charge as requested, to which plaintiff excepted, but after reading the testimony he charged the jury:

"The burden is on the plaintiff in this action, he must recover upon the strength of his title.

"The original starting points and boundaries are questions of fact for the jury to find from the evidence. I mean all the evidence bearing upon the points. Plaintiff, in order to entitle himself to recover in this action, must show that he holds the legal title to the premises in controversy, and it must further appear from a preponderance of the testi-

mony that at the time of the commencement of this action he was entitled to the possession of the premises.

"Plaintiff says his deeds cover the land in controversy. This is denied by the defendants. It is for you to say where the (164) boundaries are.

"What are the boundaries of the plaintiff's land is a question of law; where they are is a question of fact. The beginning point of plaintiff's land is the corner of Montgomery street and Wyche alley, and plaintiff must locate this corner."

Defendant asked his Honor to charge the jury, "That it is necessary for the plaintiff to show possession of the land in dispute for seven years, under a deed describing the same by metes and bounds, ending within seven years before the commencement of this action," which request was declined by his Honor.

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

Pittman & Shaw for plaintiff.
A. C. Zollicoffer for defendants.

AVERY, J. The statement of the case on appeal is not so full or so clear as it might have been made. But it seems to have become material to the location of the plaintiff's boundary to determine where Montgomery street intersected with Garnett street and with Wyche alley; and one of the questions involved in this inquiry was, What was the width of Garnett street, and what the distance from it to said alley? Neither the map used upon the trial nor any one of the deeds is sent up as an exhibit, and it does not appear in express terms from the testimony what was the description of the land claimed by the plaintiff.

Assuming that the inquiry of the jury was directed to the point mentioned, the first exception is to the competency of the minutes of the proceedings of the mayor and board of commissioners of the town of Henderson at two meetings, held respectively on 22 and 26 May, 1866 (*ante litem motam*), at one of which the entry was, "On motion, the street 190 feet northwest of Garnett and running parallel (165) with Garnett shall be called, as formerly, Wyche alley"; and at the other it appeared that a committee was appointed to assist the surveyor in widening Garnett street from John H. Young's corner to Breckenridge street, so as to make it eighty-six instead of seventy-five feet, as it then was, "by taking eight feet on the south side and twelve feet on the north side."

Where it becomes material to prove the contents of such a record, the party relying upon it may identify and offer the original or introduce

a copy properly certified. *S. v. Voight,* 90 N. C., 741; The Code, sec. 1342; 1 Greenleaf Ev., 485. In this case the original having been identified by the testimony of Dr. Young, only the question whether such a record as that put in evidence is competent is worthy of serious consideration or discussion.

The principle upon which records such as these in question are usually admitted as evidence when duly certified or satisfactorily identified, has been very clearly stated by an eminent text-writer: "Documents of a public nature and of public authority are generally admissible in evidence, although their authenticity be not confirmed by the usual and ordinary tests of truth, the obligation of an oath and the power of cross-examining the parties, on whose authority the truth of the document depends. The extraordinary degree of confidence thus reposed in such documents is founded principally upon the circumstances, that they have been made by authorized and accredited agents appointed for the purpose, and also partly on the publicity of the subject-matter to which they relate. . . . Those who are empowered to act in making such investigations and memorials are in fact the agents of the individuals who compose the public." Such public writings are "only receivable, however, in proof of those matters the remembrance of which they were called into existence to perpetuate." 1 Greenleaf Ev., sections 483 and 484; Best Ev., section 219; *Clarke v. Diggs,* 28 N. C., 159; (166) *Broadhead v. Del Hayo,* 20 N. J., 323; *Swinnerton v. Ins. Co.,* 9 Bos. (N. Y.), 361. The records offered were made by the government officials of a town, which was a public agency established with defined powers, one of which was to locate, open or widen the public streets. They were made long before the present controversy arose, and bear intrinsic testimony to the fact that the object in passing them was to fix the relative positions and bounds of Garnett street and Wyche alley, and incidentally the points of their intersection with Montgomery and other streets running diagonally across both. Such records being publicly made by public agents, and presumably for the public benefit, may be more safely admitted to show where the streets of a city or town are located than the declarations of even disinterested deceased persons as to the situation of the lines and corners of land. It has been said that the admission of hearsay evidence as to questions of boundary had its origin partly in the obsolete rule which made it competent to prove prescription by general reputation, and partly in the fact that "in many sections of this country a single surveyed boundary line is common to a number of estates, becoming in this manner a *quasi* matter of general interest." *Boardman v. Reid,* 6 Peters, 528; *Shook v. Pate,* 50 Ala., 91. In *Davidson v. Arledge,* 97 N. C., 172, it was held that a map of the city of Charlotte, shown to have been recognized by the authorities

of the city for fifteen years, was competent as testimony tending to show the location of the streets laid down thereon and the distance from one to the other. This ruling seems to have been founded upon the fact that the map was made under the direction of and was approved and corrected by the public agents, whose duty it was to fix the limits of streets, and who were presumed to have acted properly, and to have caused an accurate delineation of their true location to be made for their own guidance. The presumption of accuracy of the map was doubtless a rebuttable one in the same way the official declaration as (167) to the proper location of Wyche alley and its distance from Garnett street, and as to the increased width of Garnett street, is competent though not conclusive evidence to locate a boundary line, when the streets named or their points of intersection were called for in the deed. 2 Wharton Ev., section 1310.

It is well settled that it is competent for a defendant to prove possession by himself and those under whom he may claim, for seven years, in support of a general denial in the answer that the plaintiff is the owner, without specially pleading the statute. *Farrior v. Houston,* 95 N. C., 578; *Manufacturing Co. v. Brooks,* 106 N. C., 107.

There was no error, therefore, either in admitting the testimony objected to or in the refusal of the charge as asked by the plaintiff.

No error.

Cited: Shelton v. Wilson, 131 N. C., 501; *Pittman v. Weeks,* 132 N. C., 82; *Cone v. Hyatt, ib.,* 815; *Whitaker v. Jenkins,* 138 N. C., 478; *Fleming v. Sexton,* 172 N. C., 253; *Surety Co. v. Brock,* 176 N. C., 508.

L. C. KING v. E. B. DUDLEY, ADMINISTRATOR OF J. M. KING ET AL.

Pleading—Amendment of Complaint at Trial.

1. Where the effect of an amendment to a complaint, asked for on the trial of an action, is neither to assert a cause of action wholly different from that set out in the original complaint, nor to change the subject-matter of the action, it is not improper to allow it to be made even after the plaintiff's evidence has been introduced; therefore,
2. Where, in an action to recover a crop raised on land formerly belonging to plaintiff's deceased husband, the complaint alleged that the land had descended to her three infant children, for whom one of the defendants had been appointed receiver; that she had occupied the tract on which the crop was grown as lessee of the receiver, and that it was withheld

from her by the receiver and her second husband; and on the trial of the action, after plaintiff had introduced her evidence, and upon an intimation by the trial judge that she could not recover upon her complaint as then framed, it was not improper to permit an amendment by which she laid claim to only part of the crop as having been cultivated by her on the portion of the tract on which the mansion-house was located and in which she claimed dower.

ACTION, tried before *Shuford, J.*, and a jury, at March Term,
(168) 1893, of PITT, for the recovery of certain crops and personal property described in the complaint.

The facts necessary to an understanding of the decision of the court are set out in the opinion of *Associate Justice Burwell.*

There was verdict for the plaintiff that she was the owner and entitled to the possession of the five crops claimed in her amended complaint, and of the personal property claimed by her. The jury further found that the receiver leased the Bensboro plantation for the year 1889 to John M. King, the plaintiff's second husband, and that no part of said plantation was leased to plaintiff during that year. There was judgment accordingly, and the defendant Cotten (who had been allowed to interplead as the assignee of a mortgage made on the crops by plaintiff's second husband, King) appealed.

James E. Moore for plaintiff.
Thomas J. Jarvis for appellant, Cotten.

BURWELL, J. The plaintiff, in her first complaint, alleges that she was the owner of certain stock, wagons and farming tools, which she described in the ninth article of that complaint, and of all the crops grown on a certain plantation known as the Bensboro tract in the year 1889, and that the possession of said property was wrongfully withheld from her by her husband and S. V. Joyner. This land had belonged to her former husband, B. S. Atkinson, and upon his death had descended to three infant children. The mansion house of said Atkinson was on this plantation, and no dower had been assigned to the plaintiff. S. V. Joyner had been appointed receiver of the estate of the said infants, and the plaintiff averred that the entire crop was hers, under an arrangement between the receiver and herself, she being liable to him for the children's share of the rent.

The defendant King died, and his administrator was made a
(169) party, and R. R. Cotten interpleaded in the action and claimed the crop and a portion of the other property under a mortgage made thereon by King to Royster & Strudwick, and by them assigned to him.

Upon the trial, after the plaintiff had introduced her evidence, or a portion of it, his Honor intimated that she had failed to establish her alleged title to the crop as lessee of the receiver, and then allowed her, notwithstanding the objection of defendants (Dudley, administrator, and Cotten) to file an amended complaint, called by her counsel a second cause of action, in which she set out that she was the owner, not of the whole crop, but of "a five-horse crop," grown on said plantation in 1889 by her tenants; that in that year she, being entitled to dower in the said tract, as well as in other lands of which B. S. Atkinson died seized, occupied the mansion house on said tract, and had a five-horse crop cultivated thereon by her own tenants, who used her stock.

We think it was entirely within his Honor's discretion to allow this amendment. It did not change the subject-matter of the action. She had claimed all the crop. She, by the amendment, only admitted that a part of it belonged to the defendants. In her original complaint she asserted title to the crop as lessee of the receiver. In her second complaint she set out her relation to the Bensboro tract as the widow of B. S. Atkinson; that her dower had not been assigned to her, but that she did occupy and cultivate a five-horse farm on said land in 1889, and that the crop so cultivated by her was hers, and was wrongfully withheld from her. The effect of this amendment was neither to assert a cause of action wholly different from that set out in the original complaint, nor to change the subject-matter of the action, and was allowable. *Kron v. Smith,* 96 N. C., 389.

It is to be noted that S. V. Joyner, the receiver, who, in this action is the representative of the infant heirs of B. S. Atkinson, did not object to this amendment. No exception was taken to the (170) issues submitted to the jury.

A careful examination of his Honor's charge, as set out in the case leads us to the conclusion that the law applicable to the matters thus at issue was fairly and clearly stated. There was certainly some evidence that the plaintiff had occupied, by her tenants, that part of the Bensboro tract on which she claimed to have cultivated "a five-horse crop" by the use of her own separate property. It matters not under what supposed right she occupied this portion of the land for the purposes of this action, if in fact, she did occupy it and did grow a crop on it. Under the charge of the court and the verdict of the jury, the owners of the land, the heirs of B. S. Atkinson, represented by the receiver, got their rent and are satisfied. The tenants, by whose labor the five-horse crop was raised, got their share, and they make no complaint. The appellant has no right to any part of the crop except as assignee of a mortgage put thereon by J. M. King, plaintiff's husband. He had no better title than King had, and the verdict, founded in part on acts and

declarations of the husband, has established the fact that the plaintiff was the true owner of the crop which, in her amended complaint, she claims. If, by her conduct, she had estopped herself from asserting title to this crop against Royster & Strudwick, King's mortgagees, or their assignee, it was incumbent on the defendant, by proper issues and proper prayer for instructions, to invoke the aid of that estoppel in defense of his rights. He pleaded it, and as there is no exception to the charge in this respect, we assume that the trial was, in this respect, satisfactory to him.

What we have said seems to cover all the exceptions taken to the charge, and the exceptions to the admission of evidence were not pressed before us. We find no error, and the judgment must be

Affirmed.

Cited: Gillam v. Ins. Co., 121 N. C., 373; *Parker v. Harden,* 122 N. C., 113; *Reade v. Street, ib.,* 302; *Goodwin v. Fertilizer Co.,* 123 N. C., 162; *Simpson v. Lumber Co.,* 133 N. C., 99; *Lassiter v. R. R.,* 136 N. C., 95; *Reynolds v. R. R., ib.,* 348; *Lefler v. Lane,* 170 N. C., 183; *R. R. v. Dill,* 171 N. C., 177; *McLaughlin v. R. R.,* 174 N. C., 185.

(171)

MOLLIE J. LANE v. CANDIS ROGERS, EXECUTRIX OF ANDREW JACKSON, DECEASED, ET AL.

Evidence—Transactions With Deceased Person.

A witness was asked upon a trial, "State when and where you first saw the book now shown to you," the object of the question being declared by counsel to be "to show that she first saw the book in the hands of defendant's intestate at the time he handed it to her on the day of her marriage": *Held,* that the question was properly excluded under section 590 of The Code, since the "handing her the book" was a "personal transaction" between the plaintiff witness and the deceased. It would have been competent to show by the witness that she saw the book in the hands of the intestate on the day of her marriage, as that would not have been a "transaction" with the deceased.

ACTION, tried before *Brown, J.,* and a jury, at April Term, 1893, of WAKE.

The plaintiff claimed that the sum of $1,023 was deposited by her with Andrew Jackson, the testator of the defendant, Candis Rogers.

It was admitted that Andrew Jackson died leaving a will, and that Candis Rogers was the sole legatee and devisee under said will, and that

she was appointed and qualified as executrix thereof, and that defendant Luke Rogers was the husband of the said Candis, and that she has children by him, the said Luke.

On the trial the plaintiff introduced a memorandum book containing a statement of the sums alleged to have been deposited with the said Andrew Jackson by plaintiff, amounting to $1,023, and purporting to have been signed by the said Jackson and witnessed by C. H. Lane, now the husband of the plaintiff. Said C. H. Lane, being offered as a witness for the plaintiff, testified that on the morning of the day of his marriage to the plaintiff the said Jackson handed this book to plaintiff in his presence. The plaintiff, being sworn as a witness for herself, was asked: "State when and where you first saw the book (172) now shown you," the book being the one about which C. H. Lane had just testified; and the object of the question, as stated by the plaintiff's counsel, was to show that she first saw the book in the possession of Andrew Jackson at the time he handed it to her, on the day of the marriage. The evidence was objected to under section 590 of The Code, and the objection was sustained and the evidence excluded. Plaintiff excepted.

The plaintiff further offered to show by C. H. Lane, recalled as a witness for her, that Luke Rogers had said to him that the plaintiff's claim was just, and ought to be paid. Upon objection this evidence was rejected, and the plaintiff again excepted.

It was in evidence that the estate of Andrew Jackson consisted of $488 in bank, and of real estate in Raleigh, of which the defendant Candis Rogers was and is in possession. In opening their case the plaintiff's counsel stated that they claimed no lien upon or interest in the land in this action, but demanded only a judgment for money.

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

Batchelor & Devereux and S. G. Ryan for plaintiff.
Battle & Mordecai for defendant.

CLARK, J. The plaintiff was asked: "State when and where you first saw the book now shown you." The object of the question as stated by plaintiff's counsel was "to show that she first saw the book in the hands of defendant's intestate, at the time he handed it to her on the day of the marriage." The intestate's "handing her the book" was a personal transaction between the plaintiff and the deceased, and the question being asked, as stated by her counsel, with a view of bringing out that as a part of her statement, it was properly ruled out under (173) section 590 of The Code. It is true it was competent to show

by her that she saw the book in the hands of the intestate on the day of her marriage *(Gray v. Cooper,* 65 N. C., 183; *March v. Verble,* 79 N. C., 19; *McCall v. Wilson,* 101 N. C., 598), since that would not have been a transaction with the intestate. But the plaintiff's husband had testified that the book had been handed to the plaintiff by the intestate, and the object seems to have been to corroborate him by her testimony embracing that fact. If the object had been only to indicate the time, that could have been done by stating simply that she saw the book in the hands of the intestate on the day of the marriage. But whatever the object may have been, we can only pass upon the inquiry as made. That the plaintiff did not properly restrict the inquiry or amend it so as to exclude the incompetent matter was her own fault. The other exception is without merit, and was not relied on in this Court.

No error.

Cited: Johnson v. Cameron, 136 N. C., 245; *Davidson v. Bardin,* 139 N. C., 3; *In Re Bowling,* 150 N. C., 510; *Brown v. Adams,* 174 N. C., 502; *McEwan v. Brown,* 176 N. C., 252.

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(174)

I. F. HILL ET AL. v. THE PIONEER LUMBER COMPANY.

Insolvent Corporation—Relation of Directors to Creditors—Confession of Judgment, Invalidity of.

1. A director of a company occupies a fiduciary relation to the company which, by virtue of his office, he represents in the management of its principal functions.
2. The capital stock and property of a corporation, in case of its insolvency, constitute a fund, first, for the satisfaction of its creditors, and next, for its stockholders.
3. While a director of a company may lend it money when needed for its benefit, and take a lien upon the corporate property as security for its repayment, provided the transaction be open and entirely fair and capable of strict proof as to its *bona fides,* yet where a corporation is insolvent a director who is a creditor cannot, upon a debt theretofore existing, take advantage of his superior means of information to secure his debt as against other creditors; therefore
4. A confession of judgment by an insolvent corporation in favor of a director who is a creditor, and upon a debt theretofore existing, is void as against other creditors.

ACTION to annul and set aside a judgment confessed by the Pioneer Lumber Company in favor of a director, heard on complaint and answer,

and without a jury, before *Brown, J.*, at January Term, 1893, of WAYNE.

It was admitted in the pleadings that at the time of the confession of judgment in favor of G. A. Griswold against Pioneer Lumber Company, the defendant corporation was insolvent; that said Griswold and one Hall were the only stockholders and constituted the board of directors; that the said Hall was president and the said Griswold secretary and treasurer of said corporation, and that said Griswold was present at and participated in the meeting at which the resolutions were adopted directing Hall, as president, to confess judgment against the company in favor of Griswold.

On this state of facts the plaintiff, I. F. Hill, contended that the directors became trustees of the corporate property for the benefit of the creditors, and could not take advantage of their knowledge and position to gain an advantage over the other creditors.

The court rendered judgment in favor of the plaintiffs and against the defendant, G. A. Griswold, setting aside and vacating the judgment set forth in said pleadings in favor of the defendant Griswold, and against the defendant company, and for costs, and defendant appealed.

Aycock & Daniels for plaintiffs.
Busbee & Busbee for defendants.

MACRAE, J. This case is presented to us as upon a demurrer, all the facts alleged in the complaint being admitted in the answer, and the conclusion of law contended for by the plaintiff being denied, thus raising the issue of law, whether the facts stated in the complaint constitute a cause of action. (175)

It is admitted in the pleadings that at the time of the confession of judgment in favor of G. A. Griswold against the Pioneer Lumber Company, the defendant corporation was insolvent; that said Griswold and one Hall were the only stockholders and constituted the board of directors; that said Hall was president, and said Griswold was secretary and treasurer of said corporation, and that Griswold was present at and participated in the meeting at which resolutions were adopted directing Hall, as president, to confess judgment against the company in favor of Griswold. On this state of facts the plaintiff, I. F. Hill, contends that the directors became trustees of the corporate property for the benefit of the creditors, and could not take advantage of their knowledge and position to gain an advantage over the other creditors.

We advert to the fact that there appears to be but two members of the defendant corporation. But for the admission in the answer, we might inquire whether there has been such an incorporation as is per-

mitted by section 677 of The Code, as this privilege is extended to any number of persons not less than three. However, as the answer admits that the said defendant is a corporation duly created by the laws of North Carolina, we will proceed at once to the consideration of the only question presented—whether an insolvent corporation may confess judgment under the statute to a director in the same who is also a creditor.

There may have been a discussion at an earlier day as to the precise relation in which a director stands to the corporation of which he is an officer, whether an actual or a *quasi* trustee for the shareholders, and in case of the insolvency of the corporation, for the creditors also; but there can be no doubt that he occupies a fiduciary relation to the company, which by virtue of his office he represents in the management of
(176) its principal functions; neither can there be any doubt that the capital stock and property of the corporation, in case of its insolvency, constitute a fund, first for the satisfaction of its creditors, and next for the shareholders. As is said by *Mr. Justice Miller* in *Sawyer v. Hoag,* 17 Wall., 610, "Though it be a doctrine of modern date, we think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation. And when we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last few years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern, for the occasion for it could not sooner have arisen."

As it is stated in 2 Story Eq. Jur., sec. 1252: "Perhaps to this same head of implied trusts upon presumed intention (although it might equally well be deemed to fall under the head of constructive trusts by operation of law), we may refer that class of cases where the stock and other property of private corporations is deemed a trust fund for the payment of the debt of a corporation, so that the creditors have a lien or right of priority of payment on it in preference to any of the stockholders in the corporation."

This doctrine was clearly stated by *Mr. Justice Story* in *Wood v. Dumer,* 3 Mason, 311, in 1824, and has been generally followed and announced in the treatise on this branch of the law ever since that time. 2 Morawetz Pr. Corp., sec. 780; 1 Beach Pr. Corp., sec. 116. And we are not without authority in our own Court, for the same principle is very clearly stated in an able and interesting opinion of the late *Mr. Justice Davis* in *Foundry Co. v. Killian,* 99 N. C., 501. This much being established, we may find the duty and liability of the director laid down in the very many and sometimes diverse decisions in the leading courts of this country. As he is selected and entrusted with

the management of the affairs of the corporation and has charge (177) of its property and business, it applies to him, that "whenever confidence is reposed and one party has it in his power, in a secret manner, for his own advantage, to sacrifice those interests which he is bound to protect, he will not be permitted to hold any such advantage." 1 Story, *supra,* sec. 323. As a sequence to the foregoing proposition, we find "an insolvent corporation being indebted to its officers and directors; they executed the notes of the corporation in their own favor, and having obtained judgment by default issued execution thereon. In the distribution of the proceeds of the sheriff's sale of the personal property of the corporation: *Held,* that this conduct of the officers was a fraud in law which gave them no preference over general creditors in the distribution." *Hopkins' Appeal,* 9 Pa. Stat., 69, cited as an illustration under the head of Liability of Directors for Fraud. 1 Lawson, R. & R., sec. 343. In 17 A. & E. Enc., 122, where very many cases *pro* and *con* are cited, this principle is evolved from the weight of authorities: "It may be stated as a general rule that directors of an insolvent corporation cannot as creditors of such corporation secure to themselves a preference. They must share ratably in the distribution of the company's assets."

In 1 Beach Pr. Corp., sec. 241: "The directors of a company stand in the same relation toward creditors of the corporation that they do to its shareholders, being trustees for the benefit of corporate creditors also."

Mr. Justice Davis, in *Drury v. Cross,* 7 Wall., 299, speaking of the directors of a railroad company, says: "It was their duty to administer the important matters committed to their charge for the mutual benefit of all parties interested, and in receiving an advantage to themselves not common to the other creditors, they were guilty of a plain breach of trust."

It is true "that a director of a corporation is not prohibited from lending it moneys when they are needed for its benefit and (178) the transaction is open and otherwise free from blame; nor is his subsequent purchase of its property at a fair public sale by a trustee under a deed of trust, executed to secure the payment of them, invalid." *Oil Co. v. Marbury,* 91 U. S., 587. And there would be nothing to hinder a director from loaning money and taking liens upon the corporate property as security for its repayment, and in enforcing his lien, provided it was an open and entirely fair transaction, but even then it would be looked upon with suspicion, and strict proof of its *bona fides* would be required.

There are many decisions, however, which hold that, although directors are bound to discharge their duties prudently, diligently and faithfully, and apply the assets, in case of insolvency, for the benefit of credi-

tors instead of stockholders, yet they are not, technically, trustees, nor bound to apply the assets ratably among the general creditors. These decisions hold that they may not only make a preference between creditors, but such preference may be made in their own favor if they be creditors, and in such cases they must act with the utmost good faith. 17 A. & E. Enc., 122, note. This doctrine was held in *Garrett v. Burlington Plow Co.*, 70 Iowa, 697, and in a note to this case in 59 Am., 466, a great many cases are cited, all holding the contrary doctrine to the case last named, and sustaining that to which we adhere. And although it appears from an examination of some of the cases cited in the American and English Encyclopedia on this subject, that there are very respectable and high authorities which would seem to relieve directors from the burden incident to their trust, we cannot hesitate to adopt the views which seem to us the most consistent with the virtuous exercise of the confidence reposed in them, and hold these fiduciaries to the duty which bids them put self-interest behind that of the creditors, who have not the same means of information which might enable (179) them to protect themselves.

There are many cases cited in the brief of the plaintiff's counsel, and others found in the reports of the different States, which, for lack of decisions in North Carolina, are, to us, persuasive authority. The latest we have seen is *Banking Co. v. Lumber Co.*, 91 Ga., 624, where the proper distinction is made between a mortgage to a director of an insolvent corporation as an indemnity for liabilities already incurred, and one made in the execution or performance of an agreement or undertaking entered into at or prior to the time when the liability was incurred. It might be, in some instances, greatly to the benefit of the creditors and shareholders that directors should, in good faith, advance to the corporation funds, upon security, to enable it to carry out its undertakings.

To apply these principles to the case in hand, the defendant seems to be a corporation composed of but two persons or members, both of whom were necessarily officers and directors. The advantage to these persons in being erected into a corporation was, most probably, that they might thereby avoid, not to say evade, personal liability for the debts of the concern. It fails of success and becomes insolvent, which means that it owes more than its capital can pay. It holds a meeting, in which, of course, both of its members participate, and, by an unanimous vote, it orders the one to confess judgment in the name of the corporation to the other for a large amount of money "due by note." Will this transaction stand to the detriment of the other creditors of the corporation?

This is the first case of the kind which has come before this Court

for determination. It is an interesting and important question. By reason of the facility afforded by the statute for the formation of private corporations, much of the business of the country and of this State is now being transacted through such agencies. (180) They offer many advantages to the stockholders, and in some respects they are fraught with danger to the public, unless they are held within the bounds of law and equity. Here comes in the beneficence of that public policy which places all corporations under the visitation of the courts.

Can there be any essential difference between the principle as applied to a confession of judgment under The Code and a mortgage? Most of the cases we have observed were those of mortgages to secure directors or other officers who were creditors of their own corporations. In the few cases which have come before this Court under section 677 of The Code, notably in *Davidson v. Alexander,* 84 N. C., 621, it has been held that on account of its liability to abuse, and for the purpose of enabling other creditors to have the opportunity to make full investigation if they should so desire, the requirements of the statute should be strictly complied with. It will be observed that the case of *Sharp v. R. R.,* 106 N. C., 308, was the confession of judgment by a corporation to one of its officers, and under circumstances calculated to excite inquiry if not suspicion, but the appeal was from an order made upon a motion to vacate the judgment, where only matters of irregularity could be considered. To attack the same for fraud, it was necessary to bring an independent action, as has been done in this case.

The effect of a confession of judgment is more expeditious in securing a lien, and offers a more immediate means of securing payment of a debt, by the issue of execution and sale of the corporate property, than that given by a mortgage, for a mortgage made by a corporation cannot create a preference over antecedent creditors until a reasonable time after registration, which is notice, has been afforded them to protect their rights. The Code, sections 685 and 1255. The preference is attempted to be reached by the confession, instead of by a mortgage. The preference in this case is to be avoided by whatever (181) means it is sought. In holding that an insolvent corporation cannot prefer one of its directors, who is also a creditor, before other creditors, we are not at variance with the decision in *Blalock v. Mfg. Co.,* 110 N. C., 99. The fourth head-note in that case is misleading when it says, "A corporation has the right to prefer a just debt to one of its officers to those of other creditors." The judgment was that the debt of this officer should be postponed until the other creditors had been paid.

The law is that where a corporation is insolvent, its capital is a trust

fund for the payment of its debts. A director creditor upon a debt theretofore existing cannot take advantage of his superior means of information to secure his debt as against other creditors.

Judgment affirmed.

Cited: Bank v. Cotton Mills, 115 N. C., 513; *Light Co. v. Light Co.,* 116 N. C., 119; *Cooper v. Security Co.,* 122 N. C., 464; *Howard v. Warehouse Co.,* 123 N. C., 91; *Graham v. Carr,* 130 N. C., 274; *Holshouser v. Copper Co.,* 138 N. C., 251; *McIver v. Hardware Co.,* 144 N. C., 483; *Edwards v. Supply Co.,* 150 N. C., 172; *Powell v. Lumber Co.,* 153 N. C., 56; *Silk Co. v. Spinning Co.,* 154 N. C., 427; *Pender v. Speight,* 159 N. C., 615; *Whitlock v. Alexander,* 160 N. C., 468, *S. c. ib.,* 482; *Gilmore v. Smathers,* 167 N. C., 444; *Wall v. Rothrock,* 173 N. C., 391; *Drug Co. v. Drug Co., ib.,* 508; *Steel Co. v. Hardware Co.,* 175 N. C., 451; *Besseliew Co. v. Brown,* 177 N. C., 68.

LOCHEIMER, MANN & CO. v. SOL. WEIL, TRUSTEE, ET AL.

Trustee—Power of, to Compromise Suits Affecting Trust Estate.

1. A trustee may compromise a suit brought against him affecting the assets in his hands, and he will not be liable to the *cestui que trust,* provided he acts with due care and, in good faith, does what, under the circumstances that surround him, seems best for the interest of those whom it is his duty to serve; therefore,
2. Where a trustee, who in good faith and under advice of his counsel and of counsel employed by a creditor of the trustor, compromised a suit affecting the trust estate, he will not be held liable for loss accruing to such creditor, although the latter's counsel had no general or special authority to consent to such compromise.

ACTION, heard upon exceptions to the report of a referee at April Term, 1893, of WAYNE, before *Brown, J.*

(184) The judgment rendered by his Honor was as follows:

"The principal exception argued before me was as to the alleged want of authority by Grainger to Mann to compromise the suits of *Claflin et al. v. S. Weil, trustee, etc.* It appears that Grainger represented Mann's firm of Locheimer, Mann & Co. in that suit, although they were not parties to the record. It appears that he was associated with Weil's counsel, and the two agreed to a certain judgment. Inasmuch as Locheimer, Mann & Co.'s counsel consented to the judgment,

it is binding, whether Grainger had authority to agree to that judgment or not. Grainger's estate is admitted or found to be solvent, and the plaintiffs' remedy is against that, if they have any. It seems that Grainger had general authority to represent interest of plaintiffs in the suit. After considering the testimony, I see no reason to overrule any of the referee's findings of fact, and I see no error in any of his legal conclusions. The report is therefore confirmed and the several exceptions overruled. The judgment is affirmed."

From this judgment plaintiffs appealed.

Other facts necessary to an understanding of the case are stated in the opinion.

Fuller & Fuller for plaintiffs.
S. A. Woodard for defendants.

BURWELL, J. The plaintiffs are creditors of a firm, Stern & Sax, which in 1879 made an assignment to the defendant Weil to secure the distribution of their assets among their creditors, with (185) certain preferences therein provided for, and in this action they required of him a settlement of his trusteeship. The facts found by the referee have been confirmed by his Honor, and are thus conclusively determined. We find no error in the conclusions of law which were drawn from those facts.

As is stated in the judgment, the contention of the plaintiffs is that the defendant trustee should be held liable to them for the value of a portion of the property assigned to him, which had been attached by two of the creditors of Stern & Sax, to wit, H. B. Claflin & Co. and Armstrong, Cator & Co. It is found that the suits brought by these two creditors, in which warrants of attachment were issued and a portion of the assigned property was seized and sold, were compromised by the trustee, and, by the terms of the compromise so made, the attaching creditors were allowed to have about two-thirds of the proceeds of the attached goods, while only one-third was paid over to the trustee.

The plaintiffs had a right to demand that the defendant trustee should be diligent and faithful in the management of the estate committed to his charge, in part for their benefit, but his compromising the suits mentioned above was not at all incompatible with either good faith or due diligence. A trustee may compromise suits brought against him affecting the assets in his hands, and he will not be liable to the *cestui que trust,* provided he has acted with due care, and in good faith has done what under the circumstances that surrounded him at the time seemed best for the interest of those whom it was his duty to honestly serve.

It may be conceded that an attorney has no authority to compromise his client's cause that has been committed to his charge without special authority so to do. That is well settled. A general employment as attorney does not include such authority. But that recognized principle does not fit the case before us. Here is a question of diligence
(186) and fidelity on the part of the defendant trustee. The charge against him is that he sacrificed assets committed to him by the compromise of these suits—that he allowed one thousand dollars of the assets to be, by that compromise, diverted from the creditor to whom it belonged—to the plaintiffs in those suits, and his reply to this charge is that he acted in this matter in good faith and with due diligence, and to prove this he asserts that this compromise was made by counsel whom he had employed to represent the interest of the creditors, and after consultation with an attorney in whose hands the appellants had placed their claim against Stern & Sax for collection.

We repeat that the question here is not whether an attorney, under a general authority to conduct a suit, has authority to compromise his client's cause (which, of course, must be answered in the negative), but whether a trustee who, under advice of his own counsel, and after consultation with and by the consent of counsel employed by the creditor, compromises suits affecting the trust estate, is chargeable by that creditor with lack of good faith and proper diligence because he made that compromise. We think that this query must also be answered in the negative, and there is no error in the judgment.

Affirmed.

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(187)

NARCISSA LOYD v. WILLIAM LOYD.

Presumption—Marriage—Gifts of Personal Property—Husband and Wife.

1. A plaintiff must at all stages of the trial prove such allegations as are essential to his recovery, and this he may do by submitting plenary testimony which, uncontradicted, entitles him to a verdict, or after proving directly some of the facts that he is bound to establish, shift the burden, as to others, by offering such evidence as will raise a presumption of their truth, and resting until his adversary shall have attempted to rebut the presumption so raised.
2. As a general rule, a contract relating to marriage or other matters must be presumed, in the absence of specific proof, to have been entered into under the statutes now in force as well as in contemplation of their provisions; therefore,

3. Where, in an action by a wife living apart from her husband, to recover certain articles of personal property alleged to have been given to her by him before and after her marriage, there was no testimony as to the date of the marriage, such marriage will be presumed to have taken place since the adoption of the Constitution of 1868, in which case the wife is capable of proving title to the property; moreover,
4. There is a presumption in favor of the validity of all gifts and contracts, and hence, when the uncontradicted fact appears that a husband gave to his wife articles of personal property, it must be inferred that the gift vested a title in her, and the burden is upon him in an action by the wife for the recovery of the property to show that the property was not given to her, or that the attempted gift was invalid.

ACTION brought before a justice of the peace for certain specific articles of personal property, and tried on appeal at the April Term, 1893, of WAKE, before *Brown, J.*

The plaintiff, who is the wife of the defendant, testified as follows: "The articles of personal property in controversy were given me by defendant before our marriage. After our marriage we lived at my mother's. Defendant's mother also gave me some of the property. Defendant left me two years ago, and afterwards he got out a claim and delivery against my mother and got these things from her. I was not a party to that suit. The defendant did not prepare a room for me and tell me to come and live with him. He said I could come and live with him at his mother's if I wanted to. I have not applied for a divorce. Defendant drew a knife on me, and shut me up in a room at my mother's, and he had a pistol in our room and threatened me with that. I would not go and live with him at his mother's because it was agreed before we were married that we should live at my mother's. Defendant behaved so badly toward me at my mother's while (188) we lived together that he left my mother's of his own motion. He was not driven off by my mother. I was afraid to go and live with him at any place other than at my mother's house." Upon this testimony his Honor intimated an opinion that the plaintiff had no right to bring the suit or recover possession of the property, and thereupon the plaintiff took a nonsuit and appealed.

J. C. L. Harris for plaintiff.
T. R. Purnell and Busbee & Busbee for defendant.

AVERY, J. The appeal is from an intimation of the court below that the plaintiff's testimony did not, if admitted, establish *prima facie* the right to recover. This depends upon the application of the doctrine of presumptions. She did not state what was the date of her marriage, whether before or after the Constitution of 1868 was ratified. If be-

fore, all of her personal property belonged absolutely to the husband on the celebration of the marriage, though it was given to her by him while she was still a *feme sole,* and the plaintiff could not recover certainly the articles given her before such marriage. *Giles v. Hunter,* 103 N. C., 194.

The duty rests at all stages of a trial upon the actor to prove such allegations as are essential to his recovery. He may discharge this duty by submitting plenary testimony, which, uncontradicted, entitles him to a verdict; or he may, after proving directly some of the facts that he is bound to establish, shift the burden, as to others, by offering such evidence as will raise a presumption of their truth, and resting until the other party shall have attempted to rebut the presumption so raised.

The plaintiff testifies that she was lawfully married to the defendant, and that the articles of personal property for which the action was brought were given to her by the husband before and after marriage.

If a stranger had testified that he witnessed the celebration of
(189) a marriage in some foreign country, or in this State, between the same parties, at a date not remembered, the presumption would have arisen that the rites were performed in accordance with the laws then in force in the foreign country, or in this State, as the case might be. 14 A. & E. Enc., 531, note; *State v. Patterson,* 24 N. C., 346. Nothing more appearing than the lawfulness of a marriage, at a date unknown to or not stated by a witness, the courts would not refuse to adjust the rights of children or creditors of either of the parties that might be dependent primarily upon the marital rights of the husband growing out of the contract. The contract could not be treated as a nullity for want of proof of its actual date, and the difficulty would be met by invoking the aid of the presumption not only that the marriage was celebrated in accordance with law, but in conformity to the statutes now in force in this State. *Durham v. Bostic,* 72 N. C., 353.

In *Durham v. Bostic, supra,* the Court declared that a sheriff was justified in assuming that the contract upon which the judgment was rendered and the execution issued was entered into since the ratification of the Constitution of 1868, if nothing to the contrary appeared upon the face of the execution, and the suggestion in this case led to the enactment of the later statute (The Code, secs. 234, 235 and 236). We think that, as a general rule, a contract relating to marriage or other matters must be presumed, in the absence of specific proof, to have been entered into under the statutes now in force, as well as in full contemplation of their provisions.

Moreover, there is a presumption in favor of the validity of all gifts and contracts, and we must infer, when the uncontradicted fact appears

that the defendant husband gave to his wife certain articles of personal property, that the gift vested a valid title in her. *Woodruff v. Bowles,* 104 N. C., 197. The burden is upon him to show that the property was not given to her, or that the attempted gift was invalid. In cases where the *bona fides* of a gift or conveyance from a husband (190) to his wife is drawn in question, evidence that the husband is embarrassed with debt may impose the burden of rebutting the presumption of fraud upon the wife. *Osborne v. Wilkes,* 108 N. C., 651. But there is no allegation or proof of fraud in this case. The only question involved is whether the testimony of the plaintiff, if admitted to be true, establishes her right to the articles of property which she testifies were given to her by the defendant.

We think that the court below erred in intimating that the plaintiff was not entitled to recover, if her own testimony was believed. The judgment of nonsuit must be set aside and a

New trial granted.

Cited: Ferguson v. Wright, post, 543; *Lanning v. Tel. Co.,* 155 N. C., 345; *Blount v. Fraternal Asso.,* 163 N. C., 169.

UNITED STATES ON RELATION OF THE STATE OF NORTH CAROLINA AND S. McD. TATE, TREASURER, v. R. M. DOUGLAS ET AL.

Removal of Causes—Federal Question—Misjoinder.

1. In the transfer of causes the courts look to the real parties in interest, and not to the form of the action; therefore,
2. An action brought on the relation of the State Treasurer in a State court against the sureties on a bond of a receiver appointed by the Circuit Court of the United States is not removable into the Circuit Court of the United States under the provisions of chapter 866, Laws 1888 (25 Statutes at Large), on the ground that the United States is named as a party plaintiff, the real controversy being between the Treasurer and the defendant, and the United States being only a formal plaintiff.
3. A "Federal question" is involved in an action only when a construction is required to be put upon the Constitution or some law of the United States or treaty made under its authority.
4. No "Federal question" can arise upon the construction of a bond given by a receiver appointed by the United States Court, as to whether the liability of the sureties be joint or several, it being simply a question of law to be determined by the settled rules of construction. Neither is a ques-

tion arising upon the construction of decrees and orders of the United States Circuit Court relating to said bond and ascertaining the receiver's liability such a "Federal question," where there is nothing to show that any question of construction of such decrees, etc., will arise, other than their interpretation according to their plain meaning.

5. Section 3 of the act of Congress of 13 August, 1888 (25 U. S. S. at L., 436), relating to suits against receivers, has no reference to an action against the sureties on the bond of a receiver, but merely asserts the general equity jurisdiction of the appointing court over the receiver so appointed.

6. Where there are several defendants in an action pending in a State court and there is no separable cause of action, and the defense is plainly common to all, all must unite in the petition for a removal to the United States Court; and this is so whether only one or all of the defendants have entered a defense to the action.

7. The misjoinder of parties is a mere matter of surplusage under The Code and not a fatal objection, and, therefore, the fact that the State of North Carolina is joined with the Treasurer of the State as a relator in an action in the name of the United States against the sureties on the bond of a receiver appointed by the United States Circuit Court cannot affect the action.

BURWELL, J., did not sit on the hearing of this case.

PETITION to remove an action pending in WAKE Superior Court to the circuit court of the United States, heard by *Brown, J.*, at February Term, 1893, of WAKE.

The petition was as follows:

"The petition of Robert M. Douglas, a citizen of North Carolina, respectfully showeth: That he is a defendant in the above-entitled action, and that the matter and amount therein in dispute largely exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

"That this action is returnable to the present term of this court, at which term this defendant is required to plead in accordance with law and the usage and practice of this court.

"That this action is brought upon the official bond of Samuel
(192) F. Phillips as a receiver, appointed by the United States Circuit Court for the Eastern District of North Carolina, which said bond, dated 12 December, 1879, your petitioner signed as surety.

"That said receiver was duly appointed by said Circuit Court at June Term, 1871, in a suit of equity pending in said court, in which Anthony H. Swasey and others were complainants and the North Carolina Railroad Company, David A. Jenkins, Treasurer of the State of North Carolina, and others were defendants.

"That said receiver was required by an order of said court to give a bond for the faithful performance of his duties as such receiver in the sum of $200,000.

"That in obedience to said order said receiver did execute and deliver said bond, dated 20 June, 1871, which bond your petitioner did not sign, and with which he had no connection whatever.

"That on 15 December, 1879, the said receiver tendered a new bond, dated 12 December, 1879, in the sum of $100,000, which is the bond now sued on, and which said bond was accepted by the said Circuit Court, and 'the sureties on the old bond released and discharged, except as to past transactions.'

"That, as your petitioner is informed and believes, the failure of duty on the part of the receiver which gave rise to the liability on which this suit is brought, occurred *before* the filing of the said bond, dated 12 December, 1879, on which bond alone your petitioner was surety.

"Your petitioner further respectfully showeth, that by signing said bond he incurred a liability to the United States, the obligee in said bond, in the course of a proceeding in the Circuit Court of the United States.

"That the amount of the liability of his principal, upon which this suit is brought, was fixed and determined, if at all, by a decretal order of said Circuit Court, made in a proceeding to which your (193) petitioner was not a party, without notice to your petitioner and without his knowledge; and that his liability on said bond in this suit arises under the Constitution and laws of the United States, and under said Constitution and laws he is entitled to have this civil action removed from this Superior Court of the State of North Carolina into the Circuit Court of the United States for the Eastern District of North Carolina to be next held at Raleigh on the first Monday in June, 1893, that his defense may be made and tried in said Circuit Court, and his rights and liabilities therein determined.

"And your petitioner offers herewith good and sufficient sureties for his entering in the Circuit Court of the United States for the Eastern District of North Carolina on the first day of its next session at Raleigh a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court, if said Court shall hold that this suit was wrongfully and improperly removed thereto.

"And your petitioner prays this Honorable court to proceed no further herein, except to make the order of removal required by law, and to accept the said sureties and bond, and to cause the record herein to be removed into said Circuit Court of the United States in and for the Eastern District of North Carolina at Raleigh; and he will ever pray."

The motion to remove was denied, and petitioner appealed.

Battle & Mordecai for plaintiff.

A. W. Haywood and R. M. Douglas for defendant.

MACRAE, J. This is a petition of the defendant Robert M. Douglas to remove into the Circuit Court of the United States, under the provisions of chapter 886, Laws 1888 (25 Stat. at Large), a civil action brought in the Superior Court of Wake against the *sureties alone*
(194) upon the bond of a receiver appointed by the Circuit Court of the United States for the Eastern District of North Carolina.

1. Is the cause removable because the United States is a party?

It was held in *Maryland v. Baldwin,* 112 U. S., 480, that the State was only a formal plaintiff, the actual litigation being between other parties. "The name of the State is used from necessity when a suit on the bond is prosecuted for the benefit of a person thus interested, and in such cases the real controversy is between him and the obligors on the bond."

Here it is evident that the real controversy is between the relator Tate and the defendants, the United States being only a formal plaintiff.

2. Is there a Federal question involved in this action?

By these words are meant a question requiring a construction to be put upon the Constitution or some law of the United States or treaty made under its authority. The petitioner contends that five Federal questions clearly appear from the complaint and the answer of the petitioning defendant:

First. The construction of the bond sued on, which was given under a decree of the Circuit Court of the United States; whether the said bond is joint or several, upon which will depend the amount of the defendant's liability, if he is liable at all.

Second. The construction of the order of the United States Circuit Court substituting the bond sued on for one that had theretofore been given. This defendant contends that the liability of the receiver accrued upon the first bond, and that the second bond is discharged.

Third. The construction of the decree of said court of 6 December, 1890, which only fixed the liability of the receiver, and not that of his sureties, and which was made without notice to the sureties.

Fourth. The construction of the force and effect of the de-
(195) cretal order of said court at June Term, 1891, giving the State Treasurer leave to sue, and not the State.

Fifth. The construction of section 3 of the Act of 13 August, 1888, cited above.

The action was brought at the instance of the State Treasurer, by leave of the United States Circuit Court for the Eastern District of North Carolina, against the sureties on the receiver's bond—not against the receiver. If it were an action against the principal, it seems that it might have been removed, at his instance, into the United States

Circuit Court, under section 3 of the Act of 1888. But the liability of the receiver had already been ascertained in said court.

No Federal question can arise upon the construction of the bond as to whether the liability of the sureties be joint or several. Neither the Constitution nor laws of the United States can afford any aid in the solution of this question. It is simply a question of law to be determined by settled rules of construction. The form of a receiver's bond is not prescribed by any statute of the United States. The liability of the sureties thereon, like the liability upon a judgment in the United States Court, or that upon a treasury note or bond of the United States, involves no construction of the laws of the United States. *Provident Savings Co. v. Ford,* 114 U. S., 635. The same is true of the question arising upon the construction of decrees and orders of the United States Courts. There is nothing to show that any question of construction of these decrees and orders, other than the necessity to interpret them according to their plain meaning, will arise.

If the act should receive the wide interpretation claimed for it by the petitioner, no cause could be tried in the State Court if objection were raised by the defendant, where any right had been formerly determined in a Federal Court, as a discharge in bankruptcy, or where the title to land sold under foreclosure proceedings in such court were necessary to be shown in evidence, or the like.

The simple question is, whether the defendants are liable upon the bond, and to what amount? It is like an "attempt to en- (196) force an ordinary property right acquired under the authority of judgments and decrees in the courts of the United States without presenting any question distinctly involving the laws of the United States." *Carson v. Dunham,* 121 U. S., 421. The third section of the act referred to has no reference to an action against the sureties upon the bond, but asserts the general equity jurisdiction of the appointing court over the receiver so appointed.

It might be that upon the question whether the State Court has given due effect to the judgments and decrees of the Circuit Court, there would be a right to review a judgment of the State Court, but this question has not yet arisen, and we are not to assume that it will arise.

It is to be observed that there is no separable cause of action in this case, and that there are four defendants. It is true that only the petitioning defendant has answered the complaint, and the others are all in default, but in *Putnam v. Ingraham,* 114 U. S., 57, it was ruled that the fact that one of the defendants did not answer, but was in default, was immaterial, and that the default placed the parties in no different position with reference to a removal than they would have occupied if

that one had answered and set up an entirely different defense from that of the other defendants. In *Telegraph Co. v. Brown,* 32 Federal 337, *Brewer, J.,* speaking of the Act of 1887, section 2, first clause, which is that any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States . . . may be removed by the defendant or defendants therein to the Circuit Court of the United States for the proper district, etc., says: "Under the first clause all the defendants or all the plaintiffs must unite to accomplish a removal."

The fact that the State of North Carolina has been made a relator in this action can have no effect. The misjoinder of unnecessary (197) parties is a mere matter of surplusage under The Code, and not a fatal objection. Clark's Code, 2 Ed., p. 161. We hold, therefore, that the defendant petitioner has shown no removable cause.

Judgment affirmed.

Cited: Faison v. Hardy, 114 N. C., 433, 434; *Abbott v. Hancock,* 123 N. C., 103.

B. LILES ET AL. v. J. ROWAN ROGERS ET AL.

Subrogation—Sureties on Official Bonds.

1. Subrogation is the substitution of another person in the place of a creditor, so that the former can succeed to the rights of the latter in relation to the debt, and to entitle one to such equitable relief he must have paid the money upon request or as surety or under some compulsion made necessary by the adequate protection of his own rights.
2. Where several or successive obligations of suretyship be not in substance and nature for the same thing, and have no relation to or operation upon each other, the doctrine of subrogation cannot be invoked.
3. Where a sheriff who had given separate bonds, one for the collection of State taxes and the other for county taxes, settled the first by using some of the funds collected for county taxes, and the sureties on the county tax bond were forced to make good the default of the sheriff thereon, such sureties, in the absence of knowledge on the part of the State Treasurer or of the sureties on the State tax bond, of the misapplication of funds, cannot recover the amount so misapplied from the State tax bond sureties, since the latter's bond was extinguished by performance and the State could not have been compelled to refund the money, nor could have revived the sureties' liability if the amount had been refunded.

DEMURRER to complaint heard by *Brown, J.,* at April Term, 1893, of WAKE.

The demurrer was sustained, and plaintiffs appealed.

The purpose of the action and the facts are stated in the opinion of *Chief Justice Shepherd.*

Armistead Jones and Battle & Mordecai for plaintiffs. (198)

Busbee & Busbee, Batchelor & Devereux and J. C. L. Harris for defendants.

SHEPHERD, C. J. This case comes before us on demurrer to the complaint, from which it appears that the defendant Rogers, as sheriff of the county of Wake, executed three bonds to the State, one conditioned upon the payment and collection of county taxes, one conditioned upon the payment and collection of State taxes, and the other conditioned upon the due execution of process, etc. It further appears that the sheriff, being engaged in the collection of said taxes, used a part of the money collected by him as county taxes in his settlement of the State taxes with the State Treasurer, but it is not alleged that the State Treasurer or the defendant sureties to the State tax bond had any knowledge whatever of the misapplication of the said money. This action is brought by the sureties on the county tax bond against the sureties on the State tax bond, and the prayer is that the defendants be required to "refund" to the plaintiffs the sum of twenty-seven hundred dollars, the amount misapplied by the said sheriff.

Conceding for the purposes of the argument that the sheriff held the money in the character of a trustee, it is very plain that it cannot be followed into the hands of the defendant sureties, as it does not appear that any part of the said money ever came into their possession. In the absence, therefore, of any averment connecting them with the alleged breach of trust, their liability, if any, must result from their contractual relations with the State. It is only through this medium that the plaintiffs can look for relief, and hence it is insisted that they are entitled to recover upon the principle of subrogation.

Subrogation is the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised (199) succeeds to the rights of the creditor in relation to the debt. Sheldon on Subrogation, sec. 1. The doctrine is distinctly a creature of equity, and the ground of relief does not stand entirely upon the motion of mutual consent, either expressed or implied. *Brinson v. Thomas,* 55 N. C., 414; 1 Story Eq. Jur., 472; Beach Modern Eq. Jur., 797. The principle is applied where the person claiming its benefit has been compelled to pay the debt of a third person in order to protect his own rights or to save his own property. Accordingly it has been held that the sureties on the official bond of an insolvent sheriff, who had been

compelled to pay money collected by a defaulting deputy, may recover of the sureties on a bond given to the sheriff by the deputy, conditioned upon the faithful performance of his duties. *Brinson's case, supra.* The doctrine applies also for the benefit of a purchaser who has extinguished an encumbrance upon the estate which he has purchased; of a coöbligor or surety who has paid the debt which ought to have been met by another, and in other cases of a similar character to be found in the reports and text-books. While it is true that privity is not in all cases necessary, still to entitle one to relief he "must have paid the money upon request or as surety, or under some compulsion made necessary by the adequate protection of his own right." Beach, *supra,* 801. It has therefore been held that if several or successive obligations of suretyship be not in substance and nature for the same thing, and have no relation to nor operation upon each other, the doctrine of subrogation cannot be invoked. *Langford v. Perrin,* 5 Leigh, 552.

Tested by these general principles, it would seem that the plaintiffs are not entitled to the relief prayed for, since it is not pretended that they or any one pursuant to their directions have actually paid any money for the benefit of the defendant sureties, or that by reason (200) of their contractual obligations or otherwise they were in any manner compelled to do so. Extending to them, however, the doctrine insisted upon, let us consider whether it can aid them in the present action.

As soon as a surety has paid the debt an equity arises in his favor to have all of the securities which the creditor holds against the principal debtor transferred to him, and to avail himself of them as fully as the creditor could have done. The securities referred to do not include those which are extinguished by the payment of the debt, such as the bond securing such principal debt, and unless the surety procures it to be assigned for his benefit to a third person, it is utterly extinguished both at law and in equity, and he becomes a simple contract creditor (*Briley v. Sugg,* 22 N. C., 366; *Sherwood v. Collier,* 14 N. C., 380; *Hodges v. Armstrong, ib.,* 253; *Tiddy v. Harris,* 101 N. C., 589) and entitled to be subrogated only in respect to the collateral securities taken and held by the creditor. *McCoy v. Wood,* 70 N. C., 125. Indeed, the whole doctrine of subrogation is predicated entirely upon the discharge of the original obligation. Sheldon, *supra,* and Beach, *supra,* 798. This principle is well established in this State, and is fully sustained by the English decisions prior to the enactment of the Mercantile Law Amendment Act, 19 and 20 Vict. Thus in *Copes v. Middleton,* 1 Turn., 231, *Lord Eldon* said: "The general rule therefore must be qualified by considering it to apply to such securities as continue to exist and do not get back upon payment to the person of the principal debtor. In the

case, for instance, wherein, in addition to the bond, there is a mortgage with a covenant on the part of the principal debtor to pay the money, the surety paying the money would be entitled to say, 'I have lost the benefit of the bond, but the creditor has a mortgage and I have a right to the benefit of the mortgaged estate which has not got back to the debtor.'" So also *Lord Brougham* in *Hodgson v. Shaw,* 3 M. and K., 190, observes: "Thus the surety paying is entitled to every (201) remedy which the creditor has. But can the creditor be said to have any specialty or any remedy on any specialty after the bond has gone by payment?" So it is said by Beach, *Supra,* 811: "It was formerly (prior to the act above mentioned) the rule in England that a surety could have no right of subrogation to such securities as were extinguished by the payment of the debt, such as the bond securing the principal debt."

While many of the American courts have conformed their rulings upon this subject to the principle declared by the Act of Victoria, *supra,* this Court and the courts of Alabama, Vermont, and perhaps other States, continue to follow the original doctrine as declared by the courts of England, the only modification of the rule in North Carolina being in favor of a surety who has paid the debt of a *deceased* principal. Rev. Code, ch. 110; The Code, sec. 2096. According to these principles, the bond to which the defendants were sureties was discharged by the payment and settlement made with the State Treasurer, and cannot be revived in favor of the plaintiffs.

It is further to be observed that the party for whose benefit the doctrine of subrogation is invoked and exercised can acquire no greater rights than those of the party for whom he is substituted, and if the latter had not a right of recovery the former can acquire none. Sheldon, *supra,* sec. 6; *Clark v. Williams,* 70 N. C., 679. Could the State, after the settlement with the sheriff of the State taxes, have revived the liability of the defendants by refunding the money? The answer to this question depends upon whether the money could have been recovered of the State, and it is settled by abundant authority that, in the absence of notice of the misapplication, no such recovery could have been had. Where a trustee illegally transfers trust funds it is essential to their recovery that the person receiving them should have taken them with actual notice, or under such circumstances as would put him upon inquiry. *Bunting v. Ricks,* 22 N. C., 130; *Lockhart v. Phillips,* (202) 36 N. C., 342; *Gray v. Armistead,* 41 N. C., 74; *Polk v. Robinson,* 42 N. C., 235. In the present case there was no notice, either actual or constructive, and a settlement was made in consideration of the payment. This settlement had the effect of discharging the defendant sureties, and the State having, on the faith of the payment, parted with

its security, could have resisted a recovery. If this be so, it could not voluntarily refund the money and recover of the defendants. The State, therefore, having no right to recover of the defendants, there is nothing to which the plaintiffs can be subrogated.

Suppose the defendant Rogers had borrowed money from a bank and given these defendants as sureties on the note, and when the note matured he had paid it with county funds in his hands, without the knowledge of the bank or of the defendants, could the sureties on the county tax bond of Rogers have recovered of sureties to the note which had thus been discharged? Very clearly not, and such a case differs in nothing, we think, from the case before us. This may appear to be very hard on the plaintiffs, but it is, we hear, a common practice for sheriffs to settle with the State out of the county tax funds, and it is better that sureties who assume such risks should suffer by reason of the unfaithfulness of their principals than that the Court, in the effort to extricate them, should disregard well-settled principles and introduce uncertainty and confusion into the administration of the laws.

After a careful consideration of the case, we are unable to see how this action can be maintained. The judgment of his Honor, therefore, must be

Affirmed.

Cited: Board Education v. Comrs., 113 N. C., 389; *Peebles v. Gay,* 115 N. C., 41; *Cutchin v. Johnston,* 120 N. C., 56; *Browning v. Porter,* 116 N. C., 64; *Grainger v. Lindsay,* 123 N. C., 218; *McGuire v. Williams, ib.,* 357; *Davison v. Gregory,* 132 N. C., 395; *Fidelity Co. v. Jordan,* 134 N. C., 240; *Tripp v. Harris,* 154 N. C., 298; *Bank v. Bank,* 158 N. C., 250; *Brown v. Hodgin,* 171 N. C., 691; *Joyner v. Reflector Co.,* 176 N. C., 278.

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(203)

J. E. BYRD v. C. J. HUDSON ET AL.

Libel—Privilege—Impeaching Testimony.

1. Where, on trial of an action for libel, the plaintiff, in refutation of one of the charges in an alleged libelous circular that he had sought the nomination for an office, was allowed to testify touching a conversation he had with another on the day of the nominating convention, in which he stated that he did not want the nomination: *Held,* that such testimony was competent as corroborative of his testimony denying the charge.
2. Testimony of a witness as to an attempt made by the author of an alleged libelous circular attacking plaintiff as a candidate for an office, to induce

witness to vote against plaintiff, was competent on a trial of an action for the libel as tending to show malice.

3. While it is not every question tending to disparage or disgrace a witness which is competent, yet when the impeaching question is limited to the particular acts and is not put merely for the purpose of annoying or harassing the witness, it is allowable; therefore a question put to a party on cross-examination, whether he had not compromised an action of slander for $175 without requiring the defendant therein to retract the slanderous charge of perjury, was competent as an impeaching question.
4. Where objectionable language used by counsel in addressing a jury is not objected to at the time it cannot be objected to later.
5. If words are actionable in themselves and "unprivileged," falsity and malice are *prima facie* presumed; if they are "absolutely privileged," falsity and malice are irrebuttably negatived; in case of "qualified privilege," falsity and malice must be proven; and while proof of falsity will not raise a presumption of malice, proof of malice will remove the protection of privilege and shift the burden of proving the truth of the charge upon the defendant.

ACTION for libel, tried before *Shuford, J.*, and a jury, at September Term, 1893, of WAYNE.

The libel complained of was a circular letter published and circulated by the defendants, and was as follows:

"To the Democratic Voters of Wayne County:

"At the Democratic meeting held 3 September, 1892, for Grantham's Township, to select delegates to the county convention and nominate a tax collector, constables, etc., Joe Byrd was fraudulently (204) placed on the ticket for tax collector. Now I will let you know how he secured the nomination. A few so-called democrats, led by a so-called democrat, who, six years ago, worked so insidiously to defeat W. F. Kornegay for the Legislature—he (or they) began this nefarious work some time before the primary, and on this day negroes, radicals and boys under age were allowed to vote, and by this treacherous scheme Byrd secured the fraudulent nomination for tax collector. Now let us see who Joe Byrd is, practically. He has been for years a kicker and sorehead because he was not recognized in the distribution of offices, notwithstanding his incompetency to fill any office. Two years ago he bolted the democrats and ran, as he called it, independent, for constable, and was gloriously defeated, after taking the advantage of democrats who could not read and placing his tickets in with theirs and telling them they were voting a full democratic ticket. Besides, he mingled with the negroes and radicals, folding his name in with their tickets. The fact, is, he has been so very hungry for office for a number of years that the county commissioners took pity on him and appointed him constable

a few years ago, but he did not serve. Why? Because he could not furnish the $500 bond they required of him. What next? On the day the third party held their primary Byrd went to one of the leaders and asked his help to secure the nomination for tax collector on the third party ticket, assuring his third party brother that he had been in sympathy with this movement for the last two years; but a little consultation with the leaders, and Byrd learned that they had a much better and stronger man. So they turned him down. Now ain't he a beautiful democrat? Certainly. Well, let us see how his personal or private character stands. I can safely say, without fears of successful contradiction, that there is not a man, regardless of color, in Gran-
(205) tham's Township, that cannot show up a better and purer record than Joe Byrd. I will only refer you to reliable parties who have had dealings with him and have been swindled through his monstrous lies. First, we will take poor Nancy Warrick, his wife's own aunt, who will testify that he collected her county allowance of $2 per month—and for more than one month, at that—and never paid her one cent of it. Second, ask L. B. Cotton how Byrd treated him about the pigs. Ask Job Warrick if Byrd didn't pocket $1.20 of his money arising from pig sales. C. J. Hudson will tell you how mean he treated him about the cane-mill and pocketed all the money arising from the sales of the toll syrup. Ask John Talton how the corn held out in measure he bought from Byrd. Just one year ago his landlord was forced to seize his crop by writ of claim and delivery to prevent a total destruction of the rents, after Byrd had forfeited all the stipulations of the contract, and this bill of costs, under judgment, stands today against him on Justice Broadhurst's docket. He won't pay it; too dishonest. Now, only a very few days ago he was refused credit for one gallon of cider, as he wanted to treat a crowd. But it was no treat. Henry Strickland will vouch for this assertion. Now, as for the truth, it and Byrd are entire strangers, and when he lies—and that is all the time—he will swear to it just as quick as he can reach the Book. Can give you several instances where he is guilty of perjury. Good rye liquor is what he always calls for at the bar counter, and seems to be devoted to it, notwithstanding he is a strict member of the Methodist Church, says the Lord's prayer after the preacher, and sings in a sonorous voice. Now, democrats, I beseech you, as I shall do, to work for the success of our ticket, except Joe Byrd, and all will be well. Should you so far forget yourselves as to elect Byrd tax collector, and the tax-money goes into his hands, it will be 'Farewell Mr. Stamps, you'll never reach the treasury.' I could cite you many more of Byrd's dirty and insidious tricks, but think that is sufficient to convince any democrat that Joe Byrd is no democrat, besides having no private character. These are all

indispensable facts and will be vouched for by reliable and (206) honorable parties. Now, in conclusion, will say he actually refused to go on the stand in his own township. Why? Because he knew that the questions that would be put to him would be more than he could stomach.

"J. C. COX,
"C. J. HUDSON,
"W. J. HUDSON and
"T. C. OVERMAN,
Democrats."

The issues submitted on the trial were as follows:

"1. Are the charges set out in the circular, or any of them, false?

"2. If so, was said circular published maliciously?

"3. What damage, if any, is the plaintiff entitled to recover?"

The court required the plaintiff to specify what charges made in the circular were libelous, and charged the jury that if they found all these specified charges false or true to make a general finding as to the first issue, but that if they found any of them true and others false, to specify in their findings as to the first issue which were true and which were false.

There was evidence offered upon the part of the plaintiff tending to show that the charges in said circular were all false, and that they were made from malice, and the defendants offered evidence tending to show that said charges were true and not made maliciously, but on the contrary, were made in good faith to inform the voters of Wayne County of the character of the man for whom their votes were solicited for a public office.

One of the charges contained in said circular was that on the day the people's party, commonly known as the third party, held their primary election in Grantham's Township, the plaintiff Byrd (207) went to one of the leaders and asked his help to secure the nomination for tax collector on the third party ticket, assuring his third party brother that he had been in sympathy with this movement for the last two years. It was admitted that the plaintiff was a candidate on the democratic ticket for tax collector for the year 1892, having been nominated after the third party primary.

The defendants offered evidence tending to prove that the plaintiff was present at the primary meeting of the third party, and had asked H. B. Keen, who was chairman of said party, to help him secure the nomination for tax collector on the third party ticket.

Exception 1.—The plaintiff Byrd was offered as a witness in his own behalf, and admitted that he was present at the third party meeting, but stated that he did not then or at any other time try to secure a nomina-

tion for tax collector at their hands, and testified as follows: "On the day of said meeting Mr. McCullen asked if I wanted the nomination for tax collector. I asked him what he meant, was it in reference to the meeting to be held this p.m. He said no. I told him I would not accept the nomination except from the democratic party." The witness further stated that he did not know at the time whether McCullen was a democrat or a populist, but that he had afterwards learned that McCullen had voted the democratis ticket. To the foregoing conversation with McCullen defendants excepted.

Exception 3.—J. A. Stevens was introduced as a witness for the plaintiff, and testified as follows: "I was a candidate last year on the democratic ticket, and the plaintiff Byrd was a candidate on the same ticket. The defendant C. J. Hudson came to me during the campaign and asked me not to support Byrd as the democratic nominee. I told
(208) him that I would have to support Byrd. And he then said that if I did he would not vote for me or any one else who would vote for Byrd." This was offered to show malice. Objected to by defendants. Objection overruled, and defendants excepted.

Exception 4.—The defendant C. J. Hudson was offered as a witness in behalf of the defendants, and testified to facts, which if believed, tended to prove the truth of all the charges in the said circular. Upon cross-examination the plaintiff, for the purpose of impeaching the witness, asked him the following questions: "Did you not a few years ago bring an action against E. B. Jordan to recover damage for slander, and did you not compromise that action for $175, without requiring Jordan to retract the charge of perjury?" Objected to by defendants, and objection overruled, and defendants excepted. Witness said he brought suit for slander against Jordan, and compromised it for $175. That he did not know whether or not a retraction was made, as he left that with his attorneys.

Witness then said in explanation that he brought suit against E. B. Jordan for slander, on the ground that Jordan had charged him with perjury. That he did not want Jordan's money, but only wanted to vindicate his own character. That he agreed that if Jordan would admit that he had slandered him, and pay his counsel and costs, that he would compromise the matter. The amount agreed upon was $175. That in compliance with this agreement a judgment was rendered for said amount. That Jordan neglected to pay the amount agreed upon, and conveyed his lands to his son, and that he, Hudson, was compelled to issue execution and sell the land and buy it. That after he bought it he offered to let Jordan have it back for $400, but refused to convey it to Jordan's wife, as he did not care to aid in defeating Jordan's

other creditors. The defendant also afterwards introduced without objection the record of the judgment in the said case of *Hudson v. Jordan.*

One of the counsel for plaintiff in his argument to the jury said that C. J. Hudson, in his suit against Jordan, had sold his (209) character for $175, and that the purchaser was badly cheated. The court was engaged at the time and did not hear the remark, and it was not called to the attention of the court, no exception was made thereto, and the court had no knowledge of the same until after the conclusion of the trial. There was evidence outside of the circular tending to show malice. The court, among other things charged the jury as follows:

"The language of the circular may be considered in finding whether the defendants were actuated by malice in publishing it, the fact that it imputes to the plaintiff the commission of crime, and that one of the defendants professes to have been damaged by the plaintiff may all be considered in coming to a conclusion as to the presence of malice," and the defendants excepted to so much of this charge as instructed the jury that the fact that the circular imputed a crime might be considered in determining malice.

There were special instructions asked by the defendants, which were given as requested, and also special instructions were asked by the plaintiff, some of which were given and some rejected, but no exception was made at the time of the trial. The court fully instructed the jury on the law applicable to the facts proven by the witnesses, and to the charge there was no exception made, either at the time or in the defendants' statement of the case on appeal. At the conclusion of the charge, the court asked the counsel of both sides if there was anything else they wished called to the attention of the jury, and they answered that there was not. The jury rendered a verdict for the plaintiff, assessing damages at $1,100 for which judgment was given, and defendants appealed.

The special instructions given at the request of the defendants were as follows:

"1. That the defendants, as citizens, were interested in the proper and efficient administration of the public service, and it (210) being admitted that the plaintiff was a candidate for office they had the right to criticise him and his conduct, and to inform the public as to his character and qualifications.

"2. That if the defendants honestly believed, and had probable cause to believe, that the character of the plaintiff was such that the public interest demanded his defeat, the defendants had the right to sign and circulate the circular declared on, provided the charges therein contained were true, or the defendants had probable cause to believe the same to be true, and if they signed and circulated such circular, honestly

believing the same to be true, and had probable cause for such belief, and moved by a desire to promote the public interest, the plaintiff is not entitled to recover any damages, and the jury will answer issue No. 3 'None.'

"3. That the circular being written by a citizen of a candidate for office, the presumption is that it was written in good faith, and the burden is upon the plaintiff to show that it was written maliciously and without probable cause.

"4. That malice is not mere anger, but is any indirect and wicked motive inducing the defendants to defame the plaintiff.

"5. That if the circular was not written for the mere purpose of defaming the plaintiff, but was written with an honest desire to inform the public, it was not written maliciously, and if the jury so believe they must answer issue No. 2 'No.'

"6. That in this case mere proof that the charges in the circular were false is not sufficient, but the plaintiff must go further and show that the defendants knew they were false at the time of writing the circular, or had no probable cause to believe them to be true. And if the jury do not believe that the defendants knew the said charges were false at the time of making them, they will answer issue No. 2 'No,' unless express malice has been proven by other testimony.

"7. That if the defendants wrote the circular, not recklessly or maliciously, or without probable cause, but in good faith and from a
(211) desire to benefit the public service, the plaintiff cannot recover, although all the charges made against the defendant may be untrue.

"8. That it is to the interest of the public that the unfitness of candidates should be made public, and any citizen in good faith making charges against said candidate does no more than his duty, and will be protected by the law, provided he does not act recklessly or maliciously.

"9. That upon the charge of perjury made in the circular, the defendants having alleged said charge to be true, it is not incumbent upon the defendants to prove the truth of said charge beyond a reasonable doubt, but by a preponderance of the evidence."

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

CLARK, J. 1. The testimony of the plaintiff touching his conversation with McCullen was competent as corroborative of his testimony on the trial. *S. v. Whitfield,* 92 N. C., 831. There is no exception that the court failed to instruct the jury that they should consider it only in that view, and it will be presumed that proper instructions were given. *S. v. Powell,* 106 N. C., 635.

2. The second exception was abandoned, and as to the third exception the testimony of Stevens was clearly competent, as tending to prove malice. 13 A. & E. Enc., 431, sec. 4.

3. The question put to defendant on cross-examination, whether he had not compromised an action for slander for $175, without requiring the defendant to retract the charge of perjury, was an impeaching question. It was competent, as tending to impeach him as a witness to show he had put a low estimate on his own charac- (212) ter. The witness was properly allowed to explain the matter. It is, however, not every question tending to disparage or disgrace a witness which is competent. The question must be, as in this instance, limited to particular acts, and even then, when it is apparent to the court that it is put merely for the purpose of annoying or harassing the witness, the trial judge may in his discretion refuse to compel him to answer. *S. v. Gay,* 94 N. C., 814.

4. The comment of counsel was not objected to at the time and the objection is lost. *S. v. Suggs,* 89 N. C., 527; *S. v. Lewis,* 93 N. C., 581; *S. v. Powell,* 106 N. C,, 635; *Hudson v. Jordan,* 108 N. C., 10.

5. In *Ramsey v. Cheek,* 109 N. C., 270, the law of slander and libel is thus summarized: (1) When the words are actionable *per se,* unless the matter is privileged, the law presumes malice, and the burden is on the defendant to show that the charge is true. (2) If it is a case of absolute privilege, no action can be maintained, even though it could be shown that the charge was both false and malicious. (3) In a case of qualified privilege, the burden is on the plaintiff to prove both the falsity of the charge and that it was made with express malice. Or to put it more succinctly, if the words are actionable *per se* in "unprivileged" slander and libel, falsity and malice are *prima facie* presumed. If "absolutely privileged," falsity and malice are irrebuttably negatived, and if it is a case of "qualified privilege," falsity and malice must be proven.

In *Ramsey v. Cheek, supra,* which like the present, was a case of qualified privilege [13 A. & E. Enc., 420 (11)], it was further held that in such cases, while the plaintiff must prove both the falsity of the charge and malice, and though the falsity of the charge taken alone was not sufficient to establish malice without showing further that the defendants knew it to be false, or would have known if they had used the opportunities open to them, yet "the plaintiff is not bound to prove malice by extrinsic evidence. He may rely on the words (213) of the libel itself, and on the circumstances attending its publication, as affording evidence of malice. Odgers' Slander and L., sections 277-288; 13 Am. and Eng. Enc., 431." The instruction now excepted to, that "the language of the circular which imputes to plaintiff a crime,

and alleges that one of the defendants had been damaged by him, may be considered by the jury in finding whether the defendants were actuated by malice in making the publication, is therefore unobjectionable. *Bradsher v. Cheek,* 109 N. C., 278. There was other evidence of malice, among others that of Stevens, which is not set out in the third exception. The language of the circular might, therefore, be properly considered in connection with the other evidence in passing upon the question of malice. Newell on Defamation, 770.

It should be noted that in cases of qualified privilege, though proof of falsity does not *per se* raise a presumption of malice, yet proof of malice takes away the protection of privilege, and shifts the burden of proving the truth of the charge upon the defendant. *Ramsey v. Cheek, supra,* and cases cited, 109 N. C., p. 275.

No error.

Cited: Burnett v. R. R., 120 N. C., 518; *S. v. Tyson,* 133 N. C., 696; *S. v. Parker,* 134 N. C., 215; *Tise v. Thomasville,* 151 N. C., 283; *Muse v. Motor Co.,* 175 N. C., 469.

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(214)

STATE ON THE RELATION OF THE RAILROAD COMMISSIONERS v. WESTERN UNION TELEGRAPH COMPANY.

Railroad Commission—Jurisdiction—Interstate Commerce—Telegraph Lines—Rates.

1. Under the authority given to the Railroad Commission "to make rates for the transmission of messages by any telegraph line or lines doing business in the State," the commission has the incidental power (subject to the right of appeal) to ascertain what particular corporation is in the control of or operates any of such lines in this State, in order that the commission may exercise its authority to fix rates, as well as to know against whom to proceed for a violation of its regulations.
2. Telegraphic messages transmitted by a company from and to points in this State, although traversing another State in the route, do not constitute interstate commerce, and are subject to the tariff regulation of the commission.
3. Under the statute (ch. 320, Acts 1891) establishing the Railroad Commission, no authority is given to the commission to direct a telegraph company to open, for commercial messages, offices at which only its own business, or that of a railroad company with which it has intimate relations, is transacted. Whether it is the duty of such company to take such messages may be tested in a civil action under the tender of a message. (AVERY, J., *dissentiente.*)

Upon a petition or complaint of Eugene P. Albea, the defendant was summoned to appear before the Board of Railroad Commissioners to answer for an alleged violation of the tariff rate prescribed by the commission for the transmission of telegraphic messages.

The substance of the complaint was that Mr. Albea had applied to the agent of the defendant at Elizabeth City about 1 December, 1891, for the transmission of a message, consisting of not more than ten body words, from Elizabeth City to Winston, N. C., and tendered to the agent twenty-five cents for said service. The agent demanded sixty-five cents for the service, and refused to transmit the message unless Mr. Albea should pay that amount, which he refused to do.

The plaintiff prayed that the defendant might be required to answer the charges of the complaint, and for an order commanding the defendant to desist from further violations of the law.

The plaintiff did not ask for any recompense.

The defendant filed answer on 17 May, 1892, denying that it was engaged, at the time mentioned in the complaint, or is now engaged, in the transmission of telegraphic messages between Elizabeth City and Winston, or that it was subject to the act of the General Assembly creating the commission. It also alleged that another corporation, under the name of the Elizabeth City and Norfolk Telegraph Company, was engaged in the transmission of messages upon a line extending from the town of Edenton and through the said town of Eliza- (215) beth City in said State to the towns of Portsmouth and Norfolk in the State of Virginia; that the said line was, at the time mentioned in the complaint, and is now, operated and controlled exclusively by the said Elizabeth City and Norfolk Telegraph Company, and that the last named company was not then, and is not now, operated by or under the control of the defendant; that the agent to whom the plaintiff made tender of fare was not the agent of the defendant; that the only relation between the defendant and the Elizabeth City and Norfolk Telegraph Company is shown by the contract, which was filed as a part of the answer; that there was then, and is now, no way of transmitting a message from Elizabeth City to Winston except through the said line from Elizabeth City to Norfolk, Virginia, and the shortest way by which said message could be transmitted was through the city of Richmond, in the State of Virginia, by which it would necessarily traverse a route through said State; that the defendant had violated no law of the State, nor any rule or regulation of the commission, and that the matter being one of commerce between the States, the commission had no jurisdiction thereof.

The commission heard evidence, and made a finding of facts, upon which it made the following conclusions and order:

"1. That the office at Elizabeth City, to which the plaintiff applied for the transmission of a message to Winston, was and is an independent office, and that the defendant is not responsible for the act of the operator in refusing to transmit the message as alleged in the complaint.

"2. That the telegraphic offices at Edenton and Elizabeth City, and at other points in North Carolina on the line of the Norfolk and Southern Railroad, are under the control of the defendant, and that
(216) the operators in said offices, although employed by the said railroad company, are the agents and operators of the defendant, and that it is their duty to transmit commercial messages when tendered to them to points in North Carolina at the rate prescribed by the commission.

"3. That telegraphic messages transmitted by the defendant over its said line from Elizabeth City or Edenton, or other points in North Carolina, to points in said State, do not constitute commerce between States, although traversing another State in the route, and are subject to the rate prescribed by the commission.

"Therefore, it is adjudged that the plaintiff is entitled to no recompense from the defendant, but the commission is of the opinion, and doth so order and adjudge, that the telegraphic offices at Edenton and Elizabeth City, and at other points on the Norfolk & Southern Railroad in North Carolina, are offices of the defendant, and that said offices shall transmit commercial messages at the rate prescribed by the commission, when tendered, to any point in North Carolina.

"This order shall take effect on and after 20 August next."

From the judgment in this case the defendant prayed an appeal to the next term of the Superior Court of Wake County, which was granted.

Upon the hearing of the appeal at February Term, 1893, of Wake Superior Court, before *Brown, J.*, it was agreed that the court, instead of a jury, should find the facts, if the court should be of the opinion that the findings of the Board of Railroad Commissioners were not binding upon the Superior Court.

His Honor being of the opinion that said facts were not binding upon the court, made the following findings of fact from the evidence taken by the commission:

"It appears that the board of railroad commissioners adjudged that Albea, the plaintiff, was entitled to recover nothing, and that the appeal of the defendant is from the order of the board making a
(217) regulation to go into effect 20 August. It is therefore unnecessary to set out the facts as to the relation of said Albea to the case. The findings and ruling of the board, so far as Albea is concerned, are not excepted to. The court further finds as matter of fact

that the defendant is a corporation operating and owning an extensive system of telegraphy throughout the United States and the State of North Carolina; that the defendant owns, controls and operates a line of telegraph from Edenton, N. C., passing through Elizabeth City, N. C., Hertford and other places along the track of the Norfolk and Southern Railroad to Berkley, Va., and Norfolk, Va.; that there is a contract in writing between defendant and said Norfolk and Southern Railroad in respect to the maintenance and operation of said telegraph line, which is set out in the records in this case and is made a part of these findings; that the defendant company receives and transmits over this line messages at the towns and villages of Hertford, Moyock and other places along said line, to any place in North Carolina where it has an office, at the uniform rate of twenty-five cents per message of ten words, except at Edenton and Elizabeth City; that such messages received at Hertford, Moyock and other places are sent over the wires of defendant leading into Virginia and back into North Carolina; that the rate adopted by defendant at Hertford, Moyock, etc., along said line was in obedience to the order of the Board of Railroad Commissioners, which went into effect 1 June, 1891, set out in the findings of the board in the record; that there is a line of telegraph erected along the public county roads from Edenton, N. C., through Hertford and Elizabeth City, to Norfolk, Va., owned by the Elizabeth City and Norfolk Telegraph Company, with offices on said line only at Edenton and Elizabeth City, N. C.; that this line does business with the defendant company through a traffic contract dated 19 April, 1880 (Exhibit A), and renewed 19 April, 1890, for five years (said contract is set out in the record and is made a part of these findings); that the (218) shortest and only route over the wires of defendant by which messages can be now transmitted from Elizabeth City and all points along the Norfolk and Southern Railroad, traverses, in part, the State of Virginia, and thence back into North Carolina; that the wires of defendant now used in the transmission of this business are those leading to Norfolk via Richmond back into North Carolina; that this route now used by the defendant in transmitting messages from its offices on the Norfolk and Southern Railroad to Winston, N. C., is the shortest and best route between those points, and traverses about 269 miles in Virginia. Findings Nos. 2 and 3 of the board are approved. The charges made by the Norfolk and Elizabeth City Telegraph Company for messages from Edenton and Elizabeth City to points in North Carolina are much greater than the rates fixed by the commissioners, which rate is observed by defendant at Hertford, N. C., Moyock and Centreville, towns within a short distance of Elizabeth City and in North Carolina. That the defendant has not opened an office at Edenton and

Elizabeth City for commercial business solely because of its contract with the Elizabeth City and Norfolk Telegraph Company, set out in the record, the defendant's officers believing that to do so would be an act of bad faith. Defendant has a continuous line from Edenton and Elizabeth City to Winston, N. C., and if its offices in those two towns were opened for commercial business, messages could be transmitted direct to Winston. Defendant has a railroad office on its wire at Elizabeth City and Edenton, and the right, so far as the Norfolk and Southern Railroad is concerned, to take commercial business. That such railroad business as train reports would have preference to transmission, but the court does not think, from the evidence, that commercial business would be unusually or unreasonably delayed—possibly, in some cases, a half hour or so as testified to by defendant's agent, Pamplin; that there are offices upon defendant's wire at Elizabeth City and
(219) Edenton, operated by operators paid by the Norfolk and Southern Railroad Company, and the same arrangement between the defendant and the said company at Moyock, Hertford and Centreville. These operators are also agents of the defendant, and do commercial business for defendant and comply with the regulations and rates fixed by the board at the last three towns. Findings Nos. 4 to 12, inclusive, are approved. The present telegraph office at Elizabeth City on defendant's wire is at the depot, about a half or three-quarters of a mile from the central part of the town; but, at the rate fixed by the board and charged by the defendant elsewhere, the court is of the opinion that the defendant would get nearly all the business, even if it used the present office at the depot. That the taking of commercial business over defendant's wire at Elizabeth City and Edenton at the rates established by the commissioners will necessarily injure the Elizabeth City and Norfolk Telegraph Company very materially, but will greatly benefit those communities and not injure the defendant. In respect to rates, those towns would then be put upon an equality with the neighboring towns hereinbefore referred to."

His Honor thereupon affirmed the order of the commission, and defendant appealed.

R. O. Burton for plaintiff.
Strong & Strong and Robt. Styles for defendant.

SHEPHERD, C. J. The Board of R. R. Commissioners is "authorized and required to make or cause to be made just and reasonable rates of charges for the transmission of messages by any telegraph line or lines doing business in the State." Laws 1891, ch. 320, sec. 26. It may cause notice to be served upon corporations or persons charged with a

violation of the rules prescribed by it in pursuance of the above authority, and upon a hearing, may ascertain and direct ample and full recompense to be made by the company, corporation or (220) person offending, which recompense may be enforced by civil action, as prescribed in section 10 of said act. *Mayo v. Telegraph Co.*, 112 N. C., 343. It is a court of record, with "the powers and jurisdiction of a court of general jurisdiction," as to all subjects embraced in said act, by virtue of Laws 1891, ch. 498. *Express Co. v. R. R.*, 111 N. C., 463.

The defendant being served with process appeared before this Court to answer the complaint or petition of Eugene Albea, called plaintiff herein, and filed its answer. Thereupon a trial was had, and it appearing that the said Albea, having tendered no commercial message to any of the offices of the defendant, it was adjudged that he had no cause of complaint, and the proceeding was practically dismissed as to him. The commission, however, having the defendant before it, proceeded under its general powers to make rates of charges for the transmission of business by the defendant from and to points in North Carolina, which rate of charges is the same as that applicable to all the offices of the defendant within the limits of the State. The commission, after having disposed of the complaint of Albea, should have amended the proceeding so as to substitute as complainant the "State of North Carolina *ex rel.* the Railroad Commission"; but as it has been fully heard without reference to this irregularity, we have ordered that the amendment be now made, and the proceeding be entitled accordingly. The Code, sec. 273; *Reynolds v. Smathers*, 87 N. C., 24.

The order of the board, which is the subject of review, is as follows: "That the telegraph offices at Edenton and Elizabeth City and at other points on the Norfolk and Southern Railroad in North Carolina are offices of defendant, and that said offices shall transmit commercial messages at rates prescribed by the commission to any point in North Carolina." This order is based upon certain findings of fact, (221) some of which are excepted to. But inasmuch as it was agreed that his Honor might pass upon these questions in the place of a jury, and as there was evidence sufficient to warrant such findings as under the view we have taken are material to be considered, they cannot be reviewed in this Court. *Battle v. Mayo*, 102 N. C., 413; *Fertilizer Co. v. Reams*, 105 N. C., 283.

It appears, in the language of his Honor, "that the defendant owns, controls and operates a line of telegraph from Edenton, N. C., passing through Elizabeth City, N. C., Hertford, Moyock, N. C., and other places along the track of the Norfolk and Southern Railroad to Berkley and Norfolk, Virginia. . . . That the company receives and trans-

mits over this line (commercial) messages at the towns and villages of Hertford, Moyock and other places along said line to any place in North Carolina, where it has an office, at the uniform rate of twenty-five cents per message of ten words, except at Edenton and Elizabeth City," at which two last named offices the defendant receives no commercial business, the said offices being devoted exclusively to the business of the Norfolk and Southern Railroad Company in respect to the running of its trains, etc.

It is very clear to us that under the authority given it to make rates for "the transmission of messages by any telegraph line or lines doing business in the State," the commission (subject, of course, to the right of appeal) has the incidental power of ascertaining what particular corporation is at least in the control or operation of the same. This would seem indispensably necessary to a proper exercise of its authority to fix rates as well as to know against whom to proceed under section 10 of the act, in the event of a violation of such regulation. The exception in this respect, therefore, must be overruled.

A more serious question, however, is presented by the ruling of the court upon the third conclusion of the commission, which is as follows: "That telegraphic messages transmitted by defendant over its said line from Elizabeth City or Edenton, or *other points* in North Caro-
(222) lina to points in said State, do not constitute commerce between States, although traversing another State in the route, and are subject to the rate prescribed by the commission." It appears from the findings of fact that the shortest and only route over the wire of the defendant by which messages can be transmitted to many points in this State, necessarily "traverses, in part, the State of Virginia and thence back into North Carolina," and it is insisted that such messages so transmitted are interstate commerce, and therefore not subject to the tariff regulation of the commission.

It is not denied that the offices of the defendant along the line of the Norfolk and Southern Railroad Company, except those at Edenton and Elizabeth City, receive commercial messages for transmission, in the manner described, to various points in North Carolina, and it is plain that such business does not relate to the intercourse of the citizens of this State with those of some other State. It is purely an intercourse between the citizens of North Carolina through the means afforded by a corporation having extensive facilities of communication within the limits of the said State, and the uniform rates fixed by the commission for the business, which the said corporation accepts, or is under legal obligation to accept, in no wise affects or interferes with any business which the defendant undertakes for the citizens of Virginia, either between themselves or with the citizens of other States. Neither are we

able to see how the mere fixing of rates between different points in this State can in any way conflict with any regulation which the State of Virginia may have the power to impose in respect to its domestic business. It must be manifest, therefore, that this business is without a single feature of interstate commerce, unless it can be found in the fact that in the transmission of a message it must traverse a part of the defendant's own line in the State of Virginia. We have been referred to several cases in which it has been held, in respect to the (223) continuous carriage of freight by a railroad company under such circumstances, that a State commission had no power to prescribe rates, and also that a State had no right to levy a tax upon the gross receipts, even as to that part derived from the transportation within its territory. *S. v. R. R.,* 40 Minn., 266; *Sternberger v. R. R.,* 29 S. C., 510; *Cotton Exchange v. R. R.,* 2 Interstate Commerce Reports, 386.

Without attempting to discuss these cases, and to distinguish them in some particulars from ours, it is sufficient to say that if they are not distinctly overruled, their principle is certainly in conflict with the reasoning of the opinion of the Supreme Court of the United States (*Fuller, C. J.,*) in *R. R. v. Pennsylvania,* 145 U. S., 192.

The State of Pennsylvania levied a tax on the gross receipts of all railroad companies derived from the transportation by continuous carriage from points in Pennsylvania to other points in the same State—that is to say, passing out of Pennsylvania into other States and back again into Pennsylvania in the course of transportation.

The Lehigh Valley Railroad Company has no road of its own from Mauch Chunk, Pennsylvania, to Philadelphia, but in transporting its coal and general freight traffic it uses its own line from Mauch Chunk to Phillipsburg, New Jersey, from which point it is, under an arrangement for a continuous passage with the Pennsylvania Railroad Company, transported by the latter road via Trenton to Philadelphia. It was insisted that the State could not tax that part of the gross receipts derived from so much of the transportation as was wholly within the State of Pennsylvania, because the freight, during its entire transportation, was impressed with the character of interstate commerce. The court sustained the tax, and although it may be said that the decision relates only to that part of the receipts which arose from the transportation within the State, yet it must be apparent from a (224) perusal of the opinion that this conclusion was reached on the ground that such continuous transportation was not interstate commerce. Indeed, the entire course of the reasoning of the court is in support of this very principle, and is clearly applicable to the question involved in this appeal. The language of the court is plain and emphatic, and we do not feel at liberty to ignore it, and especially when it

is applied to telegraphic communication, under the peculiar circumstances of this case. The court, in speaking of the grant of power to regulate commerce between the States, remarked: "But, as was said by *Chief Justice Marshall,* the words of the grant do not embrace that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to *nor affect other States.* Commerce, observed the *Chief Justice,* undoubtedly, is traffic, but it is something more; it is intercourse." The court further proceeded to say: "The point of departure and the point of arrival were alike in Pennsylvania. The intercourse was between those points, and not between any other points. Is such intercourse, consisting of continuous transportation between two points in the same State, made interstate because in its accomplishment some portion of another State may be traversed? Is the transmission of freight or messages between two places in the same State made interstate business by the deviation of the railroad or telegraph line on to the soil of another State?" Again, in another part of the opinion it is said: "It is simply whether, in the carriage of freight and passengers between two points in the same State, the mere passage over the soil of another State renders that business foreign which is domestic. We do not think such a view can be reasonably entertained, and are of the opinion that this taxation is not open to constitutional objection by reason of the particular way in which Philadelphia was reached from Mauch Chunk." The court uses the words "continuous passage," (225) from which it is to be inferred that if, after the freight passed beyond Pennsylvania, it was transferred to another transportation agency in New Jersey, and by this other agency carried to Philadelphia, it would be interstate commerce, and the same is consigned to a point in New Jersey and then reshipped to Philadelphia. It is in evidence that the defendant owns and operates a continuous wire, or system of wires, from the offices mentioned to other points in North Carolina, and therefore it is not compelled to transfer its business to any other agency outside of North Carolina in order that it may reach its destination in this State. In this respect our case is stronger than the one from Pennsylvania, as the road from Phillipsburg to Philadelphia was owned and operated by another corporation, and not by the Lehigh Valley Railroad Company. We refrain from entering into an extended discussion of the subject, and are content to follow the reasoning of the Supreme Court of the United States, whose authority upon such questions is conclusive.

We will observe, however, that we think the principle laid down by that court is peculiarly adaptable to cases like the present, in which there is such an exceptional facility for the evasion of State authority to

fix the rate of charges. This may be done in an instant and without expense by so adjusting the wires that messages must go through a part of the territory of another State. We think the exception should be overruled.

The remaining exception which it is necessary to consider relates to that part of the order which substantially commands the defendant to open its offices at Edenton and Elizabeth City for the transmission of commercial messages. It is urged, but not very seriously pressed, that the order only means that the company shall transmit such messages at the prescribed rates, whenever it undertakes to do that character of business at those points. The order of the court is not, in our opinion, susceptible of such a construction, but whatever doubt there may be must surely vanish when it is considered in connection with (226) the finding of the commission upon which it is based, and which the court, in its judgment, approves and adopts. This finding is that the operators in said offices "are the agents and operators of the defendant, and that it is their *duty* to transmit commercial messages *when tendered* to them to points in North Carolina at the rate prescribed by the commission." It is impossible, without violating all rules of interpretation, as well as destroying the plain import of language, to adopt the view contended for, and it is, therefore, necessary to determine whether the commission act conferred upon the commission the authority to direct that the said offices should be opened for commercial business. That it has no such authority is settled by this Court in *Mayo v. Telegraph Co.*, 112 N. C., 343 (decided since the trial of this proceeding), in which it is declared that "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." Under this decision, so much of the order as is open to the objection referred to must be set aside, but in all other respects it is affirmed.

Let it not be understood that we are deciding that a corporation, like the defendant, exercising its franchise, the right of eminent domain and other unusual privileges, under a grant from the State for the benefit of the public, can give any undue or unreasonable preference or advantage to any particular person, company or corporation. This question may be presented when commercial messages have been tendered and declined at the said offices, but we think it would be going outside of the record to pass upon it now. And especially should we refrain from doing so when the intelligent counsel, who appeared (227) for the defendant, very properly concluded that the court would

not anticipate a point of such importance, and therefore did not deem it necessary to discuss it.

The order of the court is modified and

Affirmed.

Cited: McLean v. Breece, post, 393; *Leavell v. Tel. Co.,* 116 N. C., 220; *Caldwell v. Wilson,* 121 N. C., 474; *Pate v. R. R.,* 122 N. C., 880; *Hendon v. R. R.,* 125 N. C., 128; *Corporation Com. v. R. R.,* 170 N. C., 569; *Bateman v. Tel. Co.,* 174 N. C., 99; *Speight v. Tel. Co.,* 178 N. C., 150.

W. M. RUSS v. J. B. BROWN & CO.

Admission of Indebtedness in Answer—Costs.

Where a defendant in his answer offers to permit judgment to be entered against him for a sum which he admits to be due, and a verdict is rendered therefor, he is liable only for the costs of the action up to the filing of the answer and of judgment.

ACTION, tried before *Bryan, J.,* and a jury, at October Term, 1892, of WAKE.

The issues were submitted to the jury, and the responses were as follows:

"1. Did the plaintiff contract with defendant as alleged in the complaint?" Answer: "No."

"2. Were the plaintiff's services for the first three months satisfactory to the defendant?" Answer: "They were at $75 per month."

"3. What sum does the defendant owe the plaintiff?" Answer: "$61.50 with interest from 14 January, 1892, until paid."

The plaintiff contended that defendant was indebted to him in the sum of $524 upon a special contract, the terms of which are set out in the complaint. That plaintiff continued in defendant's service for one year from the time the contract was made, and insisted that he was entitled to the sum claimed by him in the complaint.

When the defendant Brown was on the stand in his own be-
(228) half, the defendant's counsel, with a view to corroborating Mr. Brown in his testimony that the services of the plaintiff for the first three months were not satisfactory to him as justifying the defendant in agreeing to the increased wages claimed by the plaintiff, asked the witness what, in his opinion, the plaintiff's services were actually

worth to the defendant for the first three months. The plaintiff objected on the ground that the only question to be tried was, whether there was a special contract, as alleged. The objection was overruled, and the plaintiff excepted. The witness was allowed to answer the question, and the plaintiff again excepted. In this connection, and by way of corroboration of the defendant's testimony that he was not satisfied with Russ's services as justifying the increase of wages asked by him, the defendant was permitted to testify that he could have procured other salesmen to do such work as Russ did, and as well as he did, for the three months, at $75 per month. That he had employed others at this rate, who did the same work, and were worth to him as much as Russ, and that among them he had one salesman in North Carolina whose services were worth to him as much as Russ's services, to whom he paid only $50 a month. There was no exception to this testimony.

Under the alleged contract plaintiff was employed as salesman only for the States of North and South Carolina.

The defendant, with a view of showing by the witness Brown that the plaintiff's services were not satisfactory to him as justifying the increased pay, offered to show by him what sales the plaintiff made for defendant during the first three months. His Honor confined this testimony to the first three months of plaintiff's service, and permitted no inquiry to be made for the last nine months. There was no exception to this testimony by the plaintiff.

Judgment was rendered for the plaintiff in accordance with the verdict, and for costs up to the filing of the answer and of judg- (229) ment. It was further adjudged that the defendant recover of the plaintiff the costs accruing subsequent to the answer, except the cost of the judgment.

Armistead Jones for plaintiff.
Battle & Mordecai and J. W. Hinsdale for defendant.

MACRAE, J. The jury having found in response to the first issue that there was no such special contract as was alleged in the complaint; in other words, that the defendant did not agree to pay the plaintiff one hundred and twenty-five dollars per month for the last nine months in the year, provided defendant was satisfied with plaintiff's services for the first three months, the second issue became immaterial, and the practical question was as to the value of the plaintiff's services, for it was admitted that plaintiff had served defendant for a year.

Upon the third issue, the first and second having been put out of the way, the question and answer were relevant and material.

The second exception was not relied upon, and is not set out.

The defendant having admitted in his answer that he was indebted to the plaintiff in the sum of $61.50, and offered to permit judgment to be entered against him for said sum, his Honor properly adjudged that defendant was liable only for the costs of the action up to the filing of the answer and of judgment.

Affirmed.

(230)

SOL. J. BARFIELD v. ALLY A. BARFIELD ET AL.

Devise—Charge of Legacy on Land—Venditioni Exponas, Void Sale Under.

1. A sale and deed made under a writ of *ven. ex.*, issued in 1853, several years after the death of the judgment debtor, and without proof of a *scire facias* against his heirs, are void.
2. A testator, after reserving a life estate for his widow, devised a tract of land to his son, providing that before he took possession of the home plantation (where his mother would reside during her lifetime) the son should give or secure to testator's two daughters $350 each, and in case of default therein the land should be sold and the said sum paid to the daughters and the balance to the son: *Held*, (1) that the title of the land vested in the son and his heirs, and the daughters had neither title nor right of possession, the land being simply charged with the payment of the sums directed to be paid to the daughters, whose privilege it was to prevent their brother from occupying the land and appropriating the rents to his own use until they received the sums due them; (2) that in obtaining possession after the death of the widow, and asserting a title adverse to their brother, the daughters became liable for the rents accruing after the death of the life tenant up to the date of the offer of their brother to pay the sums charged upon the land.

ACTION to recover possession of a tract of land described in the complaint, tried at April Term, 1893, of WAYNE, before *Brown, J.*, and a jury.

The plaintiff introduced in evidence the will of John Barfield probated in 1849, under the fourth and fifth items of which he claimed the land in controversy. The fourth item of said will is as follows: "I leave to my wife, during her natural life, the home plantation, and I hereby request her to relinquish her life-estate in forty acres of land which she has, as will appear by reference to a deed made by me to my

(231) son Solomon Barfield, in lieu of that to have her life-estate in my home place." And the fifth item of said will is as follows: "After the death of my wife I give, devise and bequeath to my son Solomon Barfield, to him and his heirs forever, all my lands lying

on Buck Swamp, in the county of Wayne; my son Solomon, however, is, before he takes possession of the home plantation (where his mother will reside during her lifetime), required to give or to secure to my two youngest daughters, Ally A. and Mary, three hundred and fifty dollars apiece, and in case he fails to pay or secure the payment to them of the above-mentioned sums, three hundred and fifty dollars to each of them, then and in that case, the home plantation to be sold, they each to receive the share due to them, and the balance of the money to go to Solomon and his heirs."

It was admitted that the land in controversy and described in the complaint is the same as the home plantation spoken of in said will; that John Barfield died on 20 October, 1848, and that Nancy Barfield, his widow, qualified as his executrix May, 1849; that Nancy Barfield, his widow, died on 16 August, 1889; that the defendants, Ally A. Barfield and Mary R. Barfield (now wife of the defendant D. A. Cogdell), are children of John and Nancy Barfield, and are the persons named as devisees in said will; that defendants are in possession of said land, and were in possession when this action was begun, and refuse to surrender the same; that said defendants have been in possession of said land since the death of Nancy Barfield, and were in possession at and before her death; that on 27 February, 1892, a notice was delivered to the defendants, of which the following is a copy:

"To Ally A. Barfield and Mary R. Cogdell:

"The will of our father, John Barfield, leaves the home plantation, on which he lived, on Buck and Thunder swamps, in Wayne County, to me after the death of our mother, Nancy Barfield, now dead, and I now demand possession of the same, and I will now pay you each the sum of $350, as provided in said will, if you elect to (232) surrender the possession of said land to me without litigation. Let me know if you will do so by 15 March, 1892; otherwise I shall assume that you refuse to deliver possession on the condition above stated.

"This 27 February, 1892. "SOL. J. BARFIELD.

"Witness: DANIEL KORNEGAY."

And that no other offer to pay or secure said sums of $350 each has been made, and no money has been tendered, except as shown in said notice, or paid into court by the plaintiff.

Evidence was introduced by plaintiff to show the rental value of the land since 1889. The defendants put in evidence the following receipt: "Received of Mrs. Nancy Barfield, $75, being the amount bid by her

for the tract of land on which John Barfield lived, on the north side of Thunder swamp, and on the south side of Falling Creek, joining the lands of George L. Kornegay, James Manly and others, sold by me by virtue of a writ of *venditioni exponas* issued from the Superior Court of Johnston County to satisfy a judgment recovered by the State of North Carolina, and returnable to the Fall Term, 1853, of said Court. Said land being sold by me at public auction, this 15 August, 1853." (Signed by the sheriff); and also a writing signed by said sheriff (O. Coor), dated in 1869, and purporting to be a deed made by him to Nancy Barfield, and corresponding to this receipt. This writing was not under seal. They also put in evidence a deed from Nancy Barfield to them, dated in 1881, and introduced evidence to show that they had rented out the land since her death, and had received the income therefrom. There was evidence tending to show that the *femes* defendant had removed two houses from the land, and their value.

(233) One of the plaintiff's witnesses testified that he paid to Nancy Barfield, executrix of the will of John Barfield, $600, between 1850 and 1855. This was objected to. The objection was overruled, and the defendants excepted. The following issues were submitted to the jury:

"1. Is the plaintiff the owner and entitled to the possession of the land described in the complaint, subject to the defendants' lien, under the will of John Barfield, as alleged in the complaint?

"2. Are defendants in possession thereof?

"3. What is the annual value for rents and profits?

"4. What damages other than rents is plaintiff entitled to recover, if any?"

His Honor instructed the jury that if they believed the evidence, the plaintiff was the owner and entitled to the possession of the land, and they should answer the first issue, "Yes." The defendants excepted as follows:

1. For that the plaintiff deduced his title from the fifth item of the will of John Barfield, and by said item a condition precedent was attached before the plaintiff could take possession of the land, to wit, the payment or security of $350 each to Ally and Mary Barfield, and it did not appear that the condition had been performed. That the offer of 27 February, 1892, did not fulfill the condition, for the reason, first, that the plaintiff did not make an actual tender of money; second, that he did not tender interest from the death of the life-tenant; and third, that he did not pay into court the amount admitted to be due the defendants.

2. For that the defendants had shown title to the land in controversy. There was a verdict for the plaintiff.

His Honor stated the account between the parties, charging the plaintiff with interest on the sums due to the *femes* defendant ($350 each), from the day of the death of Nancy Barfield, the tenant for life, and charging the defendants with the rents from January 1, 1890, and also with the damages assessed by the jury on account of the removal of the houses. And having then determined what was due to (234) each of the *femes* defendant ($141.44), he then made the following order: "It is ordered and adjudged that plaintiff is the owner and entitled to recover possession of the property described in the complaint; that upon the payment to the clerk by the plaintiff for the use of Ally A. Barfield and Mary R. Cogdell of the above-mentioned sums of money, then he shall issue a writ of possession. In case said money is not paid with interest within ninety days after 17 April, 1893, it is adjudged that the land be sold for cash, after advertisement, by the clerk to the highest bidder, at the courthouse in Wayne County, and in case of sale, that he report his proceedings to the next term of court, and that the proceeds be applied in payment of said liens in favor of defendants, hereinbefore adjudged, and remainder, if any, to plaintiff. Let costs be taxed against defendants, and execution issue after the expiration of said ninety days." The defendants excepted to the judgment rendered:

1. For that the plaintiff is allowed rents prior to 27 February, 1892, when he claims to have tendered payment to the defendants.

2. For that it was adjudged that plaintiff was the owner and entitled to the possession of the land in controversy.

W. T. Faircloth for plaintiff.
Allen & Dortch for defendants.

BURWELL, J. The contention of the defendants, that Nancy Barfield acquired a title in fee to the land in dispute by virtue of a purchase of it by her at a sale made in 1853 by the sheriff of Wayne, has nothing to support it. They themselves showed that if it was sold at all (of which, in fact, there was no legal evidence), the sale was made under a writ of *venditioni exponas* issued several years after the death of John Barfield, and they made no proof whatever of the is- (235) suing or serving of any *scire facias* against his heirs. The writ was null and void. *Samuel v. Zachary,* 26 N. C., 377. And every act done under it goes for nothing.

This disposes of the defendants' alleged title, and brings us to the consideration of the rights of the parties under the will of John Barfield.

By that will the title to the land, upon the death of the widow, was vested plainly in the plaintiff and his heirs. The title did not, in any

event, descend to all the heirs of John Barfield, nor did it, in any contingency, vest in the *femes* defendants, his daughters. The latter had, under that instrument, neither title nor right of possession. The land was simply charged with the payment of the sum of $350 to each of them. It was their privilege, according to the provision of the will, to prevent their brother from occupying the land and appropriating the rents to his own use till these sums were paid to them, and to that end they might have invoked the aid and protection of a court by proper proceedings to have the rent collected and reserved and the land sold, so that out of the fund so arising they might certainly have what the testator said they should have. Instead of pursuing this course, they chose to assert a title adverse to the plaintiff devisee, to rent out the land and appropriate the income to their own use; and when their pretended title fails, they insist that the rents accruing from the death of the life-tenant to the date of plaintiff's offer to pay the sums charged on the land for them, belonged to them, and that they are not accountable therefor to the plaintiff. His Honor properly decided that they should account for all the rents received by them. As we have said, they had no right to the possession, either as heirs-at-law or devisees. Had the testator put the title in them with a provision that it should vest in the plaintiff when he paid to each of them the sums named, the rents might have been theirs till the payment was made or there was a proper tender of payment. But this provision the testator did not see fit to make.
(236) He willed that they should have a certain sum of money. This they will have received when the judgment is fully executed, with interest thereon from the day it was first incumbent on the plaintiff to pay it. It is difficult to see how they can, with any show of reason, claim more than this under their father's will.

The judgment, we think, in a very proper manner, provides for an adjustment and settlement of the conflicting claims of the parties.

The evidence in relation to the payment of money to the executrix of John Barfield's will was immaterial. Its admission, if erroneous, was harmless.

Affirmed.

W. H. MORRIS v. J. R. HERNDON ET AL.

Registration of Mortgage—Constructive Notice—Estoppel in Pais.

1. Registration is not sufficient notice to prevent the operation of an estoppel *in pais;* if ever permitted to have such effect, such constructive notice applies only where the conduct creating the alleged estoppel is mere silence and not an affirmative act or word; therefore,
2. Where B, the owner of a second mortgage, induced A, a first mortgagee, to take another mortgage on the same property to secure the same indebtedness, thereby giving to the second mortgage a legal priority over the new mortgage, A having no actual notice of B's lien: *Held,* that B was not a mere silent bystander, but a participant in the transaction, and he cannot be permitted to retain the advantage obtained under such circumstances.

ACTION, tried before *Connor, J.,* and a jury, at October Term, 1892, of DURHAM.

The plaintiff introduced the following evidence:

W. H. Morris, plaintiff: "I held the mortgage of 19 March, 1886. There was due in 1889 thirty dollars and interest. L. C. (237) Herndon came and asked me to take J. R. Herndon out from under Mr. Farthing. I paid Mr. Farthing two hundred and thirty-five dollars and sixty-five cents. Two hundred was for Herndon's mother; the balance was for J. R. Herndon ($35.65). L. C. Herndon was present at the time the last mortgage was executed. He was present during the entire transaction. He said nothing about his lien. They did not tell me that L. C. Herndon had a mortgage. I paid Farthing the money. Farthing wrote the mortgage. I did not say that unless I could get all the encumbrances, I would not take anything."

At the close of plaintiff's testimony the defendant asked the court to charge the jury that, if they believed the evidence, they should answer the issues in favor of the defendants. This was refused, and the defendants excepted on the ground that, taking the plaintiff's testimony as true, he was not entitled to recover.

The defendants introduced the following witnesses, who testified as set out:

L. C. Herndon: "Farthing wrote the mortgage. Morris said that he could not take up the mortgage Farthing held against my mother unless he could get all. Morris said that he would take it on the same terms that Farthing had it. I did not urge Morris to take up the mortgage against J. R. Herndon. I paid the amount to Morris for my brother. Morris was told that I had a mortgage."

J. R. Herndon said: "That he was not present when the mortgage to Morris was being prepared. He signed it as prepared by Farthing."

G. C. Farthing, a witness for defendants, said: "The general character of the Herndons is good. I had a mortgage against Herndon's mother. Morris had agreed to settle it if Herndon would pay him thirty dollars he owed him for some rent. Henderson fixed the thirty (238) dollars in a mortgage. Herndon took up both mortgages. I wrote the mortgage from J. R. Herndon to Morris from a mortgage J. R. Herndon had previously given to me. L. C. Herndon was present when the mortgage was written."

The foregoing was all the evidence of the defendants.

The defendants duly requested his Honor to charge the jury that, upon the whole evidence, the plaintiff was not entitled to recover, and that they should answer the issues in favor of the defendants. This request was refused, and the defendants excepted, and, after verdict and judgment for plaintiff, appealed.

Boone & Parker for plaintiff.
Fuller & Fuller for defendants.

SHEPHERD, C. J. In *Mason v. Williams,* 66 N. C., 564, it is said by *Ruffin, J.,* that registration is not sufficient notice to prevent the operation of an estoppel *in pais;* but even were it otherwise, such constructive notice would not affect the rights of an innocent purchaser, if under the circumstances it was the duty of the owner to make known his claim or title. This doctrine of constructive notice when applied to estoppels, "if correct at all (says Mr. Pomeroy, 2 Eq. Jur., 810), is correct only within very narrow limits, and must be strictly confined to cases where the conduct creating the alleged estoppel is mere silence. If the real owner resorts to any affirmative acts or words, or makes any representation, it would be in the highest degree inequitable to permit him to say that the other party, who had relied upon his conduct and had been misled thereby, might have ascertained the falsity of his representation." In speaking of the same principle, Mr. Herman says (2 Estoppel and Res. Jud., 9627): "But this is applicable only in the case where the foundation of the estoppel is in silence or acquiescence, for when the owner *concurs in a sale by participating in it at the time,* it (239) becomes his own act." So it is said in *Mason v. Williams, supra,* that "the rule is that if a man so conducts himself, whether intentionally or not, that a reasonable person would infer that a certain state of things exists, and acts on that inference, he shall be afterwards estopped from denying it."

Without discussing the general doctrine as to the effect of mere silence, where there is registration, and leaving it as it stands upon our decided cases, and, conceding for present purposes the principle stated by the above-mentioned authors, we think there was something more here than simple acquiescence, and that his Honor was correct in refusing to charge that, upon the whole testimony, the interpleader, L. C. Herndon, was not estopped to claim the property in controversy. The instruction must be treated as if it were a formal demurrer to evidence, in which case it is well settled that the testimony must be considered in the aspect most favorable to the opposite party. *Gwaltney v. Timber Co.*, 111 N. C., 547. Viewed in this light, it was certainly a legitimate inference that L. C. Herndon was chiefly instrumental in bringing about the transaction, by virtue of which he insists that the claim of the plaintiff should be postponed to his own.

The plaintiff had a first mortgage executed by J. R. Herndon, and at the instance of the said L. C. Herndon the plaintiff took another mortgage upon the same property to secure the same indebtedness. The effect of taking this last mortgage was, it is conceded, to release the first, and by this means it came about that a second mortgage held by the said Herndon acquired the legal priority. Should he be permitted to avail himself of this advantage obtained under such circumstances? The plaintiff had no actual knowledge of the said mortgage, and we think it was the duty of Herndon to inform him of its existence. He was not a mere silent bystander, but a *participant* in the entire transaction, and as the property was insufficient to secure the claims of both, it was inconsistent with good faith and fair dealing that he should have encouraged the plaintiff by his silence to part with his existing (240) security. The plaintiff had a right to infer from the conduct of Herndon that he at least had no claim which would necessarily or probably impair the security which was then being substituted, at his instance, for the plaintiff's prior lien. This brings the case within the principles declared in the passages we have extracted from Herman, and *Mason v. Williams, supra,* which are abundantly sustained by our own decisions, as well as other authorities.

Affirmed.

Cited: Shattuck v. Cauley, 119 N. C., 295; *Bank v. Bank,* 138 N. C., 472; *Debnam v. Watkins,* 178 N. C., 242.

TOWN OF DURHAM v. RICHMOND AND DANVILLE RAILROAD COMPANY ET AL.

Appeal—Divided Court—Affirmance of Judgment Below.

Where an appeal has been pending for several years, and this Court is evenly divided (one of the Judges not sitting), the uniform practice of appellate courts in such cases will be followed, and the judgment below will be affirmed and the appellant required to pay the costs.

ACTION, heard before *Winston, J.*, at September Term, 1891 of CHATHAM.

From the judgment both parties appealed.

Batchelor & Devereux, T. B. Womack, W. W. Fuller and J. S. Manning for plaintiff.

D. Schenck, F. H. Busbee, W. A. Guthrie, J. W. Graham and John Manning for defendants.

CLARK, J. In this case both the plaintiff and defendants appealed. *Mr. Justice Burwell* did not sit, and the Court is evenly divided. The appeals have now been standing on this docket four terms. Under (241) these circumstances, following the uniform practice of appellate courts in such cases, the judgment below stands, not as a precedent, but as the decision in this case. *Marshall, C. J.*, in *Etting v. Bank*, 11 Wheat., 59; *Taney, C. J.*, in *Benton v. Woolsey*, 12 Pet., 27, and in *Holmes v. Jenson*, 14 Peters, 540; *Washington v. Stewart*, 3 Howard, 413, 424; *Chase, C. J.*, in *Reeside v. Reeside*, 8 Wall., 302; *Durant v. Essex Co.*, 8 Allen (Mass.), 103; 85 American Dec., 685. The appellants will respectively pay the costs, each in their own appeal.

Plaintiff's appeal affirmed.

Defendants' appeal affirmed.

Cited: Whichard v. R. R., 117 N. C., 615; *Puryear v. Lynch*, 121 N. C., 256; *Bank v. Burlington*, 124 N. C., 252; *Boone v. Peebles*, 126 N. C., 825; *Miller v. Bank*, 176 N. C., 159.

RALEIGH AND WESTERN RAILWAY COMPANY v. THE GLENDON AND GULF MINING AND MANUFACTURING COMPANY.

Foreign Will—Probate—Certificate, Sufficiency of—Attestation Clause.

1. The certificate of probate of a will executed in another State, disposing of real estate in this State, is defective which does not show affirmatively that the will was executed according to the laws of this State, i.e., written in the testator's lifetime, and signed by him or some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least, no one of whom shall be interested in the devise, etc.
2. The mere recitation in the attestation clause of a will that it was signed in the presence of two witnesses, etc., is not affirmative evidence.

ACTION, tried at September Term, 1893, of CHATHAM, before *Brown, J.*

The right of plaintiff to recover was admitted to depend, among other questions, upon the sufficiency of the probate of the will of Oliver Ditson, an exemplification of which was recorded in Chatham (242) County, to pass the land in dispute.

The attestation clause of the will and the probate in Massachusetts were as follows:

"Signed, sealed and published and declared by the aforesaid testator as and for his last will and testament, in the presence of us, who at his request, in his presence, and in the presence of each other, have prescribed our names as witnesses hereto.

"OTIS NORCROSS,
"EDWIN HOWLAND,
"GREENVILLE NORCROSS."

"At a probate court holden at Boston, in and for said county of Suffolk, on 14 January, 1889, on the petition of Charles H. Ditson, of the city, county and State of New York, Reuben E. Demmon and Charles F. Smith, both of said Boston, praying that the instrument therewith presented, purporting to be the last will and testament of Oliver Ditson, late of said Boston, deceased, may be proved and allowed, and letters testamentary issued to them, the executors therein named, without giving a surety or sureties on their official bonds; and the heirs-at-law, next of kin and all other persons interested having been duly notified, according to the order of court, to appear and show cause, if any they have, against the same; and no party objecting thereto, and it appearing that the said instrument is the last will and testament of said deceased, and was legally executed, and that the said testator was at the

time of making the same of full age and sound mind, and that said petitioners are competent persons to be appointed to said trust: It is, therefore, decreed that said instrument be proved, approved and allowed as the last will and testament of said deceased, and letters testamentary be issued to said petitioners, they first giving bond without sureties for the due performance of said trust.

"JOHN W. MCKINN, *Judge of Probate Court.*"

His Honor intimating an opinion that the probate of the will
(243) did not show affirmatively that it was executed according to the requirements of the laws of North Carolina, the plaintiff submitted to a nonsuit and appealed.

Batchelor & Devereux and T. B. Womack for plaintiff.
W. A. Guthrie and H. A. London for defendant.

AVERY, J. The right of plaintiff to recover was dependent upon the competency of the will of Oliver Ditson, which constituted an essential link in its chain of title. The court intimated the opinion that the probate was defective, in that it failed to show affirmatively that the will was executed in accordance with the statutes (The Code, secs. 2136 and 2156). The first of the sections referred to requires, in explicit and mandatory terms, that "no will or testament shall be good or sufficient in law to convey or give any estate, real or personal, unless such will shall have been written in the testator's lifetime and signed by him, or some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least, no one of whom shall be interested in the devise or bequest, except as hereinafter provided." The subsequent section (2156), as amended by the Act of 1885, ch. 393, allows a properly authenticated copy of a will proved in another State to be recorded in this State, but provides that "when such will contains any devise or disposition of real estate in this State, such devise or disposition shall not have any validity or operation unless the will is executed according to the laws of this State, and that fact must appear affirmatively in the certified probate or exemplification of the will."

It is essential to the sufficiency of a will to pass the property, the title to which is in dispute, that it shall be subscribed in the presence of the testator by two witnesses at least. Prior to 1 January,
(244) 1856, the fact of subscription by both witnesses could be shown, on proof in common form, by one of them. *Jenkins v. Jenkins,* 96 N. C., 254; *Moody v. Johnson,* 112 N. C., 798. But since that date it must appear that at least two of the witnesses, if living, were examined, or, if one has died, the living witness must testify, not only to

the handwriting of the dead witness, but to his subscription, as well as his own, in the presence of the testator. *In re Thomas,* 111 N. C., 409. Such is the proof prerequisite to sufficiency, where the original record is made in this State. But where a certified copy from another State has been recorded, we are met by the further plain provision of the statute that the fact of subscribing by at least two witnesses must appear affirmatively "in the certified probate or exemplification of the will." The Code, sec. 2156. The mere recitation in the attestation clause is not affirmative evidence.

It is not necessary to discuss or pass upon the other questions raised by the intimations of the judge, the proof of the paper-writing purporting to be the will of Ditson being defective. The judgment of the court below is

Affirmed.

Cited: Davis v. Blevins, 123 N. C., 383; *McEwan v. Brown,* 176 N. C., 251.

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TRINITY COLLEGE v. THE TRAVELERS INSURANCE COMPANY OF HARTFORD.

Insurable Interest—Wagering Contract.

1. An insurable interest in the life of another is such an interest arising from the relation of the party obtaining the insurance, either as creditor of or surety for the assured, or from ties of blood or marriage to him, as will justify a reasonable expectation of an advantage of benefit from the continuance of his life.
2. Except in cases where there are ties of blood or marriage, the expectation of an advantage from the continuance of the life of the insured, in order to be reasonable, must be founded in the existence of some contracts between the person whose life is insured and the beneficiary, the fulfillment of which the death will prevent; and when this contractual relation does not exist, and there are no ties of blood or marriage, an insurance policy becomes what the law denominates a wagering contract, and hence illegal and void, no matter what good object the parties may really have in view; therefore,
3. A policy of insurance issued on the life of a member of a religious organization, for the benefit of an institution deriving its patronage and support mainly from the members of such religious organization, is void.

ACTION, heard on complaint and demurrer before *Brown, J.,* at October Term, 1893, of DURHAM.

The complaint was as follows:

"1. That plaintiff is a religious corporation, located at Durham, N. C., and controlled by the Methodist Episcopal Church (South) of North Carolina.

"2. That defendant is a corporation organized and doing business under the laws of the State of Connecticut.

"3. That on 23 August, 1893, Edward Samuel Sheppe, of Durham, county of Durham, State of North Carolina, applied to said defendant for a policy of life insurance for $1,250 upon his own life, for the benefit as in said application expressed, of 'Trinity College, Durham, N. C., a religious corporation, sustained and controlled by the Methodist Episcopal Church (South) of North Carolina, of which church applicant is a member'; and that thereafter, to wit on 5 September, 1893, said plaintiff having paid the premium demanded therefor by said defendant, said defendant, in consideration of such premium and the application therefor by said Sheppe, issued and delivered to plaintiff its policy No. 75,658, by which it insured the life of said Sheppe for the sum of $1,250, payable upon acceptance by said company of satisfactory
(246) proof of his death, as therein expressed, to 'Trinity College, of Durham, N. C., a religious corporation, sustained and controlled by the Methodist Episcopal Church (South) of North Carolina, of which church the said E. S. Sheppe is a member.'"

(Paragraphs 4 and 5 relate to the agreement of the company to pay the cash-surrender value, etc., the surrender of the policy, and demand for the payment of such cash-surrender value.)

"6. That at the time of said application and at the date of issue of said policy said Sheppe was, and he is now, a member of said Methodist Episcopal Church (South) of North Carolina in good and regular standing.

"7. That said plaintiff is supported and maintained by voluntary contributions, gifts, bequests and devises from members of said church, and by yearly assessments levied by the conferences of said church upon the various churches composing such conferences, which are paid by the members of said churches, and that but for such contributions, gifts, bequests, devises and assessments said plaintiff would fail of that support which is necessary to its useful existence.

"Wherefore, plaintiff demands judgment that it recover of said defendant the sum of $275, with interest, etc."

The demurrer was as follows:

"The defendant demurs to the complaint filed in this action, and assigns as grounds for demurrer that the said complaint does not state facts constituting a cause of action:

"1. For that it appears in said complaint that the plaintiff corporation, Trinity College, has no insurable interest in the life of the assured, E. S. Sheppe, and that the said corporation has paid to the defendant all the premiums that have been paid on said policy of insurance.

"2. For that it appears in said complaint that the contract of insurance sued upon was but a wagering contract entered into by the said plaintiff and defendant, the said plaintiff having, at the time the said contract was entered into, and still having, no interest in the continuance of the life of the assured, E. S. Sheppe, and said (247) contract being such a wagering contract, is against public policy and cannot be enforced.

"3. For that while it appears in said complaint that the assured, E. S. Sheppe, filed application for the policy of insurance, it appears that the plaintiff paid the premiums and was the real party in making said wagering contract, and therefore cannot be permitted to recover on it.

"4. For that it appears in the complaint that the contract of insurance provided for the payment of the cash surrender value upon the legal surrender of the policy, and it appears that the attempted and alleged surrender was made by the plaintiff only, and during the lifetime of the assured, which attempted and alleged surrender was not legal, the assured not joining in it.

"Wherefore, defendant demands judgment that the said complaint does not state facts constituting a cause of action, and that it go without day and recover its costs."

His Honor sustained the demurrer and dismissed the action, and plaintiff appealed.

Fuller & Fuller for plaintiff.
Boone & Parker for defendant.

BURWELL, J. It is said in May Insurance, sec. 102 a, that "to have an insurable interest in the life of another one must be a creditor or surety, or be so related by ties of blood or marriage as to have reasonable anticipation of advantage from his life," and that an insurable interest in the life of another is "such an interest arising from the relation of the party obtaining the insurance, either as creditor of or surety for the assured, or from ties of blood or marriage to him as will justify a reasonable expectation of advantage or benefit from the continuance of his life."

Accepting these definitions as those which are to be deduced from all the adjudged cases, and leaving out of consideration (248)

those cases in which the fact that there was an insurable interest was dependent upon the existence of ties of blood or marriage, we find that this author asserts substantially that in cases where there exists no ties of blood or marriage, one can have an insurable interest in the life of another only when he is the creditor of or the surety for the assured. Under certain conditions a partner has an insurable interest in the life of his copartner. *Insurance Co. v. Luchs,* 108 U. S., 498. So one who is interested pecuniarily in the future earnings of another under a contract with him has an insurable interest in his life. *Bain v. Insurance Co.,* 23 Conn., 244. These instances and others that might be mentioned seem to show that, except in cases where there are ties of blood or marriage, the expectation of advantage from the continuance of the life insured, in order to be reasonable, as the law counts reasonableness, must be founded in the existence of some contracts between the person whose life is insured and the beneficiary, the fulfillment of which the death will prevent—it must appear that by the death there may come damage which can be estimated under some rule of law, for which loss or damage the insurance company has undertaken to indemnify the beneficiary under its policy. When this contractual relation does not exist and there are no ties of blood or marriage, an insurance policy becomes what the law denominates a wagering contract, and under its rules, made and enforced in the interest of the best public policy, all such contracts must be declared illegal and void, no matter what good object the parties may really have in view. The end will not, in the eye of the law, justify the means.

No error. Affirmed.

Cited: Albert v. Ins. Co., 122 N. C., 94; *Powell v. Dewey,* 123 N. C., 105; *Hinton v. Ins. Co.,* 135 N. C., 321; *Victor v. Mills,* 148 N. C., 116; *Hardy v. Ins. Co.,* 152 N. C., 291.

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C. ISLEY v. JOHN BOON AND WIFE.

Service of Summons—Return of Officer—Jurisdiction—Judgment—Collateral Attack.

1. The word "executed" in the return of a process *ex vi termini* carries with it the idea of a full performance of all that the law requires; therefore,
2. A return on a summons "Executed by delivering a copy to J. B. and wife, R. Fees, sixty cents," necessarily implies a delivery to each of the two.

3. Where, in an action to recover land, the defendant disputes plaintiff's title upon the ground that the summons in a special proceeding, under a decree in which plaintiff had purchased the land and to which plaintiff was not a party, had not been served upon the defendant, who was a defendant in such special proceedings: *Held*, (1) that the trial judge erred in holding that the return on the summons in such special proceedings was only *prima facie* evidence of service and could be rebutted by showing that in fact no such service was made; (2) that even if the service of the summons had been apparently irregular, the judgment in such special proceedings could not be collaterally attacked in the action at bar.

ACTION for the recovery of land, heard before *Bryan, J.*, and a jury, at March Term, 1893, of ALAMANCE.

Plaintiff appealed.

The pertinent facts are set out in the opinion of *Chief Justice Shepherd.*

L. M. Scott, J. E. Boyd and C. E. McLean for plaintiff.
J. T. Morehead and W. P. Bynum, Jr., for defendants.

SHEPHERD, C. J. The plaintiff claims the land in controversy through one John Ireland, who purchased the same at a sale made by E. S. Parker, administrator of Samuel Adams, pursuant to a decree in a special proceeding granting to the said administra- (250) tor license to sell the land of said Adams for the purpose of creating assets to pay the indebtedness of his intestate. The plaintiff introduced a part of the record in the said proceedings and, under a ruling in this case on a former appeal *(Isley v. Boon,* 109 N. C., 555), was permitted to prove by parol evidence such other parts thereof as were lost and could not, after proper and diligent search, be found in their legal depository. That part of the record which had not been lost consisted of a summons dated 27 November, 1875, which was returned under the signature of the sheriff in these words: "Executed by delivering a copy to John Boon and wife Rowena. Fees, sixty cents." The docket of the clerk was also introduced, which showed the following entries: "Summons issued 27 November, 1875. Summons executed."

The defendant Rowena, who is an heir of the said Samuel Adams, contends that it does not appear from said return that she was properly served, and she insists that she can in this action collaterally attack the decree in the special proceeding and thus defeat the title of the plaintiff, who, as we have stated, claims under John Ireland, who was not a party to the said proceeding, and does not appear to have had any notice of the alleged absence of service on the said Rowena.

It was undoubtedly necessary, in order to confer jurisdiction, that the summons should have been served, and at the time of the commence-

ment of the above-mentioned proceeding the method of service was by the delivery of a copy of the summons to the defendant personally. Bat. Rev., ch. 17, sec. 82. The courts have been very liberal in construing the returns of sheriffs, and in Alabama it was held that the word "executed" was sufficient, the court saying that the word itself implies that the writ has been executed according to law. *Mayfield v. Allen,* 1 Minor, 274. The like ruling has been made in Virginia and Kentucky, the courts holding "that the word 'executed' *ex vi termini* carries with it the idea of a full performance of all that the law requires." *Com-*
(251) *missioners v. Murray,* 2 Vir. Cases, 504; *Bridgers v. Ridgley,* 2 Litt (Ky.), 395. This principle is of very general application, except in those States where, by statute, alternative modes of serving process have been adopted in which instances a much more stringent doctrine is held, and it is required that the return must show not only that the process has been served, but which one of two or more statutory modes of bringing a defendant before the court has been adopted by the officer. It was in reference to provisions of this nature that some of the cases cited by defendant's counsel were decided. In this State there was but one mode of service provided by law, and the principle referred to has been explicitly recognized by the court in *Strayhorn v. Blalock,* 92 N. C., 292. At that time the statute required that the summons should be served by reading the same to the defendant (The Code, sec. 214), and the court held that the return of the summons with the indorsement, "served," implied that the officer had fully discharged his official duty by reading the summons to the defendant. Of course, where the officer undertakes to set forth the manner of service, and it appears that he has not complied with the requirements of the law, the force of such implication is entirely destroyed, but unless the return shows a repugnancy that cannot be harmonized the principle applies with unimpaired vigor. The return before us states that the summons was executed by delivering a copy to the said Boon and wife, and we see nothing unreasonable in holding that this language is not inconsistent with the idea that he delivered to each of them a copy. None of the cases cited by counsel, so far as we have been able to examine them, goes to the extent of deciding that such a return is void and therefore may be attacked collaterally. The returns in those cases were either set aside upon direct proceedings, or were attacked in proceedings to enforce the judgment against the parties, or upon plea in abatement.
(252) Thus, in *Versepuy v. Watson,* 12 R. I., 342, the defendants, in an action of *assumpsit,* pleaded in abatement that, in fact, but one copy was left at the "usual place of abode," and that the officer said it was a copy for one of the defendants only. The court held that such a plea would be good if established. So, in *Bugbee v. Thompson,* 41

N. H., 183, the plea was also in abatement, and it will appear upon examination that in none of the cases cited, either from this or other States, has language similar to this received the construction contended for by the defendant. Certainly the fact that the sheriff received only sixty cents for making the service cannot be permitted to overcome the legal implication of the word "executed," when, as we have seen, it is entirely consistent with the words that follow.

Whatever doubt, however, that might exist upon the construction of the return must vanish before the authority of *McDonald v. Carson,* 94 N. C., 497. In that case a notice was issued to three parties, and the return was "executed by delivering a copy." The language is identically the same as that in the present return, except the latter is perhaps stronger by the addition of the "to John Boon and wife, Rowena." The court said that the "term used in the return, 'executed by delivering a copy,'" necessarily implies a delivery to each of those to whom the notice is addressed, as, otherwise, it would be but a partial and uncompleted service. Such also seems to have been the view of his Honor, but he committed an error in holding that the return was, in this action, only *prima facie* evidence of the service, and could be rebutted by showing that, in fact, no such service was made. Even if the service had been apparently irregular, the judgment could not be collaterally attacked in this action. *Sumner v. Sessoms,* 94 N. C., 371; *Doyle v. Brown,* 72 N. C., 393, and numerous other decisions in our Reports. See, also, 1 Black Judgments, 263, and 1 Freeman Judgments, 126.

Seeing the force of this position, the intelligent counsel of the defendant insisted that the decree in the special proceeding (253) was absolutely void by reason of the insufficiency of the service, as indicated by the return of the sheriff. This is untenable, in view of our conclusion that the construction contended for should not be placed upon the said return.

It is unnecessary to review in detail the great number of cases cited on the argument. It is sufficient to say that we can find nothing in them which conflicts with the views we have taken in arriving at the conclusion that there should be a

New trial.

Cited: Comrs. v. Spencer, 174 N. C., 37.

C. C. WOODY v. ERNEST JONES.

Mortgage—Sale of Mortgaged Property—Statute of Limitations—Tax Sale of Mortgaged Property.

1. When the mortgagor of property is left in possession he or his vendee holds it for the mortgagee, and his possession does not become adverse so as to set the statute of limitations in motion until condition broken.
2. Registration is notice to the world of the lien of a mortgage.
3. Where a mortgage was duly recorded in the proper county, the fact that the mortgagor, in whose possession the property remained, took it out of the State and sold it there does not start the running of the statute against the mortgagee or his assignee.
4. A mortgage on property being duly registered, the legal title passes to the mortgagee, and a levy and sale of the property to satisfy taxes due by the mortgagor do not carry the title to the purchaser divested of the lien of the mortgage.

APPEAL from a justice of the peace, heard at August Term, 1893, of PERSON, before *Brown, J.*, a jury trial being waived, and the only plea set up being the statute of limitations.

The action was begun 29 March, 1893, for the recovery of the (254) possession of a horse, which was admitted to be worth less than fifty dollars, thus giving jurisdiction to the justice. This horse was the property of Isaac Wilson, who on 3 December, 1886, conveyed it by chattel mortgage to John F. Woody, who assigned the note and mortgage to plaintiff on 2 January, 1889. The mortgage was duly registered in Person County on 15 April, 1887, and nothing has ever been paid upon the mortgage debt.

The defendant purchased the horse in Halifax, Virginia, from Isaac Wilson, the mortgagor, in the fall of 1889, for full value. At the time of the purchase the defendant was a resident of Person County, N. C., and has had the horse in his possession in said county ever since said purchase by him, except that the horse was seized by the sheriff of Person County in July, 1890, for Isaac Wilson's taxes for 1889 and sold and purchased by the defendant for $7.20. The said taxes were the general taxes of said Wilson, who was also a citizen and resident of Person County, and not a specific tax upon the horse. The defendant had no actual notice of the mortgage.

The court below held that the defendant had notice by registration; that there was no evidence of a demand, or that plaintiff knew of defendant's possession; that defendant's possession was not adverse, or at least did not become so, until the public seizure and sale in July, 1890, and the only question being raised by the plea of the statute of limita-

tions, that the action is not barred. There was judgment for the plaintiff, and defendant appealed.

J. W. Graham and V. S. Bryant for plaintiff.
W. W. Kitchin and Boone & Parker for defendant.

MACRAE, J. We concur with his Honor in his conclusion that upon the facts of this case the action is not barred by the statute of limitations. The defendant has had possession of the horse for (255) about four years. At the time when he acquired possession the mortgage had been registered in the county of Person, where all parties to the sale resided, and the registration was notice to the world of the lien of the mortgagee. *Parker v. Banks,* 79 N. C., 480. The fact that the sale and delivery by mortgagor to defendant was in Virginia cannot affect the rights of the mortgagor or his assignee, the plaintiff. *Hornthall v. Burwell,* 109 N. C., 10.

When the mortgagor is left in possession he holds it for the mortgagee, and his possession does not become adverse until condition broken. An action for the foreclosure where the mortgagor has been in possession of the property must be brought within ten years after forfeiture. The Code, sec. 152 (3). A purchase from the mortgagor, the mortgage being registered, is not colorable title. *Parker v. Bank, supra.*

"The rule is that the mortgagor and his vendee hold in subordination to the title of the mortgagee, not adversely to him; and the statute of limitations does not run, even after the law-day is past, as in favor of the mortgagor or his vendee, without some overt act throwing off allegiance." Wood on Limitations, 446.

The defendant claims also by virtue of the sale by the sheriff to satisfy the tax list which he had in his hands against Isaac Wilson, the mortgagor, but the legal title, by virtue of the mortgage, had passed out of said Wilson, and was not subject to levy, or in any event the property passed subject to the rights of the mortgagee.

While the plaintiff is entitled to the possession, the defendant may still discharge the mortgage debt and regain possession of the horse, if he so desire.

Judgment affirmed.

Cited: Powell v. Sikes, 119 N. C., 232; *Woodlief v. Wester,* 136 N. C., 167.

(256)

J. H. LONG, TRUSTEE, v. J. A. CREWS ET AL.

Acknowledgment of Deed—Officer Disqualified by Interest—Invalid Probate and Registration—Evidence.

1. An acknowledgment of a deed taken before a justice of the peace, commissioner, or notary public is a judicial or, at least, a *quasi* judicial act, and if such officer is not authorized to take it, the probate upon it by the clerk and registration are invalid as against creditors and purchasers.
2. An officer who is interested in a deed, either as a party, trustee, or *cestui que trust*, is disqualified to take acknowledgment of its execution; therefore,
3. Where a notary public was interested in a deed of trust as a preferred creditor therein he was disqualified to take the acknowledgment, and his attempted action was a nullity, and such defect could not be cured by probate upon such acknowledgment before the clerk and registration.

ACTION, tried at July Term, 1893, of GRANVILLE, before *Brown, J.*

The following issues were framed:

"1. Is the plaintiff the owner and entitled to the possession of the property described in the complaint?"

"2. What damage has the plaintiff sustained by the unlawful taking of the said property by defendants, or either of them?"

The plaintiff offered the following evidence:

A deed from R. H. McGuire and wife to J. H. Long, trustee, 28 November, 1892; recorded in Book 47, page 290.

It was admitted that B. S. Royster, who probated this deed as notary public, was the same B. S. Royster who was a preferred creditor for $272, and who was also named as attorney and preferred for $100 in said deed.

No notarial seal was copied in the record book. The original deed was not offered. Upon objection by the defendants the said deed
(257) in trust appearing upon the registration book was excluded, and the plaintiff excepted. Upon this ruling of the court, the plaintiff submitted to a nonsuit and appealed, offering no other evidence.

Batchelor & Devereux, Graham, Royster & Edwards for plaintiff.
Strong & Strong for defendants.

CLARK, J. In this State it is settled law that an acknowledgment of a deed by the husband and privy examination of the wife taken before a justice of the peace, commissioner or notary, is a judicial, or at least a *quasi* judicial act, and if such officer is not authorized to take it, the

probate upon it by the clerk and registration is invalid as against creditors and purchasers. This was laid down by *Pearson, J.*, in the leading case of *Decourcy v. Barr*, 45 N. C., 181, in which a commissioner of deeds for this State in another State took the examination of a resident of this State temporarily absent from it. The probate and registration, based upon said defective acknowledgment, were held invalid. Though the statute in this special particular was changed by The Code, sec. 632 (*Buggy Co. v. Pegram*, 102 N. C., 540), the principle has been since followed in *Todd v. Outlaw*, 79 N. C., 235; *Duke v. Markham*, 105 N. C., 131, and many other cases. In *Ferebee v. Hinton*, 102 N. C., 99, it was held by *Shepherd, J.*, that an acknowledgment before a clerk of the county where the land lay, taken outside of the State, rendered the registration invalid. The registration upon an acknowledgment before an officer not authorized to take it, is not even notice to creditors and subsequent purchasers. *Robinson v. Willoughby*, 70 N. C., 358; *Smith v. Castrix*, 27 N. C., 518. And there are other cases. The plaintiff relied on *Darden v. Steamboat Co.*, 107 N. C., 437, and *Perry v. Bragg*, 111 N. C., 159. In the first, the head-note is misleading, unless carefully read, for the case shows that the deeds were in fact acknowledged in the county where the grantors resided. In the (258) latter, the point was taken that the deed was improperly acknowledged before the clerk of Franklin, when the grantor resided in Granville, but it did not appear in the facts agreed that the land might not be situated in Franklin, and the case went off on other points.

It is true these were all cases where the registration and probate were insufficient because the acknowledgment was made before an officer, by reason of his locality, not authorized or acting outside of his local jurisdiction, and the ruling is sustained by ample authority elsewhere. 1 Am. and Eng. Enc., 146, note 2, and 1 Devlin on Deeds, sections 487 and 488, with cases cited. The curative acts (1889, ch. 252, and 1893, ch. 293) are legislative recognitions of the prior defect of jurisdiction in taking acknowledgments. But exactly the same principle still applies where the officer taking the acknowledgment is disqualified, not (as above) by not acting within the authorized locality, but by reason of his interest in the deed, either as party, trustee or *cestui que trust*. 1 Devlin Deeds, sec. 476, and cases there cited. In both cases alike the acknowledgment is taken, so to speak, *coram non judice*, and cannot authorize probate by the clerk and registration. *Beaman v. Whitney*, 20 Me., 413; *Groesbeck v. Seely*, 13 Mich., 329; *Davis v. Beasley*, 75 Va., 491; *Bowden v. Parrish*, 86 Va., 67; *Brown v. Moore*, 38 Texas, 645; *Wasson v. Connor*, 54 Miss., 351; *Withers v. Baird*, 32 Am. Dec., 754, and notes; 1 Am. and Eng. Enc., 145, n. 6; 16 A. & E. Enc., 775. The

Act of 1885, ch. 147, places deeds on the same footing as to registration as mortgages and deeds of trust were on under The Code, sec. 1254.

The attempted acknowledgment of the deed in trust before a notary public, who was a preferred creditor therein, was before an officer disqualified to act, and hence a nullity. It could not be cured by probate upon such acknowledgment before the clerk and registration.
(259) *White v. Connelly,* 105 N. C., 65; *Freeman v. Person,* 106 N. C., 251. The deed was properly excluded.

No error.

Cited: Quinnerly v. Quinnerly, 114 N. C., 147; *Barrett v. Barrett,* 120 N. C., 130; *Bernhardt v. Brown,* 122 N. C., 591; *McAllister v. Purcell,* 124 N. C., 264; *Blanton v. Bostic,* 126 N. C., 421; *Land Co. v. Jennett,* 128 N. C., 4; *Martin v. Buffaloe, ib.,* 308; *Lance v. Tainter,* 137 N. C., 250; *Smith v. Lumber Co.,* 144 N. C., 48; *Wood v. Lewey,* 153 N. C., 405; *Holmes v. Carr,* 163 N. C., 123; *S. v. Knight,* 169 N. C., 339; *Bank v. Redwine,* 171 N. C., 571.

T. N. HILL ET AL. V. GLENDON AND GULF MINING AND MANUFACTURING COMPANY.

Railroad Right-of-Way—Condemnation Proceedings—Parties—Rights of Tenant in Common—Failure to Agree on Compensation.

1. In a proceeding for the condemnation of land for the right of way for a railroad the petition, whether filed by an answer or by the company, should state the names of all persons interested, and all of them should be in court before the commissioners are appointed.
2. Where the petition in a proceeding for assessment of damages for the right of way of a railroad enumerates the various owners of the land, and such owners voluntarily came in and made themselves parties, a demurrer by the defendant company that there *was* a defect of parties when the petition was first filed is untenable.
3. The fact that a cotenant of land has granted a right of way to a railroad company will not prevent another owner from instituting proceedings for the assessment of damages sustained by him, nor will such fact prevent the cotenant, who has made such grant, from becoming a party to the proceedings, and having his rights adjusted thereunder, upon a claim that the company had forfeited its right under the grant by failure to comply with the conditions thereof, and this, although such forfeiture did not occur until after the petition was first filed by his cotenant.
4. It is not necessary that the petition filed by a landowner in proceedings for the assessment of damages for land taken by a railroad company for

right of way shall state that the petitioners and the company have failed to come to an agreement as to the sum to be paid, such averment being necessary only when the railroad company is the actor in such proceedings.

THIS was a special proceeding, instituted before the clerk of CHATHAM, by Thomas N. Hill and his infant children, owners of one-fourth of the tract of land in said county, known as "LaGrange," to have damages assessed for the petitioners against the defendant for (260) the taking of their interest in the part of said land by defendant for right of way for its railroad, and heard at chambers in Durham 31 March, 1893, before *Bryan, J.*

John Manning and wife and M. A. Southerland, who together own three-fourths of the land, came into court and made themselves parties to the proceeding, and claim that they were entitled to damages or compensation from the defendant, for the reason, as they allege, that the grant of a right of way over the land which they had made to the defendant had become null and void, the defendant having agreed that it should be void if the road was not constructed within two years from date of the grant, and this has not been done. The period of two years had not elapsed when the original petition was filed, but had elapsed when they made themselves parties.

The defendant filed a demurrer, which was sustained by the clerk. An appeal was taken. His Honor heard the appeal and overruled the demurrer, and the defendant appealed. The demurrer was as follows:

"The defendant demurs to the original complaint (or petition) filed in this proceeding by the petitioner, Thomas N. Hill, and his children and copetitioners with him, and specifies the following objections thereto, to wit:

"1. For that it appears from the face of said complaint (or petition) that there is a defect of parties, in that John Manning and his wife Louisa J. Manning, M. A. Southerland and A. P. Gilbert are not joined, either as plaintiffs or defendants.

"2. For that the said complaint (or petition) does not state facts sufficient to constitute a cause of action, in that the said complaint alleges a conveyance by petitioners, cotenants in common, to the defendant, of the right of way for its railroad through the land described in the complaint, and does set forth therein and thereby a legal justification for the alleged action of the defendant.

"3. For that said complaint (or petition) does not set forth, as is provided in sections 1698 and 1699, chapter 38, and in sec- (261) tions 1943 and 1944, chapter 49 of The Code, inability of plaintiffs (or petitioners) to 'agree' with defendant for the purchase of the right of way in question, nor any effort to 'agree' about it."

And the defendant excepting to all orders of the court allowing interpleading prior to service of process or return day for defendant's appearance in this proceeding, demurs to the aforesaid complaint (or petition) as adopted by A. P. Gilbert, on the grounds:

"1. For that, at the date of said A. P. Gilbert's interplea, there was still a defect of parties, in that said John Manning and wife, Louisa J. Manning and M. A. Southerland were not joined as parties, either plaintiff or defendant.

"2. For that, as to said A. P. Gilbert, the complaint does not state facts sufficient to constitute a cause of action in his favor, in that said complaint (or petition) alleges a conveyance to the defendant by the lessors of said Gilbert of the right of way for its railroad through the land described in the complaint, and does set forth therein and thereby a legal justification for the alleged action of the defendant.

"3. For that it is a misjoinder of causes of action to unite in the same proceeding the alleged cause of action of said A. P. Gilbert with that of his coplaintiffs as against this defendant.

"4. For that the complaint does not state the unexpired term of said Gilbert's alleged lease.

"5. For that the said Gilbert's interplea adopting the original complaint does not state inability to 'agree,' or any effort to 'agree,' with defendant about the value of his alleged interest in the right of way in question, as is provided in sections 1698, 1699, 1943 and 1944 of The Code.

"And the defendant, excepting to all orders of the court allowing interpleading by John Manning and wife and M. A. Southerland,
(262) demurs to the original complaint (or petition) as affected by the interplea of said John Manning and wife and M. A. Southerland as a misjoinder of cause of action, in that the alleged cause of action of the original petitioners, Thomas N. Hill and his children, accrued prior to 23 December, 1892 (the date of the commencement of this proceeding), and the alleged cause of action of said John Manning and his wife, Louisa J. Manning, and M. A. Southerland accrued (if at all) subsequent to said 23 December, 1892, viz, not until after 7 March, 1893.

"2. For that the alleged grounds of the interplea of said John Manning and his wife, Louisa J. Manning, and M. A. Southerland constitute (if at all) a new cause of action, arising or accruing since 23 December, 1892, the date of the commencement of this action.

"3. For that it appears from the face of the interplea of said John Manning and his wife, Louisa J. Manning, and M. A. Southerland, that under the deeds set forth as exhibits, as annexed thereto, the entry on the lands therein described, and excavations made and embankments erected,

etc., therein prior to 7 March, 1893, were justified thereby, and said John Manning and wife, Louisa J. Manning, and M. A. Southerland are thereby estopped to claim damages therefor; and article 5 of said interplea does not allege an entry, etc., subsequent to 7 March, 1893, or after an alleged failure of the 'conditions,' as it is termed, of said deeds; and said article 5 is ambiguous and indefinite as to when plaintiffs intended to allege said entry, excavations and embankments were made, and in this said interplea of said John Manning and wife, Louisa J. Manning, and M. A. Southerland, fails to state facts sufficient to constitute a cause of action.

"4. For that said John Manning and wife, Louisa J. Manning, and M. A. Southerland cannot maintain this proceeding against this defendant under the provisions of chapters 49 and 38 of The Code, as is shown upon the face of said interplea and a proper construction of the said deeds, this not being such a case as is provided for by statute as falling within the class of cases (in sections 1943, 1944, 1699 (263) and 1698 of The Code) where parties are 'unable to agree,' etc.

"Wherefore, defendant demands judgment that this proceeding be dismissed, and for judgment against all the petitioners and interpleaders and the surety on the prosecution bond for costs."

T. B. Womack for plaintiffs.
W. A. Guthrie for defendant.

BURWELL, J. The provisions of section 1944 of The Code seem clearly to indicate that in a proceeding under that section, all parties "who own or have, or claim to own or have estates or interests" in the land over which a right of way is sought to be condemned, shall be brought before the court, to the end that all the persons interested in the assessment of the damages may be bound by the action of the commissioners, who will find what gross sum, if any, is due to the owners, and that they may all be heard when the court comes to apportion the sums between the several owners, according to their respective interests or estates in the land. The petition, whether filed by an owner or by the company, should state the names of all persons interested, and all of them should be in court before the commissioners are appointed.

The petition filed by the original petitioners, Thos. N. Hill and his children, alleged that these children were the owners in fee of one undivided fourth part of the land described in the said petition, the father having a life estate in that part. That Mrs. L. J. Manning, wife of John Manning, owned one undivided fourth part in fee; and that M. A. Southerland owned an undivided half in fee; and that A. P. Gilbert had a lease for five years on all of the tract. Here we have a care-

(264) ful compliance with the provisions of the statute, a full enumeration of all those who owned any interest or estate in the premises. And this enumeration of the owners of the land was accompanied by the statement of the petitioners, made on information and belief, that Mrs. Manning and M. A. Southerland, who together owned three-fourths of the land, had conveyed to the railroad company a right of way through the premises. It thus became evident that, in order to have a complete determination of the matter, it would be necessary to bring into court not only the defendant company, from whom alone the plaintiffs sought damages, but those other owners. They might well have been made defendants originally, but they have come in and been made petitioners, and thus all parties interested are present, and will be bound by what is done in the proceeding.

The position taken by the defendant company that there *was* a defect of parties when the petition was first filed is untenable. What the petitioners wished was to have *their* damages assessed and paid. It is not their concern to inquire whether or not the company had come to an agreement with their cotenants and the tenant for years, and had settled with those parties. In their petition they gave to the court and to the defendant information about the other persons who had an interest in the premises, as, under the statute, they were required to do. If the defendant had settled the matter with those other parties, it had but to say so in its answer, and ask that the commissioners should only report the sum due the petitioners; or if it had not settled the matter with those parties, it was its privilege to ask the court to have them brought in, that a complete determination of the matter might be had.

But whatever may be thought about the propriety or necessity of their being original parties, it is surely sufficient that before defendant's demurrer was filed they all voluntarily came into court and made themselves parties. No suggestion is made that there is any one who claims any estate or interest in the land that is not now, and was not (265) when the demurrer was filed, a party. Therefore, there can be no *defect of parties*. What the rights of the respective individuals are is another matter that will be hereafter determined.

The position of the defendant that the petition does not state a cause of action is equally untenable. If, as petitioners say they are informed, the defendant has acquired by agreement with the other parties a right to use and occupy for its purposes their shares (three-fourths) of the land covered by the "right of way," it will not be required by the final judgment in the cause to pay any damages to those persons. Under the ample provisions of sections 1947 and 1949 of The Code the rights of all the parties can be ascertained and adjusted in this one proceeding. The whole damage to the land may be estimated, and it may then be de-

termined, by reference or otherwise, how much of the gross sum the defendant owes; or what proportion of the right of way has been acquired, if any, by contract, may be first ascertained, and the damages or compensation due to the parties who have not been paid may be found and reported by the commissioners.

It was argued before us that the legal effect of the deeds from John Manning and wife and M. A. Southerland to the defendant is such that the original petitioners cannot maintain this proceeding under section 1944 of The Code, and that at any rate, Mrs. Manning and M. A. Southerland cannot join in this petition for the assessment of damages, for the reason that, at the date of the filing of the original petition, according to the statement of those parties contained in their interpleas, the defendant had not lost its title to the right of way acquired from them by it.

It cannot, we think, be seriously contended that the owners of one undivided fourth of a tract of land, through which a railroad is constructed, can be deprived of their right to have the damages due to them assessed under the provisions of section 1944, by the (266) purchase by the railroad company of the rights of one of the other tenants in common. And the right of all the parties in the damages for the taking of the land, whether those rights continue as they were at the time the petition was filed, or are changed and modified by subsequent events, can all be adjusted under the provisions of sections 1947 and 1949.

As another cause of demurrer the defendant insists that the petition does not state (as it says it should) that the petitioners were unable to come to an agreement with the defendant as to the sum to be paid by it to them for the taking of their land. This was not necessary. The statute requires the railroad company, when it becomes the actor in such a proceeding, as it may, to state that fact as its justification for summoning to court a citizen whose land it wishes to take by condemnation. But when the citizen merely seeks pay for his property that has been taken from him under a license from the State, the law does not impose upon him the necessity of asserting that he and the taker of his property have not agreed. His proceeding is in itself an emphatic asseveration to that effect.

What has been said seems to us sufficient to cover all the grounds of demurrer.

We find no error in the rulings of his Honor, and the cause is remanded, to be proceeded with according to law.

No error.

Cited: Durham v. Riggsbee, 141 N. C., 130.

(267)

J. T. F. CUMMINGS v. D. W. M. HOFFMAN ET AL., EXECUTORS OF RACHEL GRAHAM, DECEASED.

Practice—Case on Appeal—Error on Face of Record on Appeal—Erroneous Judgment on Pleadings.

1. A disputed question, as to whether there has been service, in time, of a case on appeal, should be submitted to the court below to find the facts.
2. Unless service of a case on appeal is accepted it must be made by an officer; an alleged service by an attorney is nugatory.
3. Although no legal case on appeal accompanies the record in this Court, the appeal will not be dismissed, but the judgment below will be affirmed, unless error appear on the face of the record.
4. Where the record shows an entry of appeal and the service of notice within proper time, the appeal being in itself an exception to the judgment, error on the face of the record will be noted in this Court.
5. In an action to recover money, the defendants in their answer admitted an indebtedness to plaintiff of one dollar, but an amended complaint having been filed, they denied in their amended answer any indebtedness whatever, and upon an issue relating thereto the jury found that the defendants owed nothing: *Held*, that it was error in the court below to render judgment for one dollar and costs, upon the ground that defendants had in their original answer admitted that indebtedness, for, although the admission in the first answer was competent, it was not conclusive evidence of the indebtedness, which was denied by the later pleadings, and the jury passed upon the issue concerning the same, and upon the evidence of the admission, if plaintiff saw fit to offer it.

ACTION upon a physician's account, tried before *Whitaker, J.*, and a jury, at March Term, 1892, of ALAMANCE.

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

The facts necessary to an understanding of the decision of the Court are stated in the opinion of *Associate Justice Clark.*

(268) *James E. Boyd for plaintiff.*
Busbee & Busbee for defendants.

CLARK, J. There being a disputed question whether there was service, in time, of the case on appeal, if properly raised, it should have been submitted to the court below to find the facts. *Walker v. Scott,* 102 N. C., 487. The appellees contend that their objection, indorsed on the case that the service was on the 4th of April (after the expiration of the ten days), was admitted by the appellants not sending the case to the judge to settle. *Owens v. Phelps,* 92 N. C., 231; *Jones v. Call,*

93 N. C., 170. Unfortunately for appellees, their exception was not served till April 11, after the expiration of the five days allowed by statute, and therefore goes for naught. There is, however, no evidence of the service of appellants' case within the time prescribed, and it also must be disregarded. *Peebles v. Braswell,* 107 N. C., 68; *Mfg. Co. v. Simmons,* 97 N. C., 89. It is true a *certiorari* was sent down, to which the clerk returns that there is indorsed on the original case deposited in his office by appellants, "copy served on plaintiff by W. H. Carroll, attorney for defendants, 1 April, 1892."

Without in any way recognizing as valid this attempt to settle the disputed question of fact by copying a written declaration of a party in his own interest, instead of submitting the question to the judge *(Walker v. Scott, supra)*, it is sufficient to say that the return does not help the appellant. Unless service is accepted, it must be made by an officer. Any other mode is invalid and a nullity. *Allen v. Strickland,* 100 N. C., 225; *State v. Johnson,* 109 N. C., 852; *State v. Price,* 110 N. C., 599. There being no legal case on appeal before us, it does not follow that the appeal should be dismissed. The proper course is to affirm the judgment, unless error appears upon the face of the record proper. *McCoy v. Lassiter,* 94 N. C., 131, and other cases cited in Clark's Code (2 Ed.), p. 580.

Upon inspection of the record, it appears that, by the original answer and amended answer, the defendants admitted an indebt- (269) edness of one dollar. But, an amended complaint being filed, the defendants were permitted to file an amended answer thereto, in which they denied any indebtedness whatever. An issue based upon these final pleadings was submitted to the jury—"Is the plaintiff entitled to recover of the defendants; if so, how much?"—to which the jury responded "No." Thereupon, his Honor rendered judgment as follows: "It appearing to the court, from the admission of the answer, that the defendants were indebted to the plaintiff in the sum of one dollar, it is adjudged that the plaintiff recover the sum of one dollar and the costs of the action." The record shows an entry of appeal and service of notice within legal time. The appeal itself is an exception to the judgment.

There is error upon the face of the record. The indebtedness was denied in the final pleadings of the parties, and upon the issue thus made the jury found that the defendants were not indebted. The admission in the first two answers of an indebtedness of one dollar was simply an admission against interest, like any other. It was competent to introduce the first two answers as evidence *(Adams v. Utley,* 87 N. C., 356), but the admission was not conclusive. It might be shown that it was made under a misapprehension, or by mistake or inadvert-

ence. *Smith v. Nimocks*, 94 N. C., 243. The jury passed upon the issue, and upon this evidence of an admission, if plaintiff saw fit to offer it. Upon the verdict, judgment should have been rendered in favor of defendants against the plaintiff and sureties to the bond, for costs.

The case is remanded, that it may be so entered.

Reversed.

Cited: Lyman v. Ramseur, post, 505; *Rosenthal v. Robertson,* 114 N. C., 596; *Delafield v. Construction Co.,* 115 N. C., 24; *McDaniel v. Scurlock, ib.,* 297; *Watkins v. R. R.,* 116 N. C., 966; *McNeill v. R. R.,* 117 N. C., 643; *Roberts v. Partridge,* 118 N. C., 356; *Smith v. Smith,* 119 N. C., 317; *Guano Co. v. Hicks,* 120 N. C., 30; *Westbrook v. Hicks,* 121 N. C., 132; *Barrus v. R. R., ib.,* 505; *Delozier v. Bird,* 123 N. C., 692; *Cressler v. Asheville,* 138 N. C., 484; *Norcum v. Savage,* 140 N. C., 473; *Ullery v. Guthrie,* 148 N. C., 419; *Bloxham v. Timber Corp.,* 172 N. C., 47; *Hoke v. Whisnant,* 174 N. C., 661.

(270)

GEORGE F. COLE, ADMINISTRATOR OF CAROLINE COLE, v. W. T. STOKES, EXECUTOR OF THOMAS STOKES.

Trustee and Cestui que Trust—Dealings Between—Presumption of Fraud—Burden of Proof.

1. Transactions between a trustee and his *cestui que trust* are viewed with extreme jealousy, and a presumption of fraud arises when a trustee undertakes to purchase the trust property from the *cestui que trust.*

2. In order that such a purchase may stand it is necessary, not only that the price paid be fair and reasonable, but that it appear that the fiduciary relation has ceased, or, at all events, that all necessity for activity in the trust has ceased, so that the trustee and *cestui que trust* are each at liberty, without the concurrence of the other, to consult, and able to vindicate his own interest, and that the beneficiary had full information and complete understanding of all facts concerning the property and the transaction itself, and the person with whom he was dealing, and gave a perfectly free consent, and that the trustee made to the beneficiary a perfectly honest and complete disclosure of all knowledge or information possessed by himself; therefore,

3. Where, in the trial of an action by an administrator (who was the sole heir and distributee of his intestate) against the executor of an estate in which plaintiff's intestate was interested, to recover the share to which his intestate was entitled, it appeared that the defendant executor had purchased from the plaintiff, before the latter's qualification as adminis-

trator, all his interest in the estate controlled by defendant, the jury should have been instructed upon an issue relating to fraud that a presumption of fraud had arisen which put upon the defendant the burden of proving everything to have been fair and honest.

ACTION, tried before *Bryan, J.*, and a jury, at August Term, 1892, of PERSON.

As a defense to the action for the recovery of the share of Thomas Stokes, alleged to be due the plaintiff's intestate, the executor of Thomas Stokes set up an assignment, not under seal, dated 1 May, 1890, by which plaintiff conveyed to the defendant in his own right the interest in the estate of said Stokes, to which the plaintiff, being (271) the sole heir and distributee of his wife, was entitled, including a tract of land devised to plaintiff's wife by the testator.

At the date of the assignment plaintiff had not qualified as administrator of his wife, and as the answer alleged, there were no debts owing by her.

The defendant made his settlement of the estate of Thomas Stokes before the clerk, on 6 June and 9 October, 1890.

In reply, the plaintiff contended that the sum paid him was for the tract of land, and not intended to cover the interest of his wife in the personal estate of Stokes, and that the defendant perpetrated a fraud upon him in obtaining such conveyance and in withholding from him full information as to the value of the interest of plaintiff's intestate.

The issues submitted and the responses were as follows:

"1. Was the deed and release of 1 May, 1890, executed by Geo. F. Cole, procured by fraud and misrepresentation? Answer: 'No.'

"2. What was the value of the interest of Geo. F. Cole on 1 May, 1890, in the real estate under the will of Thomas Stokes? Answer: '$282.50.'

"3. What was the value of the interest of Geo. F. Cole in the personal estate under the will of Thomas Stokes? Answer: '$609.99.'

"4. Did W. T. Stokes, in paying for the conveyance made to him by Geo. F. Cole, use the money of the estate; and if so, how much? Answer: 'Not any.'"

His Honor, in his charge to the jury, stated, "that the burden in this case is on the plaintiff, and the court charges you that the allegations material to establish the charge of fraud must be proven so as to produce belief of their truth in the minds of the jury."

There was judgment on the verdict for the defendant, and plaintiff appealed, assigning error in the charge, as above stated. (272)

Boone & Parker and W. W. Kitchin for plaintiff.

J. W. Graham and V. S. Bryant for defendant.

SHEPHERD, C. J. In order to dispose of this appeal, it is only necessary to determine whether there was error on the part of his Honor in charging the jury that the burden was upon the plaintiff to establish the fraud alleged in the replication and embodied in the first issue.

The plaintiff is the administrator and sole distributee and heir of his deceased wife, Caroline Cole, and he brings this action against the defendant, who is the executor of Stokes, deceased, to recover the amount due his intestate under the will of her father, the said Stokes. The defendant denies his liability and relies upon a deed executed to him by the plaintiff on 1 May, 1890, conveying to the defendant all of the plaintiff's interest, real and personal, in the said estate. At the time of the execution of the above-mentioned deed the defendant had not made his final settlement as executor, and the fiduciary relation therefore still existed between him and the plaintiff. It is well settled that an executor or administrator in dealing with the estate, and with those who are interested therein, is regarded as a trustee, and as such is subject to that principle which raises a presumption of fraud against him when he undertakes to purchase the trust property from his *cestui que trust.* In respect to purchases of trust property, real or personal, directly or indirectly, from himself, whether privately or at auction, the law considers them invalid; and, says *Pearson, J.,* in *Brothers v. Brothers,* 42 N. C., 150, even if the trustee "gives a fair price, the *cestui que trust* has his election to treat the sale as a nullity" and this "not because there (273) *is,* but because there *may be* fraud." *Patton v. Thompson,* 55 N. C., 285; *Stilley v. Rice,* 67 N. C., 178; *Froneberger v. Lewis,* 79 N. C., 426; *Gibson v. Barbour,* 100 N. C., 192. In respect to purchases, as in this case, from the *cestui que trust,* the court of chancery, in the time of *Lord Erskine,* seemed much inclined to impose a total disability on the trustee. This view, however, did not prevail, and his power to so contract is not absolutely prohibited, though, remarks *Ruffin, J.,* in *Boyd v. Hawkins,* 17 N. C., 195, the restrictions imposed "almost extinguish it." He further observes that such transactions are viewed with anxious jealousy, and that "it must appear that the relation has ceased, at least that all necessity for activity in the trust has terminated, so that the trustee and *cestui que trust* are two persons, each at liberty, without the concurrence of the other, to consult his own interest, and capable of vindicating it; or that there was a contract definitely made, the terms and effect of which were clearly understood, and that there was no fraud or misapprehension, and no advantage taken by the trustee of the distress or ignorance of the other party. The purchase must also be fair and reasonable. *Coles v. Trecothick,* 9 Ves., 246; *Fox v. Macreath,* 2 Bro. C. C., 400. These cases are not allowed to turn on nice inquiries whether it might not possibly be for the benefit

of the *cestui que trust* to make that particular contract rather than none at all, but when there is a fair judicial doubt, as some of the cases express it, whether the trustee has not availed himself of his confidential situation to obtain selfish advantage, the contract cannot stand."

Lord Eldon said, in *Coles v. Trecothick, supra,* "that a trustee may buy from the *cestui que trust,* provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, that the *cestui que trust* intended the trustee should buy, and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee." Again, it is said "that the trustee must show that he (274) took no advantage whatever of his situation, and that he gave to his *cestui que trust* all the information which he possessed." *Fox v. Macreath, supra;* White & Tudor L. C. Eq., 261, note. Mr. Pomeroy says that the trustee must show by "unimpeachable and convincing evidence that the beneficiary, being *sui generis,* had full information and complete understanding of all facts concerning the property, and the transaction itself, and the person with whom he was dealing, and gave a perfectly free consent, and that the price was fair and adequate, and that he made to the beneficiary a perfectly honest and complete disclosure of all knowledge or information . . . possessed by himself, or which he might with reasonable diligence have possessed," etc. 2 Pom. Eq. Jur., 958; Hill Trustees, 237; Bispham Eq., sec. 237; *Davine v. Faumey,* 2 John Ch., 251; *Baxter v. Costin,* 45 N. C., 262; *McLeod v. Bullard,* 86 N. C., 210; *Adkins v. Withers,* 94 N. C., 581.

The foregoing extracts are reproduced for the purpose of showing the nature and strength of the rule which equity has laid down for the protection of *cestuis que trust* when contracting with their trustees, and we are very clearly of the opinion that the principle applies in all its rigor to the present case. It was not contended that the trust was closed when this transaction took place, and the instrument set up in bar of the plaintiff's recovery is not, as insisted, a mere release, but most essentially a conveyance of the plaintiff's entire interest in the estate, both real and personal. Under these conditions the presumption of fraud arose, and the jury should have been so instructed. The fact that the plaintiff's lawyer was present and advised him in the matter is one of the circumstances to be considered in rebuttal of the presumption, but does not prevent the application of the presumption itself. Whether a full and complete disclosure was made to the plaintiff's lawyer— whether, indeed, the defendant's lawyer, who made the purchase (275) for him, had been put into possession of all the circumstances by his client (and this seems doubtful), and whether, in consideration of the place and manner of the settlement, the means of inquiry were at

hand, are elements to be considered in determining whether the trustee had placed himself in a condition to purchase of his *cestui que trust,* but, as we have seen, they do not prevent the operation of the presumption of fraud, so as to shift the burden of proof.

We have examined with much care the cases cited in behalf of the defendant, and are entirely satisfied that they do not conflict in the slightest degree with the principles above stated. There was error in placing the burden upon the plaintiff, instead of the defendant.

New trial.

Cited: Jones v. Pullen, 115 N. C., 471; *Hayes v. Pace,* 162 N. C., 292.

W. G. LEDUC, RECEIVER OF PEOPLES NATIONAL BANK, v. E. F. MOORE ET AL.

Certiorari—Lost Appeal—Conflicting Statements of Counsel.

Where the petition for a *certiorari* is based upon the allegation that in the court below plaintiff's counsel orally accepted notice of petitioner's appeal and extended the time for stating the case, and it is conceded that the record in the court below contains no entries as to such agreement, and the plaintiff's counsel denies the same, this Court will not undertake to decide between the conflicting statements of counsel, but will adhere strictly to Rule No. 39 of the Supreme Court.

PETITION of defendants for writ of *certiorari.* The case was tried at April Term, 1893, of FRANKLIN, before *Shuford, J.,* and a jury, and there are conflicting affidavits of counsel and others as to verbal notice of appeal and agreement of counsel as to extension of time for (276) making statement of case on appeal.

N. Y. Gulley for petitioners.
T. H. Sutton contra.

BURWELL, J. The petitioner bases his application for a writ of *certiorari* upon the allegation that in the court below plaintiff's counsel orally accepted notice of his appeal and extended the time for stating the case. It is conceded that the record in that court does not show that an appeal was asked at the trial, or that any notice of an appeal was waived or accepted, or that the time for stating the case was extended. The plaintiff's counsel denies that he made any such agreement.

His denial puts an end to the matter, for we cannot undertake to decide between them, but must adhere strictly to the rule of this Court (No. 39) and follow the decisions heretofore made in like cases, the latest of which is *Sondley v. Asheville,* 112 N. C., 694.

Motion denied.

Cited: Smith v. Smith, 119 N. C., 313.

W. A. COX, ADMINISTRATOR, v. NANCY A. JONES ET AL.

Appeal—Defective Record—Laches in Perfecting Record.

Where a case was remanded from this Court at Spring Term, 1892, to the end that appellant might have a lost record supplied by proper proceedings in the court below, which has not been done, and the record is as defective as when the order of remand was made, though three or four terms of the Superior Court in that county have transpired and no excuse is rendered for the laches, the case will be dismissed on motion of appellee under Rule 15 of the Supreme Court.

Devereux & Batchelor for plaintiff.
H. R. Kornegay for defendants. (277)

CLARK, J. This was a motion made in September, 1888, to set aside a judgment rendered in a special proceeding in 1871. The appeal was docketed here at Fall Term, 1891. The record of the special proceeding not being sent up, a *certiorari* was sent down to which the clerk returned that after diligent search, only fragmentary parts thereof could be found, and these he sent up. Thereupon, at Spring Term, 1892, the case was remanded (110 N. C., 309), to the end that the appellant might take steps to have the lost record supplied by proper proceedings in the court below. This he has not done, and the Court is unable to pass upon the case as presented in the voluminous, irregular and insufficient transcript. The record is as defective as when the order of remand was made, though since then there have been three or four terms of the Superior Court in that county. No excuse is rendered which atones for this laches. The cause having been here two terms since (Fall Term, 1892, and Spring Term, 1893), the motion of appellee to dismiss the appeal under Rule 15 is allowed. *Brantly v. Jordan,* 92 N. C., 291; *Wiseman v. Commissioners,* 104 N. C., 330.

Appeal dismissed.

J. L. STEWART ET AL. v. B. C. BARDIN ET AL.

Mortgage Without Power of Sale—Power Given to Mortgagee to Receive Rents After Default—Right to Foreclose Mortgage Through the Courts.

A provision in a mortgage which contains no power of sale, that, after default in payment of the debt, the mortgagee may take possession of the land and receive the rents until the rights of the parties shall be fully adjusted "according to law," does not prevent the mortgagee from seeking a sale of the land under a decree of foreclosure.

ACTION, tried at March Term, 1893, of PENDER, before *Winston,* (278) *J.*, and a jury, to foreclose a mortgage given by the defendant to the plaintiff.

The jury returned a verdict that defendant was indebted to plaintiff in the sum of $200 and interest, and judgment was rendered ordering a sale of the land. The defendants excepted, contending that the mortgage, by its terms and conditions, did not convey the land or authorize its sale to pay the debt, but only the rents and profits thereof.

The condition contained in the mortgage was as follows:

"If we, or either of us, or our personal representatives, shall pay back to the said J. L. Stewart the sum of $200, on or before the first day of January next, then this instrument shall be null and void; but in case we fail to make said payment, then this instrument shall be in full force and effect. And it is further understood that, until default made as aforesaid, that we, the grantors aforesaid, shall have and keep possession of said land; but after default it shall be lawful for the said J. L. Stewart and his assigns to enter upon said land, hold, occupy and receive the rents and profits of said land until the rights of the parties hereunder shall be duly adjusted according to law, it being the true intent of this instrument to secure to the said J. L. Stewart the payment of the said sum of $200 on the first day of January next."

R. O. Burton for plaintiffs.
No counsel contra.

BURWELL, J. The mortgage which the plaintiffs seek to foreclose in this action has in it no power of sale, and provides that, after default, the mortgagee or his assigns may take possession of the mortgaged premises and receive the rents "until the rights of the parties shall be fully adjusted according to law." We find nothing in this inconsistent with plaintiff's assertion of right to have the land sold under a

decree of foreclosure if the debt is not paid. It only incorporates (279) in the deed, as an express stipulation between the parties, what the law, without its insertion therein, would have adjudged to be the mortgagee's rights. The right to receive the rents after default is in no wise inconsistent with the asserted right to have the land itself sold.

No error.

O. B. COX v. C. F. GRISHAM.

Practice—Pleading—Amendment of Process and Pleadings in Justice's Court.

1. A justice of the peace has power to amend any warrant, process, pleading or proceeding in any action pending before him, either civil or criminal, either in form or substance; therefore,
2. Where, in an action of claim and delivery of personal property, the allegation as to the value was omitted in the summons, the justice of the peace properly allowed a motion to amend by filling in the blank left for such allegation.
3. In such case, the evidence being uncontradicted that the value was less than fifty dollars, such amendment could have been made after verdict and judgment; and if the omission was by mistake or inadvertence, the amendment could have been allowed in the Superior Court, not to *give* jurisdiction, but to make it appear by the summons that it had not been improperly exercised.

ACTION of claim and delivery, heard on appeal from a court of a justice of the peace, before *Armfield, J.*, at Fall Term, 1890 of ONSLOW. From a judgment dismissing the action the plaintiff appealed.

Batchelor & Devereux for plaintiff.
No counsel contra.

CLARK, J. This was an action for the recovery of a sow and five pigs. The original summons failed to show the value of the (280) property, and the justice allowed a motion to amend the summons by filling in the blank left for allegation of the value, with the words "ten dollars." The defendant offered no evidence, but upon judgment being rendered against him he appealed. In the Superior Court the defendant moved to dismiss the action, on the ground that the justice had no power to amend the warrant. This motion was erroneously allowed.

The justice had ample authority to grant the amendment. Section 908 of The Code provides that a justice of the peace "shall have power

to amend any warrant, process, pleading or proceeding" in any action pending before him, either civil or criminal, "either in form or substance." To same purport is The Code, sec. 840, rule 9; also section 273, which permits an amendment "inserting other allegations material to the case."

The evidence uncontradicted being that the value of the property was less than fifty dollars, this amendment could have been allowed even after verdict and judgment. Had the averment of value been omitted from the summons, as it doubtless was, by mistake or inadvertence, the amendment could have been allowed even on the trial in the Superior Court, not to *give* jurisdiction, but to make it appear by the summons that it had not been improperly exercised. "Such amendment would relate back to the date of the summons. It could not work injustice to the parties, because, in fact, the jurisdiction existed. It only helped, cured defective process." *Leathers v. Morris,* 101 N. C., 184. In *S. v. Sykes,* 104 N. C., 694, *Merrimon, C. J.,* says: "Procedure and proceedings before justices of the peace are generally more or less informal and summary. They are favored by every reasonable intendment, and are to be helped by the free exercise of the large powers conferred by the statute (The Code, sec. 908) upon the courts where the action in which they appear may be pending, to amend them as to form or sub-
(281) stance at any time before or after judgment. *S. v. Smith,* 103 N. C., 410, and cases there cited." To same purport are *S. v. Baker,* 106 N. C., 758; and *S. v. Norman,* 110 N. C., 484.

Error.

Cited: McPhail v. Johnson, 115 N. C., 302.

SIMEON WOOTEN ET AL. V. N. M. OUTLAW ET AL.

Evidence—Declarations of Assignor of Note, when Incompetent.

The declaration of an assignor of a note as to the amount due thereon is incompetent in an action on the note, unless shown to have been made before the assignment and against interest.

ACTION, tried at August Term, 1893, of DUPLIN, before *Bryan, J.*

The action was for the foreclosure of a mortgage made by F. M. Outlaw and wife to N. B. Outlaw, and by him assigned to the plaintiff Simeon Wooten. F. M. Outlaw, the mortgagor, is dead, and his widow and heirs-at-law are the defendants. It was admitted upon the trial

that the said F. M. Outlaw executed the note and mortgage, as alleged in the complaint, and that they were transferred to the plaintiff Wooten prior to 15 April, 1886. The defendants relied upon the sole defense of payment.

One Arnett, a witness for the defendants, testified that after the death of F. M. Outlaw he heard N. B. Outlaw say that F. M. Outlaw owed him seventy or eighty dollars, and that he heard him say this seven or eight years ago. Upon cross-examination, he said it might not have been more than six years since he heard the above conversation. This evidence was objected to by the plaintiff, upon the ground that it was not shown that this conversation occurred prior to the transfer of the note and mortgage to the plaintiff Wooten, and that the declarations of N. B. Outlaw, made after the transfer, were in- (282) competent. Objection sustained, and the defendants excepted. There was other testimony tending to show credits of $100 and $25 upon the note, and these credits, as also one of $41.80, were admitted.

The issue submitted was: Has the note declared on been paid? To which the jury responded "No."

His Honor gave judgment for the balance, after deducting the credits above set out, and interest, and for foreclosure of the mortgage. Defendants appealed.

Allen & Dortch for plaintiff.
H. R. Kornegay for defendants.

MACRAE, J. By the admission of the parties, all other issues, except that arising upon the plea of payment, were eliminated. Both of the credits claimed by defendants were allowed, and an additional credit of $41.80 was also given. There was no testimony showing the dates of said credits, and a calculation will show that in the judgment these credits were allowed as of the times at which they were admitted in the complaint. As to the credit of twenty-five dollars, the testimony does not enlighten us as to the time it should have been entered, but it will appear to have been given about the same time that the credit of $100 was allowed.

The rejected testimony was not competent, unless it was made as a declaration against interest while N. B. Outlaw was the holder of the note and mortgage, and the defendant failed to show that he was still the owner at the time of the alleged declaration. Indeed, the rejection of this testimony can work no harm to the defendant, for, if admitted, it would be consistent with the other testimony in the action.

No error.

Cited: Smith v. Lumber Co., 142 N. C., 38.

(283)

BOYKIN, CARMER & CO. v. JOHN C. WRIGHT.

Time of Docketing Appeal—Motion to Dismiss—Accepting Service of Case no Waiver of Right to Dismiss.

Where a judgment was rendered in a Superior Court at February Term, 1892, and appellee agreed that appellant might have "thirty days to perfect appeal," and upon the "case" there was an indorsement as follows, "Service accepted 31 December 1892," and the appeal was docketed in March, 1893: *Held,* that the indorsement of acceptance of service of the case does not, in itself, constitute a waiver of appellee's right to have the appeal dismissed because not docketed within the prescribed time.

This was a motion to dismiss the appeal.

W. R. Allen for plaintiffs.
R. O. Burton for defendant.

BURWELL, J. The judgment was rendered at February Term, 1892, of the Superior Court. The appeal was docketed in this Court 13 March, 1893. It appears in the record that the appellee agreed that the appellant might have "thirty days to perfect appeal." Upon "the case" is this indorsement: "Service accepted 31 December, 1892", and this is signed by counsel who represented plaintiffs in the court below.

We do not think this indorsement, standing alone, constitutes in any degree a waiver of the appellee's right to insist that the appeal shall be dismissed because not docketed here within the prescribed time. His motion to dismiss must be allowed.

Appeal dismissed.

(284)

MARY E. PASS, ADMINISTRATRIX OF JAMES C. PASS, v. JAMES F. SHINE.

Contract—Interest—Mortgage.

Where it was stipulated in a mortgage securing a note bearing interest at 6 per cent per annum, that after default in payment of the note the maker should pay 8 per cent per annum during the continuance of such default: *Held,* in an action to foreclose the mortgage, that the plaintiff is entitled to recover the debt, with 8 per cent interest after maturity, as provided in the mortgage.

ACTION to foreclose a mortgage, tried at August Term, 1893, of DUPLIN, before *Bryan, J.,* a jury trial being waived.

It was admitted that the defendant executed and delivered to the plaintiff 1 December, 1882, the note declared on, a copy of which is as follows:

$874.45. Six months after date, for value received, we promise to pay Mary E. Pass, administratrix of James C. Pass, or order, the sum of eight hundred and seventy-four dollars and forty-five cents, with interest from date, and secured by mortgage deed on land bearing even date with this note.

As witness our hands and seals, this 1 December, 1882.

JAS. F. SHINE. (Seal.)
ELIZA SHINE. (Seal.)

It was also admitted that no part of the note has been paid, except the sum of $100, paid 30 October, 1891.

It was also admitted that on said 1 December, 1882, the defendant conveyed the land described in the complaint to the plaintiff by mortgage deed to secure the payment of said note, and that in the mortgage deed, after conferring a power of sale upon failure to pay the note and interest when due, and all costs, charges and taxes, there was the (285) following stipulation and agreement:

"It is further agreed that upon default in making such payment, we promise to pay interest on said note at the rate of eight per cent per annum during the continuance of such default."

Upon the admissions and the pleadings, the plaintiff insisted that she was entitled to recover judgment for the amount of said note, subject to said credit of $100, with six per cent thereon for six months, and that there being a failure to pay at the end of six months, interest after that time ought to be computed at the rate of eight per cent, according to the agreement in the mortgage. The defendant insisted that plaintiff was entitled to recover no more than six per cent interest for any part of the time.

His Honor being of opinion with the plaintiff, rendered judgment accordingly, and the defendant excepted and appealed.

Allen & Dortch for plaintiff.
H. R. Kornegay for defendant.

AVERY, J. The defendant might have lawfully agreed by the terms of the note itself to pay interest at the rate of eight per cent from the date of its execution. By failing to specify a higher rate he, in contemplation of law, intended that the debt should bear only six per cent interest until maturity. To secure this debt he executed a deed conveying his

own land, in which his wife (now dead) joined. The action is brought against James F. Shine only, to foreclose the mortgage after default in the payment of the note. We can conceive of no reason why the defendant could not lawfully contract in the deed itself, as he could have agreed in the note, that the rate of interest should be eight per cent after maturity. It has generally been conceded by the courts of this
(286) country that interest "is allowable as damages for default in the performance of a contract to pay money." 11 A. & E. Enc., 383. By special agreement a lawful rate may be paid from the date of contracting a debt till it becomes due. The fact that the creditor is content with a lower rate before maturity does not affect his right to demand under a special agreement a higher rate, not exceeding the limit fixed by law, after maturity. The judgment is

Affirmed.

A. F. WILLIAMS, ADMINISTRATOR OF HARPER WILLIAMS, v. MOSES COOPER.

Witness—Competency Under Section 590 of The Code.

1. Incompetency of a witness under section 590 of The Code attaches only to the *surviving* party to the transaction, and in an action on a bond, plaintiff administrator of a deceased person is competent to prove the execution by the defendant of the bond.
2. Where a plaintiff, administrator and distributee of a deceased person, testified only to the execution of the bond, this did not confer upon the defendant the right to testify as to payments made by him on the bond, nor to cross-examine the plaintiff administrator in regard to such alleged payments.

ACTION to recover the amount of a note executed by the defendant to the intestate of the plaintiff, tried before *Bryan, J.*, and a jury, at August Term, 1893, of DUPLIN, on appeal from a judgment of a justice of the peace.

The plaintiff was a distributee of his intestate's estate. On the trial plaintiff was allowed, under objection, to testify to the execution by the defendant of the note sued on. On cross-examination he testified that he knew of no payments made on the note by defendant to the intestate. The defendant then offered himself as a witness, and proposed to prove that he had paid the note sued on to the intestate of plaintiff.
(287) Objection being made to the proposed testimony, it was excluded. Thereupon his Honor directed the jury to answer the issue as

to payment in the negative, and defendant excepted and appealed from the judgment rendered thereon.

A. D. Ward for plaintiff.
H. R. Kornegay for defendant.

CLARK, J. The plaintiff, administrator and distributee of the payee, was competent to prove the execution of the bond by the defendant. The incompetency attaches only to the surviving party to the transaction. The Code, sec. 590. The representative of the deceased can testify, if he so elect, under penalty of making the surviving party a competent witness to the same transaction. *Thompson v. Humphrey,* 83 N. C., 416. On cross-examination by the defendant, witness stated that he did not know of any payment made by the defendant. The witness was not examined in his own behalf, except in regard to the execution of the note. This rendered the defendant a competent witness only "concerning the same transaction or communication" by the very terms of the statute. *Kesler v. Mauney,* 89 N. C, 369; *Burnett v. Savage,* 92 N. C., 10; *Sumner v. Candler,* 92 N. C., 634; *Hughes v. Boone,* 102 N. C., 137; *Bunn v. Todd,* 107 N. C., 266.

Nor could the door be opened wider by the defendant cross-examining the witness as to another transaction, to wit, payment on the note, as to which the witness was not offered, and did not testify in chief. To permit this course would be to nullify that portion of the section (590) which restricts the competency of the opposite party when an administrator has been offered as a witness to the "same transaction." This would become meaningless if the opposite party could, by cross-examining as to other matters, make himself competent as to them also.

No error.

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(288)

J. F. MAXWELL ET AL. v. HENRY MCIVER.

Issues, Failure to Tender—Amendment of Pleadings—Irrelevant Testimony.

1. Where an issue involved by the pleadings was not tendered, and the issues submitted were not objected to on the trial, a party in such default cannot complain of the consequences of his own neglect.
2. The allowance of an amendment to pleadings is within the discretion of the trial judge, and a refusal is not subject to review.

ACTION for a money demand and foreclosure of a mortgage deed, tried before *Bryan, J.*, and a jury, at the August Term, 1893, of DUPLIN.

The note declared on is in the following words and figures, viz.:

"On or before 1 November, 1886, I promise to pay J. Flavius Maxwell, or bearer, the sum of seventy-six dollars and thirty cents ($76.30), for value received of him, with interest at 8 per cent per annum from date. This 1 February, 1886.

"HENRY (his X mark) MCIVER.

"Test: JOHN O. BRYAN."

And on this note the following indorsement is made, viz.:

"Received on the within note twenty-three dollars and ninety-six cents. This 1 April, 1889."

The plaintiff G. M. Maxwell was introduced as a witness in his own behalf, and testified that he bought the note sued on from his brother J. Flavius; that in May, 1887, defendant sent plaintiff G. M. Maxwell, $5, which, by agreement of said plaintiff and the defendant, was paid for indulgence on the note sued on; that in November, 1887, $20 was paid, and in the latter part of December, 1888, $30 was paid;
(289) that no other amount was paid plaintiff by defendant after the transfer of the said note, and most of the $20 and $30 payments were given for indulgence.

Here defendant asked leave to amend answer and set up usury. Refused. Defendant excepted.

On the cross-examination the plaintiff testified that no money was paid on the 1st day of April, 1889, but that the credit of $23.96 was entered by the direction of the plaintiff under an agreement entered into between the plaintiff and the defendant at the time said payments were made, to the effect that if the plaintiff had to deposit said note as collateral he should so credit it on account of the $20 and $30 payments; that the person to whom it was assigned could collect only $75 out of it; that plaintiff had to deposit it as collateral, but afterwards redeemed it.

Defendant was then introduced in his own behalf, and proposed to testify that he had paid one Mrs. Merritt, an heir-at-law of B. W. Kornegay, deceased, $33.50, which was a charge for equality of partition on the lands mentioned in the complaint, with a view to having same credited on the note sued on.

Objection by plaintiff. Sustained. Defendant excepted.

The defendant then testified that he had paid the plaintiff in all $55, of which $5 was paid in April or May, 1887, and was not paid on the

note, but for indulgence; that he paid the plaintiff $20 in November, 1887, and $30 about the last of December, 1888; that nothing was paid 1 April, 1889, and that no payment other than the $55 above set forth had been made by him.

The defendant further proposed to testify that at the time the note and mortgage sued on were executed he thought he was renewing the same to Howell B. Grady and wife, to whom the original note and mortgage were given, and from whom the lands described in the mortgage were purchased; that he was an ignorant colored man, un- (290) able to read and write, and he thought the note and mortgage were being executed to the same parties as before, as Mr. J. Flavius Maxwell had prepared the original note and mortgage; that they met at Kenansville to renew the papers, and Mrs. Caroline Grady was not present.

This evidence was objected to by the plaintiff. Objection sustained. Defendant excepted.

Defendant then offered receipt of Howell B. Grady and wife, Caroline Grady, for the full amount of the purchase-money of the land, and offered as witness W. H. Grady, who offered to testify that the calculation was made by him and the settlement made in his presence, the receipt written by him and witnessed by him.

This evidence was objected to by plaintiff. Objection sustained. Defendant excepted.

The defendant then offered as witness Mrs. Caroline Grady, who proposed to testify that she never gave any permission to change the note and mortgage, when renewed, from her and her husband's name to the name of J. Flavius Maxwell, or any one else.

Objected to by plaintiff. Objection sustained. Defendant excepted.

The attorneys for plaintiff and defendant having filed two statements of the case on appeal, and not being able to agree, upon request I have drawn up this as the statement of the case on appeal as settled by me, this 5 October, 1893.

HENRY R. BRYAN,
Judge Presiding.

A. D. Ward for plaintiff.
H. R. Kornegay for defendant.

MACRAE, J. The pleadings disclose that an issue of fraud was raised, which ought to have been presented to the jury; but it does not appear that any such issue was tendered by defendant's counsel, (291) and no exception was taken to the issues submitted. In *Kidder v. McIlhenny*, 81 N. C., 123, it was insisted by the defendant that the issues passed on did not dispose of the matters in controversy in the plead-

ings, and that there should have been, and should now be, a further issue passed on, involving the validity of the mortgage as against the *feme* defendant, and the objection is thus disposed of in the opinion of the Court: "Nor ought the defendants to have been content with the proposed issue, if they desired others. They should have asked for other issues, and, if necessary, they would not have been allowed; or, if not allowed, the refusal would have constituted matter of exception. It might produce serious inconveniences and delays, if, when a party has opportunity to propose other and further issues and he refuses or fails to do so, he could then be heard to complain of the consequences of his own neglect, and thereby increase the costs, as well as delay the determination of the cause." *McDonald v. Carson,* 95 N. C., 377. It is to be regretted that further issues were not tendered, for, by reason of this failure, the defendant seems to be cut off from his most vital defense. *Walker v. Scott,* 106 N. C., 56.

The issues submitted without objection were: (1) "What payments have been made on the note sued on?" (2) "Is the plaintiff G. N. Maxwell indebted to defendant by way of counterclaim; and if so, in what sum?"

Upon these issues the testimony offered and rejected and made the subject of exception was irrelevant. It might have been very material if other issues had been submitted, but as defendant made no tender of others, nor exception to those submitted, we are unable to afford him any relief.

The motion to be permitted to amend his answer and set up a plea of usury was denied, and to this the defendant excepted. The allowance of the amendment was within the discretion of the presiding judge, and is not subject to review.

No error.

Cited: Wagon Co. v. Byrd, 119 N. C., 461, 469; *Faison v. Williams,* 121 N. C., 153; *Drennan v. Wilkes,* 179 N. C., 514.

(292)

J. S. LOCKHART v. V. BALLARD AND W. S. HALLYBURTON, TRUSTEES OF W. T. BLACKWELL.

Surety—Parol Evidence to Show Suretyship—Inadvertent Admission in Pleadings After Special Denial, Erroneous Judgment on.

1. Parol evidence is admissible to show that one apparently a principal on a note is, in fact, a surety.

2. Where, after a specific denial in an answer of the allegations of a complaint, a subsequent paragraph of the answer, by inadvertence, virtually admitted such allegations, and in another suit against same defendants by other parties the answer specifically denied such allegations, and the actions were, by consent, consolidated, it was error in the court below to render judgment for the plaintiff in the first suit upon such inadvertent admission, for whatever question might have arisen on the conflicting pleading was obviated by the consolidation of the two actions and the express denial in the latter suit.

BURWELL, J., did not sit.

ACTION, heard at June Term, 1893, of DURHAM, before *Bryan, J.*, the nature of which, and the facts connected therewith, sufficiently appear in the opinion of *Associate Justice Clark.*

Appeal by the National Exchange Bank of Dallas *et al.*

J. S. Manning and Busbee & Busbee for appellants.
W. A. Guthrie and Boone & Parker contra.

CLARK, J. The tenth class, into which the judgment admits the appellee creditors, is thus described in the deed of assignment: "To J. S. Lockhart, or the holders thereof, the amount of all notes and drafts on which J. S. Lockhart is bound as surety, or acceptor, or indorser for W. T. Blackwell, all the same amounting to about thirty-five thousand dollars, and having been done for the benefit and accommodation of W. T. Blackwell." On none of the paper set out in the judgment does J. S. Lockhart appear as "surety or acceptor, or indorser (293) for W. T. Blackwell," nor does it appear that they were executed "for the benefit and accommodation of W. T. Blackwell." Parol evidence was competent to show that, notwithstanding the apparent relation of the parties upon the face of the notes and drafts, the relation of J. S. Lockhart in regard to them was, in fact, either that of "surety, indorser or acceptor for W. T. Blackwell, or that they were executed for his benefit." But no evidence was introduced, and it was error to hold that this was established by admissions in the pleadings. There were two suits—one by creditors claiming to come under class ten, and the other by creditors belonging to the fourteenth class—seeking to restrain the defendants, assignees of Blackwell, from paying out to the plaintiffs in the first suit under class ten. These two suits were consolidated without objection, and the plaintiffs in the two separate actions are, in effect, the real litigants, the nominal defendants being mere stockholders. The answer to the complaint filed in the suit first brought denies specifically the allegation of the appellee creditors, plaintiffs in that suit. The following section of the answer, however, admits, by inadvertence probably, the ninth allegation of the complaint. Whatever question might have

arisen upon this conflicting pleading was obviated by the consolidation of the two actions and the express denial in the pleadings in the latter case that the appellee creditors are in any wise entitled to come within class "ten." As always in creditors' bills, one creditor can plead a defense to the claim of another creditor, since its exclusion enlarges the fund in which he himself is to share. *Oates v. Lilly,* 84 N. C., 643.

The notes and drafts sued on by those claiming under class ten aggregate within a few thousands of the thirty-five thousand dollars specified in that clause. This fact, however, cannot supply, by itself, evidence to show that Lockhart was "surety, indorser or acceptor" on the notes and drafts set out in the pleadings.

(294) While the judgment is erroneous in holding that, upon admissions in the answer, the appellees were entitled to share in class ten, it may be that when the case goes back evidence can be found to prove that, notwithstanding in form, J. S. Lockhart was not "surety, indorser or acceptor for W. T. Blackwell," yet, in fact, that was the true relation he occupied as to the notes and drafts in controversy. *Southerland v. Fremont,* 107 N. C., 565. If so, it would be decreed that the holders thereof should participate in said estate under class ten. If this is not shown, those claimants would come in under section 14 and share *pro rata* with the other creditors named in that class.

Error.

Cited: Dunn v. Beaman, 126 N. C., 769.

B. H. COZART ET AL. v. WEST OXFORD LAND COMPANY.

Specific Performance—Breach of Contract—Issue for Jury.

1. On the trial of an action for specific performance of a contract to purchase land it appeared that the land had been sold, pending the action, under prior encumbrance, and the sale confirmed by order of court, with consent of all parties, and that the complaint had been amended so as to claim damages for an alleged breach of contract by defendant to purchase. The defendant moved in this Court to dismiss the action on the ground that the plaintiff did not have and could not make title at the time of the trial, and also because no contract in writing between defendant and plaintiff had been shown: *Held,* that the motion to dismiss the action cannot be allowed, because (1) it is not now an action for specific performance, and (2) the defendant cannot avail itself of section 683 of The Code unless it had been specifically pleaded.

2. Where, on the trial of an action for specific performance to purchase land, the owner alleged an agreement by plaintiff to take a certain amount of stock in the defendant corporation, and to convey the land clear of encumbrance by a specified day, and his failure so to do, by reason whereof the defendant was unable to make a sale and distribution of lots into which the land had been divided: *Held*, that it was error in the court below to refuse to submit an issue framed to ascertain whether such sale and distribution of lots had been prevented by the failure of plaintiff to remove the encumbrance and take the stock.

ACTION, tried before *Bryan, J.*, and a jury, at April Term, (295) 1893, of GRANVILLE.

Defendant appealed. The facts are fully stated in the opinion of *Associate Justice MacRae.*

T. T. Hicks for plaintiffs.
Graham & Graham for defendant.

MACRAE, J. The primary object of this action was to compel specific performance of an alleged contract between plaintiff B. H. Cozart and the defendant company for the purchase by defendant of plaintiff's land, the discharge by defendant of certain liens or encumbrances upon said land, and the issue by defendant to said plaintiff of twenty shares of stock in defendant company; and as ancillary relief, to enjoin the other defendants from selling said land under their mortgages or trust deeds, pending this litigation. A restraining order was made. It appears by the complaint that upon an intimation of the judge that he would dissolve the restraining order, it was agreed between the parties that the defendants Herndon & Cooper, mortgagees, might sell the land under their deeds, that they did sell the land, and the same was bought by defendant Herndon, and the sale was confirmed by an order of court reciting the consent of parties thereto.

Upon these changed conditions the plaintiff, B. H. Cozart, demands damages of defendant company for failure to comply with its contract.

The pleadings are extremely voluminous, the complaint having been used as an affidavit to obtain the restraining order, and much of it is directed to that question. The complaint has been twice amended, and there are several exhibits attached.

The defendant company admits that there were negotiations between plaintiff and defendant in relation to the purchase of the land described, but denies that plaintiff complied with the agreement (296) to relieve the land of all encumbrances over $23,000, or that plaintiff ever conveyed said land to defendant clear of all liens above said sum. It admits the tender of a deed, but denies that it was according to contract. Defendant further alleges, that relying upon plaintiff's

promises to reduce the liens upon the land to $23,000 by a certain day, it paid off encumbrances to the amount of $3,000; that it had said land laid off and surveyed; that it advertised sales to be made upon the day last above referred to, and that by reason of the failure of plaintiff to reduce the liens upon said land to $23,000 in compliance with his agreement, the defendant has been damaged to the amount of $5,000. Defendant further claims the right to be subrogated to the rights of the holders of the encumbrances paid off by it, which were prior liens to the Herndon and Cooper mortgages, and demands further judgment against plaintiff for $3,000, the amount so alleged to have been paid by the defendant. And the defendant charges that it was induced to enter into the contract or agreement with plaintiff by the false representations of plaintiff that the encumbrances upon the land did not amount to more than $19,000. To the answer there was a reply, reiterating the allegations of the complaint and denying all false representations. The pleadings on both sides abound in the statement of evidential facts and matters only pertinent upon the question as to the right of plaintiff to the restraining order.

In this Court the defendants move to dismiss the action upon the ground that the complaint does not state facts sufficient to constitute a cause of action, as it appears that the land in controversy has been sold by consent of the plaintiffs under the Herndon mortgage, and the sale has been confirmed, and that the plaintiffs cannot execute title to the defendant land company, as they are no longer the owners of said land, and it is admitted in the complaint that the liens are in excess (297) of $23,000, and have not been reduced to that sum; and also that there is no contract in writing shown between defendant corporation and plaintiff. The motion is denied, because, first, the action is now for damages for an alleged breach of contract, and not to compel specific performance; second, if defendant had desired to avail himself of the defense of the statute, section 683 of The Code, he should have specifically pleaded it. *Curtis v. Piedmont Co.*, 109 N. C., 401.

The defendant tendered the following issues: (1) "Was the agreement of the defendant, the West Oxford Land Company, to purchase the land of the plaintiff, B. H. Cozart, founded upon the representation made by the said B. H. Cozart that the judgments, liens and encumbrances on said land did not exceed $23,000?" (2) "Was said representation false?"

After a careful perusal of the answer we do not find it alleged that the plaintiff B. H. Cozart represented that the judgments, liens and encumbrances on said land did not exceed $23,000. The answer charges that said Cozart repeatedly assured the defendant that the encumbrances on the said land would not exceed the sum of $18,000 or $19,000, and

that if the defendant would assume the payment of said encumbrances, he, the said Cozart, would sell said land at the price of $25,000, $2,000 of which he would take in the capital stock of said company at par, and the difference between the amount of the said encumbrances and $23,000 in cash. That, relying upon the representations of plaintiff, defendant agreed to take said land at the prices stated, upon condition that plaintiffs would execute and deliver a deed in fee simple to said land on or before 26 March, 1891. The defendant goes on at great length to detail the assertion of plaintiff that the encumbrances did not amount to more than $19,000, the reliance of defendant upon said statement and the consequent payment by defendant of debts of plaintiff to the amount of more than $3,000; the discovery that said encum- (298) brances amounted to over $26,000; the new promise of plaintiff that if defendant would take the land at the price stated, he (plaintiff) would relieve it of all encumbrances in excess of $23,000 on or before 26 March, 1891; the acceptance of this offer by defendant if plaintiff would comply with his agreement on or before the time stated; the failure of plaintiff to comply, and his tender of a deed to defendant and refusal to accept the same by defendant, because the land had not been relieved of all encumbrances over $23,000; the execution of a deed for said land to Gregory, trustee, and the failure of defendant and Gregory, or either of them, to tender to defendant a deed in accordance with the agreement, and the great damage sustained by defendant in consequence of such failure.

The reply denies all false representations, and avers the readiness and willingness of plaintiffs and their offer to deliver to defendants a good deed for said land free from all encumbrances over and above the sum of $23,000, and the refusal of defendant to comply with its contract. The reply further alleges that the deed above referred to was made to Gregory for the use of defendant, and as its agent, and sets forth an agreement made by Gregory (with plaintiff) for himself and his associates to pay off all encumbrances on said land to the amount of $23,000, and to pay to said Cozart the sum of $2,000 in stock of defendant company at par, and alleges, in substance, that the agreement made with Gregory was with him as agent of defendant company. If we have thus far extracted from the pleadings the true matter at issue between the parties, there seems to be no great difference between them as to the terms of the contract, except in one particular, and as no issue was tendered on either side as to its terms, it seems to be conceded that the plaintiff and defendant company entered into an agreement or contract that the plaintiff B. H. Cozart would make to said defendant a deed in fee simple for the land named, relieved of all encumbrances over and above the sum of $23,000, the other plaintiffs, undertaking (299)

to discharge all liens or encumbrances in excess of said sum, and the defendant company undertook, in consideration for such deed and conveyance, to discharge the liens upon said land, which were debts of said B. H. Cozart, to the amount of $23,000, and to issue to him twenty shares of stock in said company at its par value, $2,000, and if the said liens should not amount to $23,000, to pay to said plaintiff the difference in cash.

The contention of the plaintiffs is that they have always, since the making of the contract, been ready and willing, and have repeatedly offered, to convey said land to defendant company free from all encumbrances in excess of $23,000, and that defendant company has failed and refused to comply with its contract. But the land having been sold under some of the liens which were upon it, the original demand for specific performance has been abandoned, and the plaintiffs now demand damages for breach of contract by defendant company.

The defendant, on the other hand, contends that the plaintiffs have never tendered to it a deed for said land freed from all encumbrances in excess of $23,000. It contends further, that by the terms of the contract said deed was to have been delivered to it on or before a day certain, 10 March, 1891, and that the time of the delivery of said deed was of the essence of the contract; that upon the faith of plaintiff's agreement defendant sold stock and advertised a sale and distribution of the land to be made on 19 August, 1891, and incurred expenses of preparing the land for said sale, and paid off a part of the liens upon said land, and that by the failure and refusal of plaintiffs to comply with their contract the defendant has been damaged to the amount of $5,000 for the failure of its enterprise; and in the sum of $3,000, money paid by it in discharge of liens upon said property. Defendant also asks
(300) that for the last named sum it be subrogated to the rights of the parties whose liens have been paid off. Defendant also alleges that it was induced to enter into the contract by reason of the false and fraudulent representations of plaintiff B. H. Cozart that the sum of the encumbrances upon said land did not amount to more than $18,000 or $19,000. The last charge seems to lose its force by reason of the defendant's further allegations of the agreement as to the satisfaction of all liens over $23,000, and that upon plaintiffs carrying out their agreement the defendant would take the land upon the terms above set forth.

We can see, therefore, no necessity for the two issues first tendered by defendant. The terms of the contract not being seriously controverted by either side, except in one particular, which we will reach directly, there was no necessity for the first and second additional issues presented by defendant, especially as the said issues involved the finding of a special verdict by the jury.

There was, however, a sharp contention between the parties as to the question whether the performance of the contract was limited as to time, and we think that the third of the additional issues which arose upon the pleadings, was material and has not been presented in any other form to the jury: "Was the sale of lots and distribution of same 19 August, 1891, prevented by the failure of plaintiffs to discharge the liens in excess of $23,000, or from failure of plaintiffs to comply with the agreement to take stock in the West Oxford Land Company?" And this issue, we think, ought to have been submitted to the jury, as upon a response to it might have depended the findings upon others which were submitted.

As the case must go down for a new trial, it will be unnecessary to examine the numerous and interesting questions further presented, but we suggest that the matters in dispute between the parties are (301) greatly and unnecessarily complicated by the prolixity of the pleadings, much of which matter bearing upon the question of the restraining order, as well as much statement of evidentiary facts, might be profitably eliminated upon a repleader before another trial.

New trial.

Cited: Cozart v. Herndon, 114 N. C., 252; *Friedenwald v. Tobacco Co.,* 117 N. C., 557.

OLLIN SULLIVAN ET AL. v. H. E. PARKER ET AL.

Construction of Will—Intent of Testator—Devise to Illegitimate Children.

Although, by the rigid rule of testamentary interpretation, the word "children" includes only "legitimate children," yet where a will, considered in connection with surrounding circumstances, indicates that the illegitimate children of a person named shall partake of a limitation over to "all the children" of such person, the rule will be relaxed and effect given to such intention, so as to include not only illegitimate children of such given person living at the death of the testatrix, but also those living at the death of the person named when the limitation over takes effect.

PETITION for partition, transferred, after issue joined before the clerk, to the Superior Court, and heard before *Bryan, J.,* at August Term, 1893, of DUPLIN, upon a case agreed, as follows:

"1. That Ann Garvey, at the time of her death, was seized in fee simple and in possession of the following described tract or parcel of

land in North Carolina, Duplin County, and Kenansville Township (here follows description), containing 135 acres, more or less, which said land passed under the third item of the will of Ann Garvey, and which said will was executed on 2 August, 1872, and duly probated and recorded on 7 September, 1872.

"2. That said Ann Garvey died between 2 August, 1872, and 7 September, 1872; that at the time of the execution of her will she
(302) was living in a house on the said lands with her daughter, Martha J. Bostick, who was living there with one Samuel T. Bostick, under the relations hereinafter set out.

"3. That at the time of the execution of the said will the defendant Charity C. Bostick (now Parker) and her brother, H. T. Bostick, and all the plaintiffs except Dorotha W. Bostick and Marshall E. Bostick, were born and alive; that the plaintiffs, excepting O. L. Sullivan, the husband of one, are the offspring of the said Martha J. Bostick by the said S. T. Bostick.

"4. That about 1854 the said S. T. Bostick duly intermarried in the county of Duplin with one Barbara Merritt, with whom he lived for about a year, when she left him and resided in the county of New Hanover the greater part of the time till 1885, but resided part of the time in Charleston, S. C.; that S. T. Bostick never saw the said Barbara after she left him, but all the while had information that she was residing sometimes in New Hanover County and sometimes in Charleston, S. C.; that about 1885 or 1886 the said Barbara came back to the county of Duplin and died here, about the year 1889 or 1890, in the poorhouse; that no divorce was ever granted between the said S. T. Bostick and Barbara Bostick, so far as the records of this county show.

"5. That about 1859 the said Martha Jane (Garvey) duly intermarried in Duplin County with one Joseph Bostick, by whom she had two children—the defendant Charity C. Parker and one H. T. Bostick, now living in the State of Georgia; that said Joseph Bostick died in the Confederate army about 1862.

"6. That in March, 1866, in the county of Duplin, a justice of the peace, having a license for the purpose, went through the legal form of solemnizing a marriage between the said S. T. Bostick and the said Martha J. Bostick.

"7. That the said S. T. Bostick and Martha J. Bostick lived
(303) together under these relations until the death of Martha J. Bostic in November, 1881; that about 1868 the said S. T. Bostick was convicted of fornication and adultery in living with the said Martha Jane Bostick."

The pertinent item of the will of Ann Garvey is set out in the opinion of *Associate Justice Burwell.*

Bryan, J., held that the illegitimate children of Martha Jane Bostick (those born after the death of the testatrix and living at the death of Martha Jane, as well as those living at the death of the testatrix) were entitled to share the land with the legitimate children, and defendants appealed.

H. R. Kornegay for plaintiffs.
A. D. Ward and Allen & Dortch for defendants.

BURWELL, J. The third item of the will of Ann Garvey is as follows: "I will and devise all the balance of the estate of which I may die seized and possessed or to which I am lawful owner unto my daughter Martha Jane Bostick, for and during her natural life, to have, hold and enjoy the same, free from the control, management or contracts of her husband or any other person, for and during her life, and at her death to all the children of her body, share and share alike, and their heirs forever."

In *Howell v. Tyler*, 91 N. C., 207, *Chief Justice Smith*, discussing the case of *Thompson v. McDonald*, 22 N. C., 463, says: "It is not necessary to question the correctness of this rigid rule of testamentary interpretation, which seems to ignore to some extent the inquiry as to what the testator intended in using a word, since there was nothing in that case to explain the sense of the testator or to qualify the legal principle that such children have no parent and cannot be designated by a relation they do not sustain." The "rigid rule" of which he was there speaking was that where there was a bequest to two sisters, naming them, (304) with a limitation over if either "should die without a child or children living at her death"—the word "children" was to be understood to mean *legitimate* children. And he proceeds to say that "a more general and fundamental rule, underlying all others, is to look at the whole instrument in the light of the surrounding circumstances when it is made, and see, if we can, in what sense the testator used the word, for his intent must prevail over any legal mode of construing it where there is no antagonism."

Apply this fundamental rule to the will now before us—the words used are themselves significant—"*all* the children of her body." At the time these words were written to express the intention of the testatrix there had been born of the body of her daughter two children by a former marriage, who are the defendants and appellants, and four children, who are plaintiffs, and who were the result of that cohabitation between her and S. J. Bostick, the illegality of which is set out in the agreed facts. The testatrix, at the time she executed the will, was living in the house with her daughter and this man, towards whom that daughter stood in the relation of a wife in fact if not in law. An officer

of the law, under a duly issued license, had solemnized a marriage between them. She speaks in the will of the *husband* of her daughter, evidently meaning this man, to whom she no doubt considered her daughter lawfully united. Considered in the light of the surrounding circumstances when it was made, we must conclude that there should not be applied to the interpretation of this will that rigid rule, of the correctness of which *Chief Justice Smith seems* to intimate a doubt, having in mind, perhaps, what had been said by *Battle, J.*, in *Fairly v. Priest,* 56 N. C., 383, in relation to the effect of the act (Rev. Code, ch. 64, sec. 5) to legitimate a child as to its mother, and to make offspring that at common law was cruelly called nobody's child, the heir, (305) and in law, as in fact, the child of the mother that bore it; or to speak perhaps more accurately, the rule itself does not establish the defendants' contention, for under it the word children *prima facie* means only legitimate issue (*Kirkpatrick v. Rogers,* 41 N. C., 130), and here we have in the will itself, considered in connection with all the circumstances that we are allowed to call to our aid or in our search for that all-important fact—the intent of the testatrix—more than enough to rebut this *prima facie* case against these plaintiffs, who were born before the death of the testatrix.

Having concluded, for the reasons stated above, that those four of the plaintiffs who were *in esse* at the death of the testatrix are entitled, notwithstanding their illegitimacy, to be considered as included in the words "all the children of her body," we think there can be found no good cause to stop short of the further conclusion that those children—the other two plaintiffs who, after the death of the testatrix, were born of that cohabitation which has been spoken of—should also be so included. The words are comprehensive—"all the children of her body." This interpretation does, then, no violence, and is consonant with reason and justice. It effectuates what we believe to have been the true intent of the testatrix.

Affirmed.

Cited: Harrell v. Hagan, 147 N. C., 116.

(306)

C. H. WILLIAMS v. JOHN D. KERR.

Presumption—Probate—Lost Records—Secondary Evidence—Statute of Limitations—Possession of Mortgagor—Foreclosure Proceedings—Parties—Judge's Charge.

1. The acknowledgment of a deed before a justice of the peace or clerk of a county other than that in which the grantor resided or the land lay was invalid and did not authorize probate and registration [The Code, sec. 1246 (1)], and this is not cured by the curative acts of 1891, chapters 12 and 102, and 1893, chapter 293, as to third parties who have acquired rights prior to the passage of such acts; but where the certificate of probate of a deed recites that the justice of the peace taking the same was a justice of the peace of a given county where the land lies, the presumption is that he *was* such, and that he took the acknowledgment within the county.
2. It is not necessary that a lost record should be supplied by an independent action, for, upon satisfactory proof of loss, secondary evidence is admissible on a trial where it becomes material to show their contents.
3. If, when a deed previously withheld from record is filed for registration, there is a suit pending affecting the land, the holder of such deed is a purchaser *pendente lite*, and is bound by a decree in such suit as effectually as if a party to the action.
4. Subsequent encumbrancers, while proper parties to a suit for foreclosure of a mortgage, are not *necessary* parties.
5. Payment on a bond secured by mortgage before it goes out of date, and within ten years before suit brought, will prevent the bar of the statute of limitations, and a purchaser of the land at a mortgage sale will not be barred.
6. A mortgagor in possession of land holds under the mortgage, as also a purchaser from such mortgagor, provided he had notice of the mortgage, or if the mortgage was on record at the time of the purchase, and a seven-years holding by such mortgagor or his purchaser will not give title.
7. Where, in the trial of an action to recover land, it appeared that the defendant purchased the land from the mortgagor within less than a year before the mortgagee brought suit to foreclose the mortgage, the trial judge correctly charged the jury that if the defendant bought the land with actual knowledge of the mortgage, agreeing to assume the debt, he would be in possession under the mortgage; and further, that he would not have had possession long enough to make his title good against the mortgagee, even if his possession was adverse and without notice.

ACTION for the recovery of real estate, tried before *Winston, J.*, (307) and a jury, at February Term, 1892, of SAMPSON.

Both plaintiff and defendant claim title to the *locus in quo* from one James S. Boone.

The plaintiff offered a deed of mortgage dated 20 September, 1876,

duly registered, from said Boone and wife to M. E. Parker, wife of J. P. Parker.

Defendant objected to introduction of said deed, because it did not appear from the clerk's commission that the person authorized to take the same was a justice of the peace, or a resident of the county, or that he took the acknowledgment in said county. Objection overruled. Exception.

The commission issued by the clerk to "James Stringfield, Esq.," did not show that he was a justice of the peace of the county, but the certificate of probate signed by the justice described himself as a justice of the peace of the county.

The plaintiff next proposed to show by the clerk and other witnesses that the foreclosure papers in the case of *Edward Williams v. J. S. Boone and wife* had been lost and could not be found.

Defendant objected, because said lost records could not be supplied in this way, and could only be supplied by an independent action to restore the same. Overruled, and exception.

Plaintiff next offered Bizzell, the clerk, and M. C. Richardson, the commissioner, who sold the land and executed deed to the plaintiff, and also the attorney in said case, to wit, Mr. Cooper, and the defendant in this case, J. D. Kerr, as witnesses, each of whom swore that he had made diligent search for the lost papers in their respective law offices, and also in the clerk's office, and had been unable to find them, and that they were lost; that they had searched repeatedly.

The court held that secondary evidence was now admissible, after objection and exception.

(308) Plaintiff next offered the record in the foreclosure case.

Defendant objected to these records, because it appeared that suit was brought 19 September, 1889, and prior to that date the defendant had taken a deed from the mortgagor, and was in possession of the land, and also because he was not a party to the said suit. Overruled. Exception.

Page 256 of Summons Docket, *Edward Williams v. J. S. Boone and wife,* read in evidence, after objection and exception.

Deed from M. C. Richardson, commissioner, to plaintiff, dated 4 January, 1890, and duly registered, next read and put in evidence. Objection overruled, and exception.

It was proven that the defendant was in possession of the land in dispute, being the same described in the complaint, and also in the several deeds.

J. S. Boone, being put on the stand as a witness for plaintiff, stated that he made the last payment on the land and mortgage to M. E. Parker in December, 1879, the payment being $75 or $80; the bond was $400

at first; credit was entered on the back of note; was in possession of the land until he sold it to Newkirk in 1883; sold land to Newkirk with the understanding that he was to assume the Parker debt; J. D. Kerr now in possession, and has claimed it ever since C. H. Williams bought it.

M. C. Richardson sold the land. Kerr was present at the sale, and forbid the sale in presence of the plaintiff, who bought it.

Defendant offered deed from Boone to Newkirk, dated 14 August, 1883, registered 2 January, 1890, in Book 74, page 387; also deed from said Newkirk to defendant Kerr, dated 2 April, 1890, covering the land in dispute.

Plaintiff offered the answer to estop the defendant, and read the same as evidence.

It appeared in evidence that on 12 April, 1890, a suit was brought by present plaintiff against present defendant to recover the same land, but at October Term, 1891, a nonsuit was taken, and this action begun within a year. (309)

Upon the issue of the statute of limitations, the court charged the jury that if they believed that in December, 1879, Boone, the mortgagor, paid $75 on the bond, and that in September, 1889, within ten years, an action was begun to foreclose said mortgage; that the cause of action was not at said time barred by the ten-year statute of limitation; that the purchaser at such foreclosure sale was not at that time barred, if the debt was not out of date. Defendant excepted.

The court also charged the jury that a mortgagor in possession of land held under his mortgage, as did also a purchaser from such mortgagor, provided he had notice of the mortgage, and that if the mortgage was registered at the time of the purchase, that was notice to the purchaser. That a seven-years holding by such mortgagor or purchaser would not give title. Defendant excepted.

Also, that if Newkirk had actual knowledge of the mortgage when he bought the land of Boone, and agreed to assume the Parker debt, and purchased with this understanding, he would be in possession under the mortgage. That the defendant, having bought of Newkirk in 1890, had not had possession of the land a sufficient length of time to make his title good against the mortgagee, even if it were adverse and without notice. Defendant excepted to this portion of the charge.

W. R. Allen for plaintiff.
J. D. Kerr for defendant.

CLARK, J. It is true that if the mortgage was acknowledged before a justice of the peace not of the proper county [The Code, secs., 1245, 1246 (1)], the registration would be invalid. *DeCourcy v. Barr,* 45

N. C., 181; *Todd v. Outlaw,* 79 N. C., 235; *Duke v. Markham,* 105 N. C., 131, and cases cited; Devlin on Deeds, secs. 487, 488. It (310) is also true, as contended, that the acts validating such irregular acknowledgments and probates (Laws 1891, chs. 12 and 102; Laws 1893, ch. 293), while good, probably, as between the parties, and as to third parties from the passage of the acts, would not validate such acknowledgments and probates as to third parties whose rights had already been acquired prior to the validating statutes. *Gordon v. Collett,* 107 N. C., 362. But here the probate recites that the justice of the peace taking the same was a justice of the peace of Sampson County, where the land lay, and the presumption is that he was a justice of the peace of said county and that he took the acknowledgment within the same, subject to proof of the contrary. *Kidd v. Venable,* 111 N. C., 535; *Darden v. Steamboat Co.,* 107 N. C., 437; *Devereux v. McMahon,* 102 N. C., 284.

Exception 2.—It was not necessary that the lost record should be supplied by an independent action. Upon satisfactory proof of loss, secondary evidence is admissible. *Mobley v. Watts,* 98 N. C., 284; *Hopper v. Justice,* 111 N. C., 418.

Exception 3.—The proof of loss was sufficient to justify the admission of secondary evidence of the lost records.

Exception 4.—This goes upon the ground that the defendant was not a party to the proceedings in foreclosure. The defendant's title was derived by conveyance from Newkirk, the assignee of the mortgagor, and the plaintiff had purchased at the foreclosure sale made under proceedings in which the mortgagee and the mortgagor were the parties. The foreclosure action was commenced on 19 September, 1889, and the sale by the commissioner under the decree rendered therein was on 4 January, 1890. The records are lost, and it will be presumed that the decree was rendered upon a complaint regularly filed, setting out the facts. The deed from the mortgagor (Boone) to Newkirk, though dated August, 1883, was not registered until 2 January, 1890, and the deed (311) from Newkirk to the defendant Kerr, though dated 15 October, 1899, was not registered before 2 April, 1890. In *Collingwood v. Brown,* 106 N. C., 366, the Court say: "If, at the time it (the deed) is so filed for record, there is a pending suit, the holder of such a deed, previously withheld from the record, is a *pendente lite* purchaser." And in that case it is held that such a purchaser is as effectually bound as if a party to the action.

It would be strange, indeed, if a party could take a deed pending litigation, and could hold the deed in his pocket, setting up no claim, and, after the litigation closes, could say he ought to have been made a party.

The defendants Kerr and Newkirk were not made parties because the records did not show that either had title or claim of title. Besides, subsequent encumbrancers are proper parties in a foreclosure proceeding, but not necessary parties. *Kornegay v. Steamboat Co.*, 107 N. C., 115.

Exceptions 5 and 6 are, it seems to us, simply exceptions out of "abundance of caution," and are without merit.

Exception 7.—If there was a payment on the mortgage bond within ten years before suit brought, the debt not being out of date, the purchaser at the foreclosure sale was not barred. The Code, sec. 152 (3); *Ely v. Bush*, 89 N. C., 358.

Exception 8.—The court correctly charged the jury that "a mortgagor in possession of land held under his mortgage, as did also a purchaser from such mortgagor, provided he had notice of the mortgage, and if the mortgage was registered at the time of the purchase, that was a notice to the purchaser, and a seven-years holding by such mortgagor or purchaser would not give title." *Parker v. Banks*, 79 N. C., 480.

Exception 9.—The court correctly stated the law in charging that "if the purchaser bought the land with actual knowledge of the mortgage agreeing to assume the mortgage debt, he would be in possession under the mortgage, and the defendant having bought the land from the aforesaid purchaser within less than a year before the suit was originally brought (this suit having begun within one year after a (312) nonsuit taken in such original suit), the defendant would not have had possession of the land long enough to make his title good against the mortgagee, even if his possession were adverse and without notice." *Parker v. Banks, supra.*

No error.

Cited: Dixon v. Robbins, 114 N. C., 103; *Harper v. Edwards*, 115 N. C., 248; *Barrett v. Barrett*, 120 N. C., 130; *McAllister v. Purcell*, 124 N. C., 264; *Gammon v. Johnson*, 126 N. C., 67; *Jones v. Williams*, 155 N. C., 188, 194.

DANIEL GATEWOOD ET AL. v. T. R. TOMLINSON ET AL.

Married Woman—Inchoate Right of Dower.

1. A married woman has an inchoate right or estate in one-third in value of all the lands of which her husband is possessed during coverture, but its enjoyment is postponed by the law until his death, and is contingent upon her surviving him; therefore,

2. Where the husband's land was sold under execution the wife cannot in his lifetime have her dower allotted until his death before her.
3. A summons in a proceeding for the allotment of dower is returnable before the clerk of the Superior Court, and not to the court in term.

ACTION, heard on demurrer to the complaint, before *Whitaker, J.*, at May Term, 1893, of ANSON.

The demurrer was sustained, and plaintiffs appealed.

The facts are succinctly stated in the opinion of *Associate Justice Burwell.*

R. T. Bennett for plaintiffs.
R. E. Little for defendants.

BURWELL, J. The plaintiffs were married in 1856; the husband acquired land in 1874; it was sold under execution against him in 1889; the defendant purchased it at the sale, and the *feme* plaintiff asks that her dower in this land be allotted to her. The summons was re-
(313) turnable to the Superior Court in term, and not before the clerk.

A married woman's rights in her husband's lands are fixed by the statute. She has none therein, except such as are thus secured to her. The act, which is applicable here (The Code, sec. 2103), provides that upon *the death of her husband,* the plaintiff shall be entitled to an estate for her life in one-third in value of all lands of which her husband was seized during the coverture. By the express words of the statute, her enjoyment of the possession of one-third of the land is postponed until the death of her husband. The defendants have acquired the husband's rights. They stand in his place as to this land. She has, it is true, a right, an inchoate right or estate in the land, but its enjoyment is postponed by the law until the death of her husband, and is contingent upon her surviving him.

The case of *Felton v. Elliott,* 66 N. C., 195, is directly in point, we think. Three reasons were given by *Chief Justice Pearson* for dismissing that case. The first two there specified apply here.

No error.

Cited: Joyner v. Sugg, 131 N. C., 349; *Rodman v. Robinson,* 134 N. C., 505; *Shackleford v. Morrill,* 142 N. C., 222; *Linebarger v. Linebarger,* 143 N. C., 231.

JOHN W. McCASKILL ET AL. v. JAMES L. CURRIE ET AL.

Verdict of Jury—Inconsistency of Findings—Setting Aside Verdict.

Although the verdict of a jury should be set aside where it is so inconsistent in its responses to the issues or with the pleadings that the court cannot determine what judgment should be rendered in favor of a given party, or which of the parties is entitled to judgment, yet mere informality will not vitiate a verdict, and it should not be set aside when the two findings will support precisely the same judgment in favor of the same party, and where no injustice will result from an adjudication upon the substance or general purport of the verdict.

McRAE, J., dissents *arguendo.*

ACTION, tried before *Connor, J.,* and a jury, at August Term, 1893, of MOORE. (314)

Plaintiffs sought to have set aside and canceled a deed from Alexander Robinson, their ancestor, to the defendant J. L. Currie, the material parts of the complaint being as follows:

"1. That on or about 1 May, 1886, one Alexander Robinson sold and conveyed to James L. Currie a parcel of land in Moore County, containing eighty acres, part of two hundred acres, adjoining the lands of James L. Currie, described in said deed aforesaid, for the recited consideration of five hundred dollars ($500), and afterwards, without the knowledge or consent of said Alexander Robinson, and after said deed was delivered, and without any consideration, the said James L. Currie fraudulently inserted in said deed the description, courses and boundaries of another tract of land belonging to said Alexander Robinson, containing one hundred and fifty acres, on Downing Creek in Moore County, purchased by said Robinson from _____ McKimmon, known as the Sandy Robinson place, adjoining the lands of James L. Currie, John M. Graham, Stephen Bennett and others, described in said deed from Alexander Robinson to James L. Currie.

"2. That the consideration recited in said deed is greatly less than the value of said land, the 150-acre tract alone being worth $1,500.

"3. That at the time of the execution of said deed said Alexander Robinson was not of sufficient mental capacity to execute a deed, nor had he sufficient mental capacity to understand the nature of a contract, and his signature to said deed was obtained by the defendant James L. Currie by undue persuasion and false representations as to the contents and nature of said deed, representing that it embraced only the eighty acres aforesaid.

"4 That the defendant James L. Currie was the friend and confidential adviser of said Alexander Robinson for many years (315)

before his death, and said Robinson had and reposed unbounded confidence in said Currie in all business transactions and relations, and was easily influenced by said Currie in the most important matters, and that said Currie took advantage of these circumstances and existing state of facts to procure said deed.

"5. That as plaintiffs believe, said Currie has never paid the consideration price expressed in said deed for said eighty acres of land."

The answer of James L. Currie denied the material allegations in the complaint.

The defendant moved that the plaintiffs be required to elect between the inconsistent allegations in the complaint, on the ground that it could not be true that the defendant obtained the deed by fraud and undue influence as to the one hundred and fifty acres, when the one hundred and fifty acres was not, as alleged, described in the deed when it was executed. Motion refused, and defendant excepted.

The suit was prosecuted against James L. Currie only, his codefendant having died since the commencement of this action.

The following issues were submitted to the jury, to both of which the jury responded "Yes":

"1. Did the defendant procure the deed from Alexander Robinson by undue influence or false representations as to the 150-acre tract?

"2. Did the defendant, after the execution of the deed, fraudulently and without the knowledge and consent of Alexander Robinson, insert in said deed the 150-acre tract?"

After the verdict was rendered the defendant moved to set aside the same, on the ground that the issues and the answers thereto were inconsistent and contradictory.

Whereupon his Honor made the following order, to wit:

"It appearing to the court that the verdict of the jury upon the (316) issues is contradictory and inconsistent, the same is for that reason set aside and a new trial awarded."

To which the plaintiffs excepted, and appealed.

Black & Adams for plaintiffs.

J. W. Hinsdale and W. E. Murchison for defendant.

AVERY, J. Where the verdict of a jury is either so inconsistent or so indefinite that the court cannot determine upon the pleadings and findings what judgment should be rendered in favor of a given party, or which of the parties is entitled to judgment, it must be set aside and a new trial awarded. *Allen v. Sallinger,* 105 N. C., 333; *Crews v. Crews,* 64 N. C., 536. The same result must follow where findings of the jury are irreconcilably inconsistent with the admissions in the pleadings. *Tankard v. Tankard,* 79 N. C., 54.

A careful review of the cases in which this Court has given its approval to setting aside verdicts on account of inconsistent findings, discloses the fact that the rulings have invariably rested upon the ground that there were two responses to different issues in each case, one of which would support a decree for the defendant, while the other would entitle the plaintiff to recover. So that the court could not proceed to judgment because there was no principle of law which empowered the judge to choose between two contestants, both of whom had been declared by the jury to be the prevailing party. *Mitchell v. Brown,* 88 N. C., 156; *Bank v. Alexander,* 84 N. C., 30; *Morrison v. Watson,* 95 N. C., 479; *Turrentine v. Railroad,* 92 N. C., 638; *Porter v. Railroad,* 97 N. C., 66; *Allen v. Sallinger, supra; Puffer v. Lucas.* 107 N. C., 322. But when the verdict points out who is the prevailing party, and determines distinctly the facts upon which the nature and measure of his redress depend, the court is not precluded from pronouncing the sentence of the law upon the findings, because, upon two allegations in the complaint, in the nature of separate counts in a declaration or distinct grounds of action, issues have been framed and responses (317) returned which are not in perfect harmony with each other, when it appears that upon either finding, considered separately, the same party (here the plaintiff) would be entitled to precisely the same judgment. In the case at bar, whether the defendant inserted the description of the 150-acre tract of land in the deed before it was signed, and by undue influence or false representation induced the grantor to execute it in that shape, or whether after execution he forged the portion of the deed embracing the calls of that tract, in either event the court would declare the deed fraudulent and void as a conveyance of the 150-acre tract, and adjudge that the plaintiff recover the possession, and costs in the action. Indeed, we can readily understand how the jury might have been misled so far as to intend by the response to the first issue to find that the defendant represented to Alexander Robinson that he was conveying only the eighty-acre tract, and afterwards altered the deed by inserting the description of the other tract.

If the judge who presided in the court below entertained any doubt about the weight of the evidence, and thought that the findings of the jury upon both issues, together with other circumstances, indicated that they were unduly biased in favor of the plaintiff, he might have set aside the verdict in the exercise of a sound discretion, and the order would not have been reviewable here. But we do not think that the verdict is so contradictory or inconsistent that the court could not see what judgment should be entered. Mere informality will not vitiate a verdict if it appears that no injustice will result from an adjudication upon its substance or general purport. *Hawkins v. House,* 65 N. C.,

614; *McMahan v. Miller,* 82 N. C., 317; *Walker v. Mebane,* 90 N. C., 259.

We have extended our examination of authorities upon the practice in cases of this kind to the text-writers and decisions of other
(318) courts, and we have not found any case where two findings, which would support precisely the same judgment in favor of the same party, have been set aside on the ground of inconsistency in the verdict. *Potter v. Hancock,* 30 Conn., 518; Hilliard New Trials, p. 148. The Supreme Court of New York, in the case of *Hyatt v. Railroad,* 6 Hun, 306, held that a verdict was inconsistent where the jury assessed punitive damages against a railway company on account of an assault on the plaintiff by its conductor, who was a codefendant, but did not find a verdict against the conductor, because *ex necessitate,* if the conductor was in fault the company was not liable. The finding in favor of the conductor necessarily meant that the plaintiff was entitled to recover nothing against the corporation, while the assessment of damages against the company was a basis for a judgment for the amount against it. The verdict was set aside, because, in one aspect of it, the plaintiff was entitled to recover, while in another he was not. The test; therefore, is whether there are two phases of a verdict—the one entitling the one party and the other the adverse party to a judgment in his favor.

The judgment of the court is reversed and the case remanded, to the end that judgment may be rendered upon the verdict in favor of the plaintiff.

Reversed.

MacRae, J., (dissenting). I am constrained to dissent from the conclusion reached by a majority of the Court, and to concur in the view taken by the learned judge who tried the case below. It seems to me that the responses to the two issues are so inconsistent and illogical that they cannot stand together, and as the court could not select either one as against the other, both should be rejected. The response to the first issue necessarily negatives the second, for if the defendant procured the deed from Alexander Robinson by undue influence or false representation as to the 150-acre tract, it was physically impossible that he
(319) should have inserted the calls of this tract in the deed after its execution. If, on the other hand, the defendant, fraudulently and without the knowledge and consent of Alexander Robinson, inserted in said deed the 150-acre tract, it was equally impossible that he should have procured the deed from Robinson by undue influence and fraudulent representation as to the 150 acres. So that, by the verdict, we have, in effect, an affirmative and a negative response to each issue.

Cited: Turner v. Davis, 132 N.C., 188; *Stern v. Benbow,* 151 N. C. 463.

JAMES M. ALLEN ET AL. v. S. H. McLENDON ET AL.

Certiorari—Omissions from Case on Appeal.

A case on appeal settled by the trial judge imports absolute verity, and this Court will not, certainly, in the first instance, direct a *certiorari* to be issued to supply evidence alleged to have been omitted when it does not appear that the judge below has intimated that he will make the correction if the case is presented to him again for the purpose.

Battle & Mordecai for plaintiffs.
R. E. Little for defendants.

MACRAE, J. This was a petition for a *certiorari,* filed in this Court upon the ground that his Honor, in making up the case on appeal, had inadvertently omitted some portions of the testimony which were material to be set out, in order that the appellant might fairly present his exceptions; that said testimony was set out in the case tendered by the appellant, and in the countercase offered by appellee, and also appeared in the notes of the judge which were attached to the affidavit of the petitioner, and that the foregoing facts are the grounds of petitioners' belief that if an opportunity was afforded him, his Honor would insert in the case the testimony referred to, in (320) response to the *certiorari.* There is no allegation, however, that any application had been made to his Honor, or that any intimation had been made by him that he would, upon opportunity, make the amendment desired.

In *Boyer v. Teague,* 106 N. C., 571, the matter involved in this application was very fully considered and discussed. In that case his Honor below had, upon application to him, intimated that he would insert the testimony referred to in response to a *certiorari,* and the same was granted.

And in *Broadwell v. Ray,* 111 N. C., 457, the petitioner gave his reason for his belief that the judge would insert the testimony to be that he had informed petitioner's counsel that he had the evidence taken down at the trial, and that he would furnish the same if the case was again placed before him, and there the motion was granted.

But it is said in *McDaniel v. King,* 89 N. C., 29: "If the judge, by inadvertence, mistake or misapprehension, has failed to settle the case for this Court correctly, we cannot doubt that he will gladly correct his error, either with or without notice to the parties to the action, as he may deem just and proper. This Court will not, certainly in the first instance, resort to harsh and extreme remedies to compel courts to dis-

charge their duties correctly and correct their errors in respect to cases coming to this Court by appeal.

This case settled by the trial judge imports absolute verity.

This Court has no authority to require the judge, in settling the case, to set forth any matter of evidence alleged to have been omitted. It is entirely within his discretion to amend the case when the opportunity is afforded him by the *certiorari*. "The writ will not, even in such case, be granted unless the grounds for such belief are set forth so that the court may pass upon the reasonableness thereof." *Lowe v. Elliott,* 107 N. C., 718, and cases there cited.

It seems but fair to the trial judge that he should have the op-
(321) portunity presented to him to intimate whether he will make the desired correction.

For the reasons stated in *McDaniel v. King, supra,* that this Court will not direct a *certiorari* to be issued in the first instance, it not being made to appear that the judge below has intimated that he will make the correction if the case is presented to him again, the prayer of the petitioner is denied.

Certiorari denied.

Cited: Cameron v. Power Co., 137 N. C., 105; *Slocumb v. Construction,* 142 N. C., 351, 352; *Martin v. Knight,* 147 N. C., 581.

JAMES M. ALLEN ET AL. v. S. H. McLENDON ET AL.

Motion to Set Aside Fraudulent Mortgage—Judgment Creditors—Evidence—Amendment of Pleading on the Trial.

1. In an action to foreclose a mortgage, judgment creditors of the mortgagor became parties defendant and attacked the mortgage as fraudulent. An issue submitted by the judge confined the inquiry as to the fraud to the knowledge of the mortgagee, while one tendered by the plaintiff and refused extended the inquiry to his participation in, as well as knowledge of, the fraud. In response to another issue, the jury found that the debt alleged to be due by the mortgagor to the mortgagee was not *bona fide: Held,* that such finding of the jury renders immaterial an inquiry as to whether the mortgage would have been vitiated simply by notice of fraud on the part of the mortgagor fixed upon the mortgagee.
2. Where, in an action to foreclose a mortgage, judgment creditors of the mortgagor became parties defendant and filed an answer, in the nature of a complaint, setting out their judgments and asking that the mortgage be set aside as fraudulent, the mortgagor made no reply, but plaintiff

excepted to the evidence offered to prove such indebtedness: *Held*, that the question of the indebtedness of the mortgagor to the judgment creditors was a matter between them, and did not concern the mortgagee, especially where the jury found that his alleged debt was not *bona fide* and that the mortgage was fraudulent.

3. On an issue as to the *bona fides* of a mortgage given to secure an alleged preëxisting indebtedness, the tax lists for several years in the county and township in which mortgagee resided were competent to be submitted, not as absolute and convincing evidence, but as *some* evidence that the mortgagee had no solvent credits.

4. It is within the discretion of a trial judge to permit an amendment of the pleadings on the trial when such amendment does not change the character of the action.

5. In the trial of an issue relating to the *bona fides* of a conveyance, it was proper for the trial judge to instruct the jury that the law looks with suspicion upon a transaction whereby one indebted to others conveys his property, or a part of it, to a brother-in-law to secure an alleged pre-existing indebtedness, and that it was the duty of the jury to scrutinize the matter closely in considering its validity.

BURWELL, J., did not sit on the hearing of this case.

ACTION, tried at May Term, 1893, of ANSON, before *Whitaker, J.*

The action was brought by James M. Allen against S. H. McLendon and wife for the foreclosure of a mortgage theretofore made by defendants to plaintiffs to secure the payment of a note for $2,040.57 and interest. A complaint was filed at the return term, and for want of an answer judgment final by default was rendered at the same term and a foreclosure sale decreed. At the succeeding term of the court, W. A. Liles, executor of Nancy McLendon, was allowed to become a party plaintiff, and filed a complaint alleging that defendants had executed another mortgage to this plaintiff's testatrix since the before-mentioned mortgage was made, and asking that his rights under the second mortgage might be protected.

Upon report of sale and affidavits at a subsequent term, the sale was set aside, resale ordered and the clerk appointed commissioner, who made sale and reported that plaintiff Allen was the last and highest bidder, but being the mortgagee creditor had paid in no money. Pending the motion for confirmation of this sale, a large number of judgment creditors of defendant S. H. McLendon were allowed to come in and make themselves defendants and filed an answer, duly verified, alleging the indebtedness to them of defendant S. H. McLendon, (323) and further, that in April, 1885, the defendants, McLendon and wife, conveyed with other lands, the lands described in the mortgage thereafter made to plaintiff Allen, who was the clerk and brother-in-law of S. H. McLendon, and that said Allen, by deed in May, 1885, con-

veyed to his sister, the *feme* defendant L. A. McLendon, all of said lands; and they allege that all of said conveyances, including the mortgage made by said McLendon and wife to said Allen, were fraudulent and void as to the said creditors, and that the judgment of foreclosure was obtained by fraud and collusion, and they demanded that the same be canceled, vacated and set aside. Plaintiff Allen filed his reply, denying all fraud or collusion, admitting the conveyances and mortgage, and alleging that the same were *bona fide* and for valuable consideration, and denying all knowledge or information as to the judgments alleged by defendants. McLendon and wife filed no reply. A receiver was appointed.

At said May Term, 1893, the following issues were submitted to the jury, and responded to as follows:

"1. Was the mortgage by S. H. McLendon and wife to James M. Allen executed with intent to fraudulently hinder or delay the creditors of S. H. McLendon? Answer: 'Yes.'

"2. If yes, did the plaintiffs have knowledge of such fraudulent intent? Answer: 'Yes.'

"3. Was the alleged indebtedness to plaintiff, or any part thereof, *bona fide; if so,* what part? Answer: 'No part.'

"4. Was the defendant S. H. McLendon indebted to defendants as alleged in their answer? Answer: 'Yes.'"

Plaintiff Allen moved for a new trial; the motion was denied, and judgment was rendered vacating the former judgment and decree of foreclosure, and setting aside and declaring void the deeds and mortgages aforementioned, directing the receiver to sell the lands
(324) named in said deeds and mortgage for cash, and report, and the cause was retained for further directions and the distribution of the proceeds of said sale among the judgment creditor defendants and W. A. Liles, executor, *pro rata,* and for costs. Only James M. Allen appealed. The exceptions are stated in the opinion.

Battle & Mordecai for plaintiff.
R. E. Little for defendants.

MACRAE, J. The plaintiff Allen tendered the following issues:

"1. Was the mortgage executed by S. H. McLendon and wife to the plaintiff J. M. Allen made to secure a *bona fide* debt to the plaintiff, and has the same, or any part thereof, since been paid?

"2. Was the said mortgage executed with the intent to defraud the creditors of S. H. McLendon?

"3. Did the plaintiff know of and participate in such fraud?"

The first exception was to the submission by the court of the second

issue submitted, and the refusal by the court to submit the third issue tendered by the plaintiff.

The issue submitted confined the question to the knowledge of the grantee, while that tendered and refused extended the inquiry to a participation in, as well as knowledge of, the fraud. The rule is that "A mortgage deed executed to secure the payment of money loaned or of a valid preëxisting debt, but also with the intent on the part of the mortgagor to hinder, delay or defraud his creditors, will, nevertheless, be deemed valid and enforced by the courts as against the claims of creditors other than the mortgagee or *cestui que trust,* unless the beneficiary under the deed had knowledge of and participated in the fraud." *Woodruff v. Bowles,* 104 N. C., 197; *Hudson v. Jordan,* 108 N. C., 12; *Battle v. Mayo,* 102 N. C., 413. But the response of the jury to the third issue, that the alleged indebtedness of McLendon to plaintiff (325) Allen was not *bona fide*—in other words, that there was no debt to be secured by the mortgage, and therefore that the conveyance was necessarily fraudulent as to both grantor and grantee—relieves us of the necessity of considering the question whether the mortgage would have been vitiated simply by notice of fraud on the part of the mortgagor fixed upon the mortgagee.

The plaintiff Allen objected and excepted to the evidence offered to prove the judgment indebtedness of S. H. McLendon to the new parties defendant, but that was a matter between defendant McLendon and the other defendants, who had put in a duly verified answer, in the nature of a complaint, charging that they were judgment creditors of said McLendon in the sums set out. He made no reply, and the alleged judgment creditors were entitled to judgment against him as to the indebtedness. Besides, it appears that most of the judgments were proved by the judgment docket, which was proof of the record itself; and if there was irregularity in proof of any of the judgments rendered by justices of the peace, it cannot now concern this plaintiff, by reason of the response to the first, second and third issues.

For the purpose of showing that McLendon was not indebted to Allen, it was entirely competent to offer the tax lists for several years in the county and township of said Allen's residence to show that he listed no solvent credits. While this may not have been absolute and convincing proof, it was surely some evidence competent to go to the jury upon the question stated.

J. M. Allen testified that he owned a tract of land in Anson County, worth $250, which he had bought in 1886 on credit. He was then asked by his counsel what other property, if any, he owned outside of the mortgage sued on. Defendants objected. The objection was sustained,

and plaintiff Allen excepted. As the testimony is reported, there is no ground on which to base this exception.

Defendant McLendon testified as a witness for plaintiff Allen (326) that he (witness) owned several tracts of land, naming them and their values. Witness was asked on cross-examination if this land or a portion of it had not been allotted to him as his homestead, and at what price. His answer was objected and excepted to. Whatever may have been the object of the question there could be no valid objection to it and the answer, for it was asked and answered upon cross-examination.

The defendants were allowed to amend their answer during the trial by inserting the words "not due" and "illegal," to which plaintiff Allen excepted. This was within the discretion of his Honor, and not subject to review. The amendment did not change the character of the action.

We see no error in the charge of his Honor that the law looks with suspicion upon a transaction of this kind—where the defendant McLendon is indebted to others, and conveys his property or a part thereof to his brother-in-law—that they were required to scrutinize the matter closely in reaching their conclusion as to its validity. The language seems to follow an approved precedent in *Brown v. Mitchell,* 102 N. C., 347.

The exceptions—"(2) Because the court did not put its charge in writing and read it to the jury; (3) Because the court stated in full the contentions of the defendants, and failed and neglected to state the contention of the plaintiff Allen; and (4) Because the court failed to charge the jury as requested by plaintiff," are met by the statement in the case that "the plaintiff Allen did not request the court to put its charge to the jury in writing; the plaintiff Allen did not tender or show to the court any requests or prayers for instructions to the jury; and the court in its charge did state to the jury carefully, particularly and fully the contention of the plaintiff Allen as to all the questions embraced by the different issues submitted to them." These findings are binding upon us.

There was also a motion for judgment *non obstante verdicto,* (327) but we have not been furnished with the grounds of the motion, and we see nothing in the plea which confesses a cause of action, nor that the matter relied on in defense is insufficient.

No error.

Cited: Calvert v. Alvey, 152 N. C., 613; *Hamilton v. Lumber Co.,* 160 N. C., 52.

LEVI MORRISON v. K. M. McDONALD.

Motion to Set Aside Judgment—Statute Affecting Vested Rights, Constitutionality of.

1. Before the passage of chapter 81, Laws 1893, amending section 274 of The Code, a judgment based on a verdict could not be set aside for excusable neglect, etc.
2. The Legislature has no right, directly or indirectly, to annul, in whole or in part, a judgment already rendered or to reopen and rehear judgments by which the rights of the parties are finally adjudicated and vested; therefore,
3. A judgment based on a verdict, and from which there was no appeal, rendered before the passage of the act (ch. 81, Acts 1893) extending the remedial effect of section 274 of The Code to judgments based on verdict, cannot be set aside for excusable neglect, etc.

The plaintiff recovered judgment against the defendant for $150 with interest, before a justice of the peace, from which the defendant appealed to the Superior Court.

At the December Term, 1892, of MOORE, in the absence of the defendant, the case was tried—the following issues having been submitted to the jury, viz:

"Is the defendant indebted to the plaintiff; if so, in what amount?"

To which the jury responded, "Yes; $150, with interest from the ____ day of August, 1891." Whereupon, the following judgment was rendered:

"This cause coming on to be tried upon appeal from justice's court, and being tried, and the jury having found all issues in (328) favor of plaintiff, on motion of Douglass & Shaw, it is adjudged by the court that the plaintiff recover of the defendant the sum of $150, with interest from ____ day of August, 1891, and the cost of this action. Hereby affirming the judgment of the justice's court.

"ROBT. W. WINSTON,
"Judge Presiding."

Said cause had been continued the preceding term for the defendant, on account of his absence.

At August Term, 1893, of said Superior Court, before *Connor, J.*, the defendant moved to set aside judgment and verdict of the jury, upon his affidavit and the certificate of his physician showing that when said judgment was recovered at the December Term the defendant was sick and unable to attend court.

His Honor refused to grant said motion, for the reason that said judgment was rendered and duly docketed previous to the passage of the Act of the Legislature authorizing the setting aside the verdict, and therefore refused to set aside the judgment and verdict, to which the defendant excepted and appealed.

Thomas J. Shaw for plaintiff.
Black & Adams for defendant.

SHEPHERD, C. J. While it is true, as a general proposition, that laws may be passed so as to operate retrospectively upon existing remedies or procedure, it is also well established that where such legislation has the effect of disturbing vested rights, it must be construed as prospective in its operation only. In accordance with this qualifying principle, it is laid down by Black in his Constitutional Prohibitions, sections (329) 198 and 199, that "the Legislature has no constitutional power to grant to a party litigant a right to an appeal or writ of error, in cases where no such right existed when the judgment was pronounced, or where the right has been definitely forfeited. . . . It is well ruled that a statute authorizing the opening of judgments rendered since a certain anterior date impairs vested rights and infringes on the judicial department of the government."

Wade, in his Retrospective Laws, section 171, says: "The rights secured to either party to a suit by an adjudication of the matter in controversy between them, are proprietary rights which the Constitution will protect. . . . If the constitutional provisions referred to were insufficient to protect judgments, final and conclusive, under the law as it existed at the time of their rendition, because there was no appeal, then they would be equally insufficient to secure the rights of judgment creditors after affirmance by the Court of last resort. Litigation would have no end so long as the Legislature maintained the power to reopen a case in which possible errors may have been committed."

In Black Judgments, section 298, it is said: "While a statute may, indeed, declare what judgments shall *in future* be subject to be vacated, or when or how, or for what causes, it cannot apply retrospectively to judgments already rendered and which had become final and unalterable by the court before its passage. Such an act would be unconstitutional and void on two grounds; first, because it would unlawfully impair the fixed and vested rights of the successful litigant, and second, because it would be an unwarranted invasion of the province of the judicial department. It is therefore held by a majority of the decisions that a statute vacating, or directing the courts to vacate a particular judgment or class of judgments already rendered and become final before the enactment

of the statute, and granting new trials in such actions, is unconstitutional and invalid." 1 Freeman Judgments, section 90; (330) Sedgwick Stat. Law, 195; Potter's Dwarris Statutes, 162, n. 9.

In support of the foregoing propositions, many decisions are cited, but we will refer to only a few, and these simply by way of illustration.

In *Stewart v. Davidson,* 10 Smedes & Marshall, 351, it was held that a statute giving to probate courts the power to entertain bills of review of its own decrees and judgments, had no retrospective operation so as to allow the entertainment of a bill to review a decree of the court rendered prior to the passage of the act. *Chief Justice Sharkey,* in delivering the opinion of the court, said that the judgment was liable to be reversed by appeal or writ of error upon exceptions, but as no such course had been pursued, the parties interested in the judgment had acquired rights under it, which could not be impaired by subsequent legislation.

In *Atkinson v. Dunlop,* 50 Me., 111, it was held that a statute allowing previously adjudicated cases to be opened by a petition for review, if retrospective and intended to apply to cases in which existing remedies had been exhausted and the judgments had become final by the expiration of the time limited for appeals or reviews, was "manifestly unconstitutional."

In *McCade v. Emerson,* 6 Har. Pa., 111, it was held that a statute allowing a writ of error in cases where none lay before the passage of the act could have but a prospective operation, and this on the ground that as to existing judgments it would be unconstitutional and void.

In *Ratcliffe v. Anderson,* 31 Grat., 105, it was held that an act authorizing the reopening of judgments rendered prior to its passage was in conflict with the fundamental law. The court (*Christian, J.*) said: "Both upon principle and authority, we conclude that the Legislature has no right, directly or indirectly, to annul, in whole or in part, a judgment or decree of a court already rendered, or to authorize the courts to reopen and rehear judgments and decrees, already final, (331) by which the rights of the parties are finally adjudicated, fixed and vested; and that every such attempt of legislative action is plainly an invasion of judicial power, and therefore unconstitutional and void." In another part of the opinion the learned judge said: "At the time the act under review was passed, the money adjudged to be paid to the defendant in error was his property, in a legal sense, and of this he could not be deprived, and his vested right therein could not be impaired by subsequent legislation." 30 Barb., 10; 11 Paige, 400; 2 Allen, 361; 27 Barb., 154.

The application of the above principle affords an easy solution of the question presented by this appeal. At the December Term, 1892, of the

Superior Court of Moore County a judgment was rendered against the defendant in favor of the plaintiff for the sum of $150. This judgment was based upon a verdict, and there was no appeal, nor is it contended that the judgment was in any respect irregular. The defendant, therefore, can only seek relief under The Code, sec. 274, on the ground that the judgment was taken against him through his mistake or excusable neglect. It is well settled that at the time of the rendition of the judgment it could not have been set aside under the above-mentiond provision of The Code, as it has been decided that it was not applicable to cases in which a judgment had been rendered upon verdict. *Brown v. Rhinehart,* 112 N. C., 772. The plaintiff, then, had an absolute and final judgment, duly docketed, and as the law then stood no court had the authority to set it aside. This judgment, according to the foregoing authorities, was "property," or a "vested right," and could not be disturbed by the Legislature. Some time after the judgment was rendered and docketed, an act was passed extending the said provision of The Code to cases in which a *verdict* had been rendered (Laws 1893, ch. 81), and it is under this amendatory act that the defendant prosecutes his motion. This certainly comes within the principles we have (332) stated, and we think his Honor was correct in holding that the amendatory act was applicable only to judgments rendered after its enactment. The result thus reached is all the more satisfactory when it is considered that the plaintiff, by having had his judgment docketed, had acquired a lien upon the real estate of the defendant.

Affirmed.

Cited: Ins. Co. v. Scott, 136 N. C., 158; *Jones v. Schull,* 153 N. C., 521; *Mann v. Hall,* 163 N. C., 53, 59.

J. J. ADAMS v. FIRST NATIONAL BANK OF WINSTON.

Bank Dealings—Partnership Overdraft—Partner's Individual Account—Set-off—Counterclaim.

1. The right of set-off only exists between the same parties and in the same right.
2. A bank has no lien on the deposit of a partner for a balance due from the partnership; therefore,
3. Although a bank may recover from any partner the overdraft of the partnership in an independent action, or may plead it as a counterclaim in a suit by such partner to recover his individual deposit, yet the bank may not charge up such overdraft against the partner's individual account.

ACTION, begun before a justice of the peace, and heard at Spring Term, 1893, of FORSYTH, before *Boykin, J.*, and a jury.

The plaintiff complained of the nonpayment of the sum of $40, alleged to be due him by defendant, which debt was denied by the defendant.

The plaintiff, introduced as a witness in his own behalf, testified that on 21 March, 1892, the firm of J. J. Adams & Co., composed of himself and one J. A. Reid, dissolved copartnership; that theretofore they had an account with the defendant bank, and plaintiff went to defend-
ant bank before noon of the said day and asked for the account in (333)
bank of J. J. Adams & Co., wishing to know the balance; that
he was told by the bookkeeper of the bank that the balance due J. J. Adams & Co. was $201.08, for which amount he gave the check of J. J. Adams & Co., and the check was there and then paid to him; that this sum was coming to witness as due him of assets of J. J. Adams & Co.; that several days thereafter, about 23 March, the plaintiff deposited with the defendant bank the sum of $615 of his own money from the sale of his own individual property, and opened the account in his own name; that he checked on this sum various times in various amounts, and that on 5 April, 1892, he made a check for balance due him, when he was told by the officer of the bank that his check was not good by $40; that this sum had been taken from his account by order of the president of the bank and paid on a draft drawn by J. J. Adams & Co.; that his balance, less the $40, was paid to the plaintiff, plaintiff demanding the total amount, including the $40, which was refused. Plaintiff further testified that he did not know whether the check for $40, drawn in the name of J. J. Adams & Co., was in the bank at the time he asked for the balance due J. J. Adams & Co., on 21 March, or not; that no notice of the dissolution of the copartnership of J. J. Adams & Co. had been given by publication.

Colonel James Martin, in behalf of the defendant, testified that he was a bookkeeper in the defendant bank, and on 21 March, 1892, the plaintiff asked him for balance of J. J. Adams & Co., which he told him was $201.08, and which plaintiff made check for and drew the amount out of bank; that "a check of J. J. Adams & Co., for $40, made by J. A. Reid, came into bank, I think, on that day; it might have been in the bank at the time I gave the balance of $201.08 to Mr. Adams; it was not entered on the books, but might have been on the file. I cannot say whether it was in bank at the time or not. I did not know it had been paid by the teller. If I had known so, I would have charged
it in the account of J. J. Adams & Co. before giving the plaintiff (334)
the balance."

J. A. Reid, a witness for defendant, testified that he was a member of the firm of J. J. Adams & Co.; that he drew the check for $40 on the firm account in bank to pay an individual debt due by him for rent; that the check was given several days before 21 March; that the firm agreed to dissolve on 21 March, but no final settlement of the copartnership had ever been made; that on 21 March they quit business, and Adams drew out all they had in bank.

No special instructions were asked by either side.

His Honor instructed the jury, among other things, as follows:

"That if the check given by J. A. Reid was paid by the defendant after the payment to plaintiff of the balance of $201.08, the plaintiff would be entitled to recover; that if, as the defendant contended, the check for $40 was paid by the bank before the check for $201.08 was paid plaintiff, and the defendant gave the balance by mistake, the plaintiff would not be entitled to recover.

To which charge, given as above stated, defendant excepted, and assigned as error the charge as above given; and further, that he did not tell the jury that the defendant had a right to offset the $40 check as an overdraft of the firm against individual account of J. J. Adams.

There was a verdict and judgment for plaintiff.

Glenn & Manly for plaintiff.
Watson & Buxton for defendant.

CLARK, J. If the overdraft of the firm of which plaintiff was a member was paid by the bank after the balance was drawn out, it not appearing that the bank had any notice of the dissolution, such
(335) overdraft could be recovered by the bank out of the plaintiff as a member of the firm. If, at the time the plaintiff drew a check for the balance which the cashier told him was due the firm, in fact, there was less due the firm, it was equally an overdraft, by mutual mistake of the parties, and the bank could recover it back out of the plaintiff as a member of the firm. But the bank had no right to charge up against the individual account of a member of a partnership a balance due it on the firm's account. Such right of set-off only exists between the same parties and in the same right. Morse Banks, sec. 334. The bank has no lien on the deposit of a partner for a balance due from the partnership. Bolles Banks, sec. 385. The reason is thus given by *Lord Langsdale,* Master of the Rolls, in *Watts v. Christie,* 11 Beavan, 555: "It is of the nature and essence of transactions between banker and customer that a customer, having a balance in the hands of his banker, should have full power over it and be able to command payment at sight. If, where there is an account between a firm and the bank, and

another account with one particular member of the firm, it be once held that the bank has a lien upon the balance due upon the separate account of the individual partner for a balance due to the bank from the firm, there would be an end to some transactions which it is most important to commerce should be continued."

Inasmuch as the members of the partnership can draw in the name of the firm, if their overdrafts can instantly be charged up against the individual account of a member of the firm, no partner would be safe in keeping his private account in the same bank where the partnership account is kept. Otherwise his private funds, deposited perhaps for special engagements he may have in view, would be liable at any time to be swept away by checks drawn by another for his own personal ends, but in the name of the firm, and the partner's checks on his private account would go to protest, to his damage and incon- (336) venience. Then, too, in case of insolvency and an assignment by the partner, or of the partnership, his available cash could be subject to appropriation by the bank in this short-hand mode to his partnership liability, notwithstanding his or the firm's election in the deed of assignment to prefer another or to share the assets *pro rata*. And this also would deprive the individual partner having a sum to his credit, using it as his personal property exemption as against the indebtedness of the partnership to the bank. It is true in the present case the plaintiff being liable to the bank for the overdraft of the firm, the bank could sue him therefor, and hence, of course, could have pleaded it as a counterclaim instead of bringing an independent action. But the bank did not plead a counterclaim. It claimed the right to charge up against the individual account of the plaintiff the overdraft of the firm, and hence pleaded the general issue that it was not indebted. This it cannot do. The difference between a counterclaim and a payment is not merely technical, but substantial. Some of the differences are pointed out above. There are others, among them the cases in which the statute of limitations might be pleaded to the counterclaim. In the present case, it is still open to the bank, as it did not plead the counterclaim, to bring an action against the plaintiff for the balance due by the firm. It is not yet barred by the statute of limitations, and if the plaintiff has property in excess of his exemptions, the bank has lost nothing except the bill of cost in this case.

While not concurring altogether in the reasons of his Honor, we reach the same conclusion, and declare the

Judgment affirmed.

Cited: Davis v. Mfg. Co., 114 N. C., 333; *Hodgin v. Bank*, 124 N. C., 543; *Moore v. Bank*, 173 N. C., 182.

(337)

J. M. LONG, EXECUTOR OF JOHN B. DOUB,
v. MARTHA S. WALDRAVEN ET AL.

Will—Devise—Life Estate—Power of Disposal of Fee.

1. Where an estate is given for life only, with a power of disposition or to appoint the fee by deed or will, the devisee takes only an estate for life, unless there be some manifest and general intent of the testator which would be defeated by adhering to the particular intent; therefore,
2. Where a testator, in one item of his will, directed that all of his estate, real and personal, should be given to his wife during her natural life, and in a subsequent item declared "It is my will that, after the death of my wife, my estate shall be equally divided between the heirs of my brothers and sisters, with the exception of one-third of my estate, which I leave at the disposal of my wife, to be left as she may will": *Held*, that the wife was entitled to an estate for life in all the property, and to dispose of one-third of it by will, and the power not being exercised as to the third, it did not vest in her heirs.

This action was brought by the executor of John B. Doub, deceased, for a construction of the will, the devisees and legatees (who were also the heirs-at-law and next of kin) of the testator, and the heirs-at-law and next of kin of Minerva S. Doub, the deceased widow of the testator, being made parties defendant. The disposing clauses of the will are set out in the opinion of *Associate Justice Burwell.*

The defendants (heirs-at-law of Minerva S. Doub, who died intestate after the testator) contended that they were entitled under the will of John B. Doub to one-third of the real and personal property disposed of by his will.

Upon the hearing, at Spring Term, 1893, of FORSYTH, *Winston, J.*, adjudged as follows:

"That under said will of John B. Doub his widow, Minerva S. Doub, took a life estate in all the personalty, with the power of disposing of one-third of the same during her life. That as she failed to make
(338) any disposition thereof, said property goes under said will to the heirs of the testator's brothers and sisters, by which is meant under the statute their children, and that said children take per capita and not *per stirpes.*"

From this judgment the next of kin of Minerva S. Doub appealed, claiming that said Minerva took a fee simple estate under said will to one-third of the estate of said testator.

Eller & Starbuck for plaintiff.
E. B. Jones and Watson & Buxton for defendants.

BURWELL, J. The appellants are the next of kin of Minerva S. Doub, whose husband, John B. Doub, by his will directed that all his estate, consisting of real and personal property, should be given unto his wife during her natural life, and in the third item of his will said: "It is my will that after the death of my wife, Minerva S. Doub, my estate shall be equally divided between the heirs of my brothers and sisters, with the exception of one-third of my estate, which I leave at the disposal of my wife, Minerva S. Doub, to be left as she may will." The testator thus gave to his wife an estate for life in all his property, and the power to dispose of one-third of it by will. She failed to exercise that power. Her estate in the whole property was distinctly and unequivocally limited by her life. There are no words in the will that in any way enlarge that estate, or enhance her rights in the property while she lived.

"A devise of an estate, generally or indefinitely, with a power of disposition over it, carries a fee. But where the estate is given for life only, the devisee takes only an estate for life, though a power of disposition or to appoint the fee by deed or will be annexed, unless there be some manifest and general intent of the testator, which would be defeated by adhering to the particular intent. Words of im- (339) plication do not merge or destroy an express estate for life, unless it becomes absolutely necessary to uphold some manifest general intent." *The Church v. Disbrow,* 52 Penn. St., 219.

This rule of interpretation has been approved by this Court in *Bass v. Bass,* 78 N. C., 374; *Patrick v. Morehead,* 85 N. C., 62, and other cases.

We find in this will no words that either expressly or by implication manifest any general intent that would be defeated by adhering to the particular intent so clearly expressed, that his wife should have only an estate for life. She was not to be allowed to consume any part of the corpus of the fund. Had that right been conferred upon her, it would be inconsistent with the notion that a life estate only was given. *The Church v. Disbrow, supra.* The testator did not direct that one-third of his estate should, upon the death of his wife, go to whomsoever she should think proper to make her heir or heirs, in which event it might be said, perhaps, as in *Sherer v. Sherer,* 1 Wash., 266 (1 Am. Dec., 460), that the wife by suffering her legal representatives to succeed her, actually made them her heir or heirs, as much so as if she had pointed

them out by an express devise. Hence this case must be added to that line of cases which, as was said in *Sherer v. Sherer, supra,* tend to prove " that an express estate for life to the wife, with a power to dispose of the fee, shall not turn her estate for life into a fee."

What has been said disposes of the only question brought before us by this appeal.

Affirmed.

Cited: Steadman v. Steadman, 143 N. C., 352; *Chewning v. Mason,* 158 N. C., 582; *Griffin v. Commander,* 163 N. C., 232.

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(340)

JOHN C. TAYLOR v. P. A. MILLER.

Statute of Limitations—New Promise—Effect of the Words "Propose to Settle."

The words "I propose to settle," written in answer to a letter demanding payment of a note barred by the lapse of time, amount to an acknowledgment or new promise sufficient to take the case out of the operation of the statute of limitations.

APPEAL at Spring Term, 1893, of DAVIE, from *Boykin, J.*

Upon the intimation of the judge that the evidence was not sufficient to rebut the bar of the statute of limitations, the plaintiff submitted to a nonsuit and appealed.

T. B. Bailey for plaintiff.
Watson & Buxton for defendant.

MACRAE, J. The action was upon a note for $400 and interest, dated 29 March, 1886, payable one day after date, and made by defendant to plaintiff. The only plea was that of the statute of limitations, and the same was good unless there had been a new acknowledgment or promise in writing, under section 172 of The Code.

The case turns upon the testimony of E. L. Gaither and a letter referred to therein, which witness testified that he had received from the defendant. That portion of his testimony which is material is as follows:

"That on or about 1 November, 1891, the plaintiff put this note into witness' hands for collection; that witness had this note and one other

note against the defendant; that on 4 November, 1891, witness wrote to defendant a note, a copy of which is:

"'DEAR SIR—Mr. John C. Taylor had your note for $400, principal. He says you have promised to pay it off, and he needs (341) the money, and has left it with me so you can take it up. Please settle the matter at your earliest convenience, and if you can't pay it all at once, send me what you can.

"'Respectfully, E. L. GAITHER.'

"That between 4 November and 21 December, 1891, the witness received a letter from the defendant, post-marked 'Mocksville, N. C., 21 December, 1891,' and is as follows:

"'*Mr. E. L. Gaither, Mocksville, N. C.:*

"'DEAR SIR—Your letter received, and I have been to town twice to see you, but you were not in. I propose to settle both of your claims the first of next month, which I hope will be agreeable. Will see you in person soon.

"'Yours respectfully, P. A. MILLER.'"

It was also in evidence that the defendant has never owed the plaintiff anything but this note sued on.

The question is, whether this letter was such a promise or acknowledgment as continued the obligation of the promise contained in the note and prevented the bar of the statute— whether the words "propose to settle," taken in connection with the testimony of Gaither and the rest of the letter, can be reasonably construed to mean "promise to pay." If they will bear the latter construction, the bar of the statute has been repelled; if not, the plaintiff can have no relief.

The word "propose," like nearly every other word in the English language, has many meanings. A proposal may mean an offer, as of marriage; an introduction, as of a measure in a legislative assembly. It may also mean an expression of intention or design. "I propose to settle" is the same as "I intend or mean to settle." Webster (342) defines it, "to form or declare a purpose or intention." A promise is defined to be a declaration which gives to the person to whom it is made a right to expect or claim the performance or nonperformance of some particular thing.

There are many other meanings of these words, as there are also of the word "settle." Indeed, there are two distinct words "settle," the meanings of which have become confused. But we have no difficulty in selecting the definition in the Century Dictionary of this word in its

colloquial sense—to liquidate, balance *pay*—as appropriate to the present use of it. We must construe language in its ordinary significance, unless it is manifestly used in some special or technical sense.

Mr. Gaither writes to the defendant, demanding payment of this specific note and another. The defendant answers: "I propose to settle both of your claims the first of next month, which I hope will be agreeable."

How would this answer strike a man in an ordinary business transaction? It is evidence that its effect would be to raise the expectation of payment at the time specified. The accumulation of adjectives used in their application to the words "acknowledgment and promise" in the statute, has produced the impression that it requires more than an ordinary promise in writing to repel the bar of the statute. The old law, before the promise need be in writing, was, "the new promise must be definite and show the nature and amount of the debt, or must distinctly refer to some writing, or to some other means by which the nature and amount of it can be ascertained; or there must be an acknowledgment of a present subsisting debt, equally definite and certain, from which a promise to pay such debt may be implied." *McBride v. Gray,* 44 N. C., 420; *Faison v. Bowden,* 72 N. C., 405; *Riggs v. Roberts,* 85 N. C., 151. Since the statute, the words used are as applicable
(343) to this case: "The promise must be unconditional." *Greenleaf v. R. R.,* 91 N. C., 33. It must be "certain in terms." *Long v. Oxford,* 104 N. C., 408.

In *Riggs v. Roberts, supra,* the words "distinct and specific," "unequivocal," are really applied to a promise to pay which would revive a debt from which the debtor had been discharged in bankruptcy. While either one of these qualifying words alone would be applicable to the promise or acknowledgment to take the case out of the statute of limitations, there is no special weight superadded by the use of them all at once.

The law speaks for itself: "No acknowledgment or promise shall be received as evidence of a new or continuing contract whereby to take the case out of the operation of this title, unless the same be contained in some writing, signed by the party to be charged thereby."

Here is the original contract, liable to be defeated by the plea of the statute, but still *continuing.* Here is the correspondence between the agent of the payee and the maker himself; it is perfectly definite and certain as to what note is meant. And here is the letter of the defendant in which he refers to the letter which describes it and demands payment; he proposes to settle both claims the first of next month.

The defendant was probably no philologist. He used words in their ordinary acceptation, and which could not be misunderstood. We think they fill the letter and spirit of the statute.

There is error, and a new trial must be awarded.
New trial.

Cited: Wells v. Hill, 118 N. C., 904; *Cooper v. Jones,* 128 N. C., 41; *Shoe Store Co. v. Wiseman,* 174 N. C., 717; *Phillips v. Giles,* 175 N. C., 412.

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J. J. JORDAN ET AL. v. H. McD. SPIERS ET AL.

Co-administrators—Power of One to Bind the Other—Principal and Surety.

1. Unlike one or two or more executors, one administrator has not the power, without the consent of his associate, to make a sale or to compromise a debt due his intestate.
2. Where one administrator, without the knowledge or consent of his co-administrator, agreed to compromise a suit for the possession of land and foreclosure of a mortgage wherein R. had become surety on an undertaking given by the mortgagor (under section 237 of The Code), to secure the rents, etc., which agreement included an indulgence for a definite time, and no positive act of affirmation or adoption by the coadministrator of the agreement was shown: *Held,* that the surety was not released.

This action was commenced by J. J. Jordan and wife, Mary E. Jordan, mortgagees in a mortgage given by H. McD. Spiers to secure a debt due said J. J. Jordan, to recover possession of the mortgaged premises, and for damages for the detention thereof, and for a foreclosure of said mortgage. The defendant filed his undertaking, found on the record, with Sampson Rea as surety, and answered the complaint.

Shortly after the beginning of the action J. J. Jordan died intestate, and P. B. Picot and John E. Vann were duly qualified as his administrators, and were made parties plaintiff in this action.

At Fall Term, 1890, judgment was entered in said action in favor of plaintiffs for possession of said land, and for a foreclosure of said mortgage, as appears from the record, and the case was continued to try the issue of damages. Pending this continuance, and on the 31st day of January, 1891, the plaintiff, P. B. Picot, one of the administrators of the said J. J. Jordan, entered into the following agreement with the defendant, H. McD. Spiers, to wit:

"Received this 31 January, 1891, of H. McD. Spiers the sum of $100, it being in part payment of a compromise of the suit (345)

now pending in Hertford County Superior Court, entitled Mary E. Jordan and P. B. Picot and John E. Vann, administrators of J. J. Jordan, against H. McD. Spiers; and the said suit is compromised on the following terms and conditions, viz: Said Spiers is to pay all costs of said action at the time that a nonsuit is entered by said Picot and Vann, administrators. $100 cash, and $137.50 to be paid on or before 19 October, 1891, with interest from this date at 8 per cent. It is specially understood and agreed by parties hereto that if said Spiers shall make the deferred payments at the time named, with the interest thereon accrued, said Picot and Vann, administrators, shall enter a nonsuit in said pending action, at Fall Term, 1891, of said Superior Court; but if said Spiers shall fail to make said deferred payment, with interest as aforesaid, at the time mentioned, said Picot and Vann, administrators, may proceed with said suit as they may be advised, and the $100 paid this day by said Spiers, shall, in the event that judgment is taken against him in said action, be deducted from said judgment, that is to say that the $100 shall be credited on said judgment.

"PICOT and VANN, *Admrs.*
"H. McD. SPIERS.

"This 31 January, 1891."

That thereafter, during the interval between the Spring and Fall Terms, 1891, of said court, P. B. Picot died, leaving his coadministrator, John E. Vann, surviving him.

That said contract was written and signed "Picot and Vann, Admrs.," without the knowledge or consent of said John E. Vann.

At Spring Term, 1891, of said court, this action was called for trial before *Bynum, J.*, and a jury The verdict was in favor of plain-
(346) tiffs. The plaintiffs moved for judgment thereon against defendant and Sampson Rea, the surety on defendants' undertaking.

Rea answered said motion, and alleged his discharge, and set up said compromise agreement and brought out the above facts in reference thereto, and asked that the plaintiffs' motion as to him be denied.

The court ruled that said Rea was not discharged, and granted the judgment found in the record. Said Rea excepted, and appealed.

B. B. Winborne for defendant Rea.
No counsel contra.

AVERY, J. In discussing the power of one of several personal representatives to act for his associates, in the case of *Gordon v. Finley,* 10 N. C., 239, *Henderson, J.,* said: "One administrator cannot alone, when there are more, make a sale. They are in this respect unlike executors,

for all of the administrators together represent the intestate, whereas each executor represents the testator." *Ward v. Sparks,* 18 N. C., 389. The appellant Rea cannot maintain the position that he, as surety, is discharged by indulgence extended to the principal in the undertaking (under The Code, sec. 237) to pay such costs and damages, including rents and profits, as the plaintiff might recover, unless he can first show a binding agreement on the part of the creditor to forbear to proceed against the principal for a fixed period without reserving the right to move meantime against the surety. *Forbes v. Shephard,* 98 N. C., 111. If, however, the surety shows a valid contract extending the time of payment for the benefit of the principal in a bond or undertaking made without the knowledge or consent of the former, such agreement operates to exonerate the surety from liability. *Carter v. Duncan,* 84 N. C., 676; *Scott v. Harris,* 76 N. C., 205. If Picot had no authority to sell personal property belonging to his intestate without the consent of his coadministrator, Vann, we do not think he could lawfully exer- (347) cise the more important and dangerous power of compromising a debt due his intestate, and thereby release the debtor in part of responsibility, on receiving only a portion of the amount due, without consulting one who had been commissioned by the officer appointed by law for the purpose of securing the benefit of the judgment of both in reference to every such important transaction. It is in order to divide responsibility and multiply counselors that the clerk is empowered in his discretion to give letters of administration to one or more of the next of kin. Such precaution on his part is in vain, if either the widow or the next of kin can compromise all of the solvent credits and dispose of all of the choses in possession without consulting the other. We are aware that authorities differ upon this subject, but we prefer to adhere to the principle as stated by *Henderson, J.,* because it is safer and more reasonable to do so. A testator is supposed to repose a special trust and confidence in every person named by him as executor, but the object of our statute is to give the power to the clerk to utilize the combined wisdom of two or more agents in the management of fiduciary matters under his supervision.

We fail to discover in the statement of the case on appeal any evidence tending to show a subsequent ratification by Vann of the agreement entered into by Picot, his coadministrator, without his knowledge or consent. It does not appear affirmatively that Vann was consulted as to the application of the one hundred dollars paid down. When the agreement was subsequently set up by answer in the nature of a plea since the last agreement, the defendants refused in their reply to recognize it, denominating it an alleged agreement. After Picot had received the money without the consent of Vann, and presumably paid it over

to the persons lawfully entitled to receive it, we cannot readily conceive of any step other than the expression of his dissent in the repli-
(348) cation filed, that it was incumbent on Vann to take, in order to show affirmatively that he repudiated the unauthorized conduct of his associate. If the money was within his control, he still claimed a balance due from Spiers for rent, in any view of the situation, amounting to more than one hundred dollars, and he was not authorized to refund the sum paid to Spiers when such was the state of accounts between Spiers and his intestate. It does not appear that Vann assented to a single continuance from the time he filed his reply repudiating the agreement until the trial term, when the court allowed the payment as a credit on the amount of damages for rents and profits found by the jury. The only positive act of Vann in relation to the matter was the filing of the reply, in which both he and Mary Parker joined, and in which the agreement set up was denominated an alleged agreement.

If the plaintiffs are bound by the contract made by Picot, it must be by reason of some positive act of affirmation or adoption of the agency of Picot by Vann after being informed of what he had done. No such act has been shown. The judgment of the Superior Court is

Affirmed.

JAMES W. THOMPSON ET AL. v. JAMES NATIONS ET AL.

Practice—Premature Motion for Judgment.

Where, by a former ruling of this Court, an issue was left undetermined, and the cause stood for a new trial below, a motion for judgment was properly declined.

The opinion of this Court in the appeal heard at February Term, 1893 (112 N. C., 508), having been certified to the court below, the defendants, at Fall Term, 1893, of SURRY, before *Winston, J.*, moved for judgment, which was refused, his Honor being of the opinion
(349) that the certificate of the Supreme Court was not a final judgment, but only an order for a new trial. Defendants thereupon appealed.

A. E. Holton for plaintiffs.
Glenn & Manly for defendants.

PER CURIAM: The former ruling of this Court left the issue undetermined, and it is therefore open for a new trial. The motion of the defendants for judgment was properly declined.

Affirmed.

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STROUSE, LOEB & CO. v. W. H. COHEN AND WIFE.

Married Woman—Charge on Separate Estate—Mortgage.

1. No particular form is essential to the validity of a chattel mortgage, and it is sufficient if the words employed express, in terms or by just implication, a purpose to convey the property as security for the debt.
2. A married woman engaged in merchandising, by an instrument signed by herself, under seal, with the written assent of her husband, duly probated upon her privy examination, and registered, acknowledged her indebtedness to plaintiff in a certain sum for goods sold and delivered to her, and further declared as follows: "And I being a married woman and being possessed of a separate estate of both real and personal property, all of which is situated in New Bern, N. C., and desiring to secure the payment of the above sum to the said parties, etc.; now, therefore, be it known that I hereby convey to the said parties aforesaid, their heirs and assigns, such an interest in the said separate estate, both real and personal, as will secure the payment of the above expressed amount, hereby making the said sum a charge upon the said separate estate for the purpose herein expressed": *Held*, (1) that such instrument has all the essential elements of a mortgage, and is a lien upon the separate personal estate of the married woman in New Bern; (2) that, being a mortgage, the words added at the end of the instrument, "Hereby making said sum a charge upon said separate estate," are surplusage and do not invalidate or revoke the preceding conveyance as a mortgage and change it into a mere charge upon the separate estate, so as to entitle the married woman to her personal property exemptions.

Semble, that as between the parties to it, rights of third parties not having supervened, the mortgage is good also upon the realty, by virtue of the curative act of 1893, ch. 293.

ACTION to have certain agreements (one of which is set out in the opinion of *Mr. Justice Clark*) declared a lien upon the separate estate, real and personal, of the *feme* defendant, in New Bern, N. C.

The complaint, after alleging the indebtedness and the agreements (which were signed by the *feme* defendant, under seal, with the written assent of her husband, and duly probated as to both, with the privy examination of the wife, and duly registered), and further setting out the character and location of *feme* defendant's property, alleged in the fifth paragraph, as follows:

"That the said Theresa Cohen is possessed, in her own right, of the said separate estate, consisting of both real and personal estate, and as referred to and located in the said notes and agreements herein set forth at length, and that the said notes or agreements constitute a lien or charge upon the same, as the plaintiffs are informed and believe."

The prayer was for judgment for sums aggregating $834.78 and interest, and that the indebtedness "be declared a lien upon the separate

estate as herein described, and the said property constituting the said separate estate be subjected to the payment of the above-expressed amounts."

The answer denied none of the allegations of the complaint except the fifth, which is given above.

The cause was heard before *Hoke, J.*, at May Term, 1893, of CRAVEN, on complaint and answer, the answer being treated, by consent, as a demurrer. His Honor adjudged that the contract set out and declared on in the complaint gave plaintiff no lien on the real estate of *feme* defendant, but that it did give a specific lien on all her separate
(351) personal estate situated in New Bern at the date of the contract, except such as was acquired after the date of the contract and not from the proceeds of the original separate estate, unless the same had been so mingled with the original estate that the last cannot be identified; that *feme* defendant was not entitled to her personal property exemption out of said property unless the same should be sufficient to pay the debts and costs. And it was further adjudged that the property should be sold, etc. From the judgment the defendant appealed.

Jas. W. Waters for plaintiffs.
O. H. Guion and W. W. Clark for defendants.

CLARK, J. In the present case the married woman executed her note, payable 1 September, 1892, recited to be for value received, and further recites in the same instrument: "The said amount is due the said firm of Strouse, Loeb & Co., by myself, for goods sold and delivered to me by the said firm at the city of New Bern, county of Craven, and State of North Carolina, at which place I am engaged in the business of merchandising; and I being a married woman, and being possessed of a separate estate of both real and personal property, all of which is situated in the said city of New Bern, county and State aforesaid, and desiring to secure the payment of the above sum to the said parties constituting the said firm of Strouse, Loeb & Co.; now, therefore, be it known that I hereby convey to the said parties aforesaid, their heirs and assigns, such an interest in the said separate estate, both real and personal, as will secure the payment of the above-expressed amount, hereby making the said sum a charge upon the said separate estate for the purposes herein expressed."

This is signed under seal by the wife, and the husband appends his "full consent and agreement" to the execution of the above by his
(352) wife. The privy examination of the wife is duly had, and the instrument is probated, ordered to registration and is duly registered. The officer certifies that both husband and wife "acknowledged

the execution of the foregoing instrument as their act and deed." The instrument expresses a desire "to secure the payment of the above sum to the party selling the goods," and then it proceeds, "therefore, be it known that I hereby *convey* to the said parties aforesaid, their heirs and assigns, such *an interest* in the said separate estate, both real and personal, as will *secure* the payment of the above-expressed amount." Here is every essential of a mortgage. The debt and consideration for it are set out. The word "convey" is as complete a transfer as if a dozen or more synonymous words followed. *Harris v. Jones,* 83 N. C., 317. "To parties aforesaid, their heirs and assigns." While the words "heirs and assigns" are not necessary in a mortgage, they are customary words therein, but inappropriate and unusual in merely acknowledging a debt to be due. "Such an interest" in property already described, is held sufficient in a mortgage. *Pemberton v. Simmons,* 100 N. C., 316. "My real and personal estate, all of which is situated in the city of New Bern," is held a sufficient description in *Woodlief v. Harris,* 95 N. C., 211; *Harris v. Alden,* 104 N. C., 86, and other cases. Certainly these words would be sufficient in a deed, and of course in a mortgage also. "To secure the payment of the above-expressed amount" makes it a mortgage, and not a simple conveyance. If, at the end of such a conveyance by a male person or a *feme sole,* there had been added, "hereby acknowledging such debt to be honestly due," no one would contend that this invalidated the mortgage, which had just so solemnly described grantor's property and conveyed it to secure the indebtedness. Yet the words added by a married woman, "hereby making said sum a charge upon said separate estate," can have the same effect, no more. While a charge is not necessarily a mortgage, a mortgage is necessarily a charge. The use of those words is, therefore, mere surplusage, (353) and not contradictory of the mortgage. They surely cannot revoke the conveyance of the property "to secure such indebtedness," in pursuance of the intention just therein above recited, "desiring to secure such payment." Indeed, no particular form is essential to the validity of a chattel mortgage. It is sufficient if the words employed express in terms or by just implication a purpose to convey the property as security for the debt. A power of sale is not essential. *Comron v. Standland,* 103 N. C., 207. Mortgages upon a stock of goods, however precarious, are not uncommon; besides, here the mortgage is upon all the personalty of all kinds, and the realty is added. If it be true that the conveyance is defective as a mortgage of real estate, because the husband does not join in the body of the deed (*Furguson v. Kinsland,* 93 N. C., 337), that technicality in no wise invalidates it as a mortgage of personalty, as to which the husband has no tenancy by the curtesy to release. It is immaterial to consider whether this is cured as between the parties by

chapter 293 of the Act of 1893, since there is no appeal brought up from the ruling that the mortgage was insufficiently executed as to the real estate.

There is no "beneficent provision of the Constitution" which throws additional shackles around women in the management of their separate property. The provision of the Constitution is in exactly the opposite direction, in accordance with the free spirit of the age and with the universal trend of legislation the world over. Its purpose is not to further assimilate married women to the condition of infants, but to make free women of them, to emancipate them from most of the restrictions formerly existing. To this end the Constitution (Art. X, sec. 6) provides that all the property of a married woman "shall be and remain the sole and separate estate and property of such female, . . . and may be devised and bequeathed, and with the written assent (354) of her husband, conveyed by her as if she were unmarried." Here she has made a conveyance which would be unquestionably good as a mortgage if made by a *feme sole,* and it is made "with the written assent of her husband," which is the sole restriction placed by the Constitution upon a married woman's right to convey her own property, if she chooses to do so. The court cannot be astute to find an intention of the grantor contradictory to the express words of a conveyance, nullifying and revoking it. The intent is to be gathered from the deed itself, "from the four corners" thereof. *Lowdermilk v. Bostic,* 98 N. C., 299. But if such intent could be a subject of surmise, we might well ask why, if the intent was solely to charge the separate estate, words of conveyance were used, and the words "heirs and assigns," and why there was a signing under seal, privy examination, probate and registration, and further, why was there a description of the property set out and a formal acknowledgment by both husband and wife of the instrument as "their act and deed," since none of these were necessary simply to charge the separate personal estate. *Flaum v. Wallace,* 103 N. C., 296. If this is not a mortgage, it will be hard to conceive what form or formality a married woman can use to execute a valid mortgage. If valid otherwise as a mortgage, the words added at the end acknowledging the indebtedness as a valid charge were mere surplusage, and certainly not intended by the parties as a repeal of the conveyance just made under seal, with the expressed intent of securing the debt by the property therein described (with the written assent of the husband), not only to the creditors, but to their heirs and assigns, privy examination, acknowledgment of the instrument as their act and deed, and registration. The conveyance was doubtless prepared between the parties themselves. Like all laymen, they would naturally suppose the words "hereby charging the separate estate" to mean "hereby giving a lien" upon it, which words

would of themselves be sufficient to create a mortgage. *Harris v. Jones,* 83 N. C., 317. This would be in accordance with and con- (355) firmatory of all the words used up to that time, and not a violent and unaccountable nullification of them.

It is true a married woman might restrict herself to simply charging her estate, but she might go further and mortgage it also, and here she used the very words and formalities which were requisite for mortgaging it, if she so desired. Doubtless she could not have gotten the goods except upon a mortgage. The ruling of the court below, that the mortgage is valid as to the personalty, is in accordance with both the letter and spirit of the Constitution. It may be that, as between the parties to it, rights of third persons not having supervened, the mortgage is good also upon the realty by virtue of the curative Act of 1893, chapter 293, but the plaintiff not having appealed from the adverse ruling below, this point is not presented.

No error.

BURNETT STEALMAN v. S. J. GREENWOOD.

Sheriff's Return of Process—Penalty—Amendment.

A sheriff may amend his return of process so as to make it speak correctly, even after suit brought for the penalty imposed for a false return, and such amendment defeats the plaintiff's right to recover such penalty.

ACTION tried at Spring Term, 1893, of WILKES, before *Boykin, J.,* and a jury.

Plaintiff's action was for an alleged false return made by defendant sheriff for the penalty of $500, prescribed by statute. Plaintiff introduced in evidence a judgment of a justice of the peace, duly docketed in the Superior Court in a cause entitled *Burnett Stealman v. Joel Church,* in which it was adjudged that the plaintiff recover (356) of the defendant the sum of $7.50 and interest and costs, etc. Plaintiff also introduced an execution issued upon the aforesaid judgment, commanding the sheriff to satisfy said judgment out of the personal property of the defendant, and if sufficient personal property could not be found, then out of the real property belonging to the defendant on the day when the said judgment was docketed, etc. The sheriff returned this execution as follows:

"This execution not satisfied; collected from sale of land (see return of sale in this execution) $9.50; my fees and commissions retained—

$2.56; paid into office, $6.94. After due advertisement according to law, I sold the land described in the levy in this execution on the 13th of October, 1890, at the courthouse door, when James W. McNeill became the bidder in the sum of $9.50."

By leave of the court, the following amended return is made on the execution:

"That I received the execution on 7 April, 1890. The plaintiff furnished me $5 to defray expenses of laying off homestead and personal property exemption. I proceeded to summon appraisers (naming them), who proceeded, on 7 August, 1890, to view the defendant's land and lay off and assign to him his homestead therein, and his personal property exemption. There was no excess of personal property out of which any part of the execution could be satisfied, and I levied the execution on the excess of the defendant's land as found by the appraisers, and after due advertisement and notice to defendant I sold the same publicly to the last and highest bidder, at the courthouse, on 13 September, 1890, when James W. McNeill became the bidder and purchaser thereof at the price of $9.50. That of the $5 furnished me by plaintiff to lay off the homestead, etc., I paid $1 to each of the three appraisers above named and retained $2 as my fee for laying off the homestead, etc., and out
(357) of the money arising from the sale I retained my commissions on this execution, in which is included 62½ cents due me on a former execution issued in the same case, returnable to March Term, 1890, as will appear by the return on said execution, and paid the balance ($6.94) into office. This 14 September, 1891." (Signed by the sheriff, by J. H. Andrews, D. S.)

After this action commenced, on a notice issued to the plaintiff at Fall Term, 1891, the defendant was allowed to amend his said return on the execution as above, which said amendment was made and attached to the aforesaid execution, and the plaintiff excepted.

Issue submitted by the court: "Is the plaintiff entitled to recover the statutory penalty demanded in the complaint?" Answer: "No."

The court instructed the jury that if they believed the evidence, the plaintiff could not recover. Judgment for defendant, and appeal by plaintiff.

L. S. Benbow for plaintiff.
D. M. Furches for defendant.

MACRAE, J. Plaintiff's counsel readily concede the power of the court to allow the amendment, but they deny that its effect is to discharge any part of the penalty, especially the part thereof which is said to belong

to the plaintiff. They contend most strenuously that the court has no right to "purge the vice" of the false return and discharge the penalty after the popular action becomes a private one of plaintiff by reason of his bringing suit. The authorities cited by the learned counsel for the plaintiff seem to establish the position that popular actions can only be barred, after suit brought, by a pardon, and possibly by a repeal of the penal statute. But the power of amendment in the courts to make the return speak the truth (the amendment when made, relating back to the time of the return) is entirely distinct from the power (358) to remit or to pardon, and has been too long established and is too well settled to be now disturbed.

The statute, as interpreted in this State, imposing the penalty, even in cases of mere mistake, would seem severe and apparently harsh, but for the extreme importance both to public and private interest that these returns should in all cases speak the truth. Hence the discretionary power of allowing amendments in meritorious cases has always been liberally exercised. *Albright v. Tapscott,* 53 N. C., 473.

In *Hassell v. Latham,* 52 N. C., 465, which was an action like the present, brought in the Superior Court for a false return in the county court, where the sheriff was allowed to amend in the latter court, it was held that the plaintiff was not entitled to recover. While it does not appear in so many words that the amendment was made after suit brought, there is much to indicate that such was the fact. In *Patton v. Marr,* 44 N. C., 377, which was a motion to amerce for an insufficient return, it was held that the return was not sufficient, and the Court said: "Nor can there be any doubt that the court would have allowed the sheriff (the defendant), if he had been here, to amend his return." In *Finley v. Hayes,* 81 N. C., 368, the Court said: "It is inconceivable how it was that the defendant did not obtain leave to amend his returns so as to acquit himself of all penalty." In *Peebles v. Newsome,* 74 N. C., 473, it is said that "any hardship resulting from this rule may be relieved, and will be relieved, by our law of amendment."

The plaintiff, by bringing this action, acquired no such vested right to the penalty that it might not be defeated by an amendment of the return. Murfree Sheriffs, sec. 879. This power of allowing amendment is so deeply fixed into our judicial system that all persons bringing such actions as the present do so with notice that the return may be amended and the penalty never recovered. There are many instances of amendment of process by which rights are acquired and lost. (359) Defects in judgments may be amended even after a writ of error, and executions may also be amended after they have been acted upon, so as to render them a justification to the officer where otherwise they

would not be, "although it thereby may bar an action of him who has been imprisoned on it, or had his property sold under it, while in an imperfect state. *Bender v. Askew,* 14 N. C., 149.

No error.

Cited: Campbell v. Smith, 115 N. C., 499; *Swain v. Burden,* 124 N. C., 18; *S. v. Lewis,* 177 N. C., 558.

ARTHUR D. COWLES v. NANCY HALL, EXECUTRIX OF R. D. HALL.

Judgment for Costs—Statute of Limitations—Motion for Execution Against Estate of Deceased Person.

1. A plaintiff in a judgment on which costs only are due is not barred by section 155 (8) from proper proceedings to enforce his claim, the same being in his favor and not of the officers of the court.
2. A motion for leave to issue execution against the estate of a deceased person cannot be allowed.

APPEAL, heard before *Graves, J.,* at Fall Term, of WILKES, 1891, from the decision of McNeill, Clerk, made in the above-entitled cause upon notice to Nancy Hall, executrix of R. D. Hall, deceased, for the purpose of reviving a judgment rendered at Fall Term, 1885, for the sum of $66.15, for plaintiff's and other costs, a part of which was for witness attendances, taxed in the case, an ordinary bill of cost arising in a case at law.

His Honor was of opinion, and so decided, that the plaintiffs were not entitled to a renewal of their judgment as to an execution upon the same, and that the collection of the judgment was barred by the statute of limitations, and that plaintiffs were entitled to no entries upon
(360) the same. It appeared that no execution had issued on said judgment.

Cowles & Barber for plaintiff.
No counsel contra.

MACRAE, J. The statute of limitations, chapter 3, section 151 of The Code, is: "The periods prescribed for the commencement of actions, other than for the recovery of real property, shall be as follows: . . . Section 155(8). Fees due to any clerk, sheriff, or other officer, by the

judgment of a court, within three years from the judgment rendered or of the issuing of the last execution therefor." This statute, as will be seen, regulates the time for the commencement of actions. But the present proceeding, while not stated in the case with ordinary clearness, was evidently a motion for leave to issue execution under section 440 of The Code, for by reference to the record it will so appear.

His Honor held that the collection of plaintiff's judgment is barred by the statute of limitations. The record shows that a part of the judgment was for fees due the officers of the court, but the judgment was in favor of the plaintiff, upon the presumption that he had paid the costs for which he was liable, as they accrued, and he was entitled to recover the same from defendant. As this is not an action by any officer to recover fees due him by the judgment of a court, we are of the opinion that the section of the statute of limitations relied on by defendant does not apply to this proceeding.

His Honor also held "that the plaintiffs are not entitled to a renewal of their judgment, as to an execution upon the same." We concur with his Honor that plaintiffs are not entitled to leave to issue execution upon their judgment. The motion seeks to have execution against the estate of a deceased person upon a judgment rendered against such person during his life. The Code, chapter 33, provides elaborately for the settlement of estates of deceased persons; section 1416 prescribes (361) the order of payment of the debts, including judgments, and section 1448 *et seq.* prescribes the proceeding by which creditors may enforce payment of the debts due them. While, therefore, the plaintiffs are not barred by section 155(8) from proper proceedings to enforce their claim (the same being in favor of plaintiffs in the action, and not of the officers of the court), they are not entitled to leave to issue execution.

Modified and affirmed.

J. M. RUSSELL v. S. H. HEARNE.

Practice—Pauper Appeal, Time of Taking—Evidence.

1. Under the statute (ch. 161, Acts 1889) it is not necessary that there should be at the time of the trial an intimation by the dissatisfied party that he desires to appeal, it being a sufficient indication of his desire at the time of the trial if he fulfills the requirements of the statute within the time prescribed by law.

2. In the trial of an action to recover the penalty for a usurious transaction, a witness offered by the defendant was allowed, under objection, to testify that plaintiff had the reputation of suing for usury: *Held*, that the testimony was incompetent because (1) it was irrelevant, and (2) as impeaching testimony it should not have been allowed, for, even if it were true, the plaintiff had a right, under the statute, to "sue for usury" if he had paid usurious interest for the loan of money.

ACTION brought under section 3836 of The Code, to recover twice the amount of interest alleged to have been paid by plaintiff to defendant in certain usurious transactions, tried before *Winston, J.*, and a jury, at Spring Term, 1893, of STANLY. Verdict and judgment for defendant. Plaintiff appealed *in forma pauperis*.

In this Court defendant moved to dismiss the appeal, "because
(362) it does not appear that the plaintiff desired an appeal at the time of the trial, according to section 553 of The Code."

Brown & Jerome for plaintiff.
Jas. A. Lockhart and Battle & Mordecai for defendant.

MACRAE, J. The term of the Court began on 10 April, and was by law then limited to one week. The provisions of section 550 of The Code, with regard to entry of appeal and services of notice, appear by the record to have been strictly complied with.

The affidavit of inability to give security on appeal, required by section 553, was made on the 15th, and the certificate of counsel and order of the clerk allowing the appeal to be taken without giving security, were made and filed on 22 April, the affidavit on the last day of the term, if the Court continued during the week, in any event, within five days of the trial. And the other proceedings above referred to were within ten days from the expiration by law of said term of Court.

By Laws 1873-74, ch. 60: "When any party to a civil action, tried and determined in the Superior Court, shall at the time of the trial, desire an appeal from the judgment rendered in said action to the Supreme Court, and shall be unable by reason of his poverty to give the security required by law for said appeal, it shall be the duty of the judge of said Superior Court to make an order allowing said party to appeal from said judgment to the Supreme Court, as in other cases of appeal now allowed by law, without giving security therefor. *Provided, however*, that the party desiring to appeal from said judgment shall make affidavit that he is unable, by reason of his poverty, to give the security required by law for said appeal, and that said party is advised by
(363) counsel learned in the law that there is error in matter of law in the decision of the Superior Court in said action. *Provided*

further, that said affidavit shall be accompanied by a written statement from a practicing attorney of said Superior Court that he has examined the affiant's case, and that he is of opinion that the decision of the Superior Court in said action is contrary to law."

As the law then stood, an appeal *in forma pauperis* was required to be perfected during the term at which the judgment was rendered; but by Laws 1889, ch. 161, the authority to make the order was extended to the clerk, and the party desiring to appeal was allowed five days to make his affidavit; and it was further provided "that the appeal when passed upon and granted by the clerk shall be within ten days from the expiration by law of said term of the Court." Clark's Code, 2 Ed., sec. 553 and notes.

We do not think that under the statute it is necessary that there should be an intimation by the party at the time of the trial that he desires to appeal. If he fulfills the requirements of the statute within the time prescribed by law, it is a sufficient indication of his desire at the time of the trial. The motion to dismiss is denied.

It will only be necessary to notice the third exception.

The allegations of usury were denied; a clear issue arose upon the pleadings, and the testimony was conflicting; the plaintiff and defendant each testifying. A witness offered by the defendant was asked by defendant's counsel if plaintiff had not sued for usury before, and if he did not have the reputation of suing for usury. Plaintiff objected. The objection was overruled, and witness answered in the affirmative, and plaintiff excepted.

This testimony was entirely irrelevant, and might not have been harmless. Its only object could have been to impeach the plaintiff's testimony, and in this view it was incompetent, for if it were (364) true, he had a right, under the statute, to "sue for usury," if he had paid for the loan of money a greater rate of interest than was allowed by law. *Cox v. Brookshire,* 76 N. C., 314.

Error. New trial.

Cited: Cecil v. Henderson, 119 N. C., 423; *Houston v. Lumber Co.,* 136 N. C., 329.

J. C. FAGG v. SOUTHERN BUILDING AND LOAN ASSOCIATION.

Contract—Pleading—Issues.

1. A complaint alleged that upon a contract with a local agent of defendant loan association, to the effect that if plaintiff would subscribe for a certain number of shares of stock of the association and pay a certain amount of money the association would make a loan to plaintiff, the plaintiff complied with the requirements and the defendant association refused to make the loan, and plaintiff thereupon returned the stock and demanded a return of the money paid by him, and defendant refused: *Held*, upon a demurrer thereto, that the complaint sufficiently stated a cause of action for, if the allegations be true, the plaintiff would be entitled to recover as damages for the breach of contract the money paid out by him to the association.
2. An allegation in a complaint that defendant association knew that the only inducement to the payment of money and subscribing for stock was the promised loan, and that defendant accepted the money with such knowledge, was a sufficient statement of a cause of action, although it was not alleged that the agent of the defendant who made the alleged promises had authority to make them.
3. A denial in an answer of *knowledge* on the part of defendant of an allegation of a complaint is incomplete unless it includes a denial of information sufficient to form a belief as to the truth of the allegation.
4. An exception by a defendant that, upon all the evidence submitted on a trial, the plaintiff is not entitled to recover, should be taken before the case is given to the jury. If taken for the first time after verdict, it will not be considered.
5. Where the burden upon each of three issues was upon the plaintiff, and the answer to the third depended upon the response to the others, it was not error to charge, in substance, that the burden of the two issues was on the plaintiff.

ACTION, tried at August Term, 1893, of FORSYTH, before *Win-*
(365) *ston, J.*

The plaintiff alleged:

1. That defendant is a corporation, duly organized and doing business in North Carolina.

2. That on or about the -- day of _____, 1891, the plaintiff, being in need of money, applied to the local agent of the defendant for a loan of five thousand dollars; that the said agent promised and agreed with the plaintiff verbally, and by printed representations furnished to the plaintiff by the company, that if the plaintiff would subscribe for fifty shares of stock in the defendant corporation and pay in advance the sum of $260 and certain counsel fees amounting to $20, making in all $280, and would furnish real estate security, as required by the corporation, the company would loan to the plaintiff said $5,000.

3. That plaintiff had no money to invest in stock in the company, but relying on said representations and promise, paid the aforesaid sum, aggregating $280, and applied for the loan of the money, complying with all conditions of the corporation, and offering real estate security, but the defendant corporation, in violation of its contract, refused to make such loan to plaintiff, although the defendant knew that the loan of money was the only inducement to the payment of the money by plaintiff, and the taking of the stock.

4. That after the refusal of the defendant to furnish the money as promised, plaintiff returned the stock to the company and demanded the return of his money, which was refused.

Plaintiff demanded judgment for $280, with interest until paid, etc.

The defendant, answering the complaint, said:

That the second paragraph of the complaint is not true.

That the third paragraph is not true.

The defendant has no knowledge of the fourth, and demands proof.

As a second defense the defendants say that they have never promised to loan money to the plaintiff through their literature (366) or printed representations, except what appears in such printed matter, and that the local agent has no authority to make contracts for this company other than appears in the prospectus containing contract and by-laws of the company. That the company has loaned thousands of dollars in the city, but always upon approved security and applications satisfactory to the board of directors of the company. Defendants demand judgment that the complaint be dismissed, and they recover their costs, etc.

The following issues were submitted and responded to by the jury:

"1. Did the plaintiff enter into a contract with the defendant company for the sole purpose of borrowing money? 'Yes.'

"2. Did the plaintiff become a member of the defendant association? 'No.'

"3. What sum, if any, did the plaintiff pay the defendant under and by virtue of such contract? '$265.'

"4. Is the defendant indebted to the plaintiff, and if so, in what sum? 'Yes, the sum of $265, with six per cent interest from date of payment.' "

From verdict and judgment in favor of plaintiff, defendant appealed.

Watson & Buxton for plaintiff.

J. S. Grogan for defendant.

MACRAE, J. The first exception is in the nature of a demurrer *ore tenus,* on the ground that the complaint does not state facts sufficient to

constitute a cause of action, and this objection may be taken for the first time in this Court. *Jackson v. Jackson,* 105 N. C., 433.

In examining this question, we can only look at the complaint
(367) itself, from which it appears that the plaintiff seeks to recover back money alleged to have been paid by him to the defendant upon an alleged contract made by plaintiff with the local agent of the defendant to the effect that upon the subscribing by plaintiff for fifty shares of stock in defendant corporation, and the payment by plaintiff of the sum named and the furnishing of real estate security, as required by the said corporation, the defendant would loan the plaintiff the sum of $5,000. The complaint further alleges that plaintiff fully complied with his part of said contract, and that defendant failed and refused to loan the said sum of $5,000 to plaintiff, and thereupon the plaintiff returned the stock to defendant and demanded the repayment to him of the money so paid to him, and defendant refused to repay the same.

Upon the foregoing facts, taken as true—for they are admitted for the purposes of this exception—it will appear that the plaintiff has stated a cause of action; for it is clear that, upon this statement, if admitted, he would be entitled to recover the money paid by him as damages for the breach of contract by defendant.

It is not alleged, however, in the complaint, that the local agent had authority to make the contract for defendant. If it be contended that there is nothing to show that said agent had such authority, and therefore the defendant is not bound, still there is a cause of action stated, for the plaintiff would be entitled to relief, because it is alleged in the complaint "that the defendant knew that the loan of money was the only inducement to the payment of money by plaintiff and the taking of stock," the only meaning of which allegation is that the defendant knew of the inducement offered by its agent and accepted the plaintiff's money with such knowledge. A bare statement of the proposition shows that the defendant would not be permitted, at law or in equity, to retain the money so paid by the plaintiff and refuse to loan him the $5,000 upon sufficient security. *Follette v. Insurance Co.,* 110 N. C.,
(368) 377; *Benson v. Insurance Co.,* 111 N. C., 47. The case does not make out a voluntary payment with a knowledge of all the facts, which could not be recovered back, but a payment in subscription to stock upon a condition known to defendant when it accepted the payment. *Adams v. Reeves,* 68 N. C., 134. We are not encumbered upon this point with any questions which might arise if it appeared that this payment was made with notice to the plaintiff of any conditions of subscription which may appear in the prospectus or other notice of defendant, for we are now considering the case simply upon the complaint, and in this view we think it states a cause of action.

The second exception is that, upon all the evidence, the plaintiff was not entitled to a verdict. The answer denies the allegations of the second and third articles of the complaint. We do not think that the fourth article, alleging the return of the stock and demand for the return of the money, has been sufficiently denied by the answer, for it is simply a denial of knowledge, and not of information, sufficient to form a belief. *Durden v. Simmons,* 84 N. C., 555; The Code, sec. 243. For a second defense the defendants, in their answer, deny that they have ever promised to loan money to plaintiff "through their literature or printed representations, except what appears in their printed matter," and they further deny the authority of their local agent to make contracts for this company other than appears in the prospectus, etc. The effect of this second defense is simply to deny the authority of their local agent to make the contract set out in the complaint.

Upon these pleadings, which are copied in full, issues were made up by the court and submitted to the jury. To these issues there was no objection on the part of defendant. There were no other issues tendered. We must presume, then, that defendant was satisfied with them and desired no others. Clark's Code, sec. 395, p. 357.

There were no objections to testimony, except the one objection stated in the third exception, to be considered hereafter, and no (369) prayers for instructions.

The second exception, taken for the first time after verdict, cannot now be considered. The point ought to have been made in the court below before the case was submitted to the jury. *Tayloe v. Steamboat Co.,* 88 N. C., 15.

The third exception was to the exclusion of the question asked the plaintiff as to the value of his real estate. It was urged by defendant's counsel that this question and its answer were relevant, because the plaintiff alleged in his complaint that he had offered defendant ample security for the loan, and that this was denied in the answer. It will appear that no issue upon this allegation and denial was tendered by defendant, and upon the issues submitted without objection this testimony was not relevant.

We find another exception in the case, though not in the assignment of errors. His Honor, among other things, charged the jury "that if from the evidence they found that the plaintiff entered into a contract with defendant simply to borrow money, and did not become a member of the company, they would so find, otherwise, they would so find, the burden being on the plaintiff." "To this the defendant excepts." The meaning of this part of the instruction was that upon the first and second issues the burden was on the plaintiff, and we see no valid ground of objection to this charge, for the burden was on the plaintiff, not only

upon those, but upon all of the issues. There is no error of which the defendant can complain.

Affirmed.

Cited: *S. v. Harris,* 120 N. C., 578; *Cobb v. Clegg,* 137 N. C., 162.

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(370)

F. E. SHOBER v. W. H. WHEELER ET AL.

Fraudulent Conveyance—Parties—Discretion of Trial Judge—Witness —Testimony—Practice—Exceptions to Charge—Inadequacy of Price.

1. Where, at the call of a case for trial in the court below, it appeared that the plaintiff was willing to proceed without certain mortgagees of defendant being made parties, and that defendants had excepted to a former order of the court directing such mortgagees to be made parties, and that the validity of the mortgages could not be affected by the result of the trial, it was a matter entirely within the discretion of the trial judge to determine whether or not the cause should be tried before some of the mortgagees were brought in.
2. A party who has examined his adversary under the provisions of section 581 of The Code is not compelled to use the testimony on the trial, nor does he, by such examination, make such adversary his witness.
3. Objection to testimony is obviated where the objecting party, by his own witness, afterwards substantiates the testimony so objected to.
4. In the trial of an action to set aside a deed as fraudulent, a tax return made by the grantee, in which he did not return the land as his, was properly admitted for the consideration of the jury, it being *some* evidence that the grantee did not consider himself as the owner of the land.
5. The decision of the trial judge as to which party shall open and conclude argument to the jury (the defendant having introduced evidence) is final and not reviewable.
6. It is within the discretion of the trial judge whether he will consider or ignore prayers for special instructions to the jury handed to him after the time prescribed therefor.
7. Exceptions to a charge should be specific; therefore, where a charge contains numerous distinct propositions, an exception "for misdirection in charging the jury as requested by plaintiffs, which charge is recited above," is too general and will not be considered.
8. While inadequacy of price will not *per se* vitiate a sale made by an insolvent to a near relative, or to another, unless so gross as to appear that the purchaser got the property for nothing, yet it is always a suspicious circumstance in a transaction by an insolvent and justifies careful scrutiny, and the greater the discrepancy the greater the suspicion.

ACTION, tried before *Winston, J.*, and a jury, at the August (371) Term, 1893, of FORSYTH.

The action was to set aside two certain deeds set out therein from W. H. Wheeler to Ann J. Wheeler and W. H. Wheeler to E. H. Jennings.

No. 1. At the May Term, 1891, on motion of Watson & Buxton, plaintiff's counsel, the point having been raised by Jones & Kerner, attorneys, in the answer of the heirs-at-law of Ann J. Wheeler, as appears in the record, his Honor Judge John G. Bynum made an order in the cause that certain mortgagees of the lands set out in the pleadings were necessary parties, and ordered them to be brought in by process of the court, as appears by the said order, to which order defendant excepted, and had his exceptions noted on the record of the court. On calling the cause for trial at August Term, 1893, defendants, Wheeler and wife, and Jennings (Mrs. Ann Wheeler and Mrs. Jennings not being alive), insisted that the cause could not be tried, as some of the said mortgagees were not brought in or in any way made parties to the suit, and the cause did not stand for trial until they were made parties. His Honor thereupon decided to try the cause, as the mortgagees did not object, and ordered the cause to be proceeded with. To this defendants excepted.

No. 2. It appeared to the court by admissions of counsel for the plaintiff that the evidence of W. H. Wheeler had been taken before the clerk of the court under the provisions of The Code, sec. 581, to be read in evidence in this cause, and the same was fully recorded by the clerk, and on file in the cause, and a copy thereof in the hands of plaintiff's counsel during the examination of said W. H. Wheeler; that during the progress of the trial W. H. Wheeler testified in his own behalf, and on cross-examination plaintiff was permitted to ask the following questions:

"Was not your mother old and feeble and subject to your influence at the time of the sale to her?" Answer: "Not subject (372) to my influence."

"Did you not tell Mr. Buxton that you did not intend to pay the Shober debt?" Answer: "No."

"Did you not intend to convey all your real estate to avoid this judgment?" Answer: "No."

Defendants objected, for that they were impeaching questions, and plaintiff could not impeach the witness, as he had his testimony, and made him his own witness. The court overruled the objection, for that the evidence of Wheeler taken before the clerk was not read in evidence in the case, and plaintiff was allowed to proceed with the examination, and the defendants excepted.

No. 3. In order to show the insolvency of W. H. Wheeler at the time of the alleged deeds from him to Ann J. Wheeler, dated 27 November,

1887, and to E. H. Jennings, dated the ____ day of _____, 188__, plaintiff offered in evidence an execution issued on a judgment in the Superior Court of Forsyth County, in the case of *F. E. Shober v. W. H. Wheeler* (it being the judgment now sued on) to the sheriff of Forsyth County, and the return of the sheriff thereon, allotting homestead and personal property exemptions and a return of nothing found in excess, said execution bearing date the 2d day of January, 1889, and the sheriff's return thereon bearing date ____ day of _____, 188____.

Defendant Jennings and others objected, for that the same was incompetent; that it was not a record; that if a record, it was *res inter alios acta,* and not competent in the cause, as there were other parties to the suit at bar. The court admitted the evidence and defendants excepted.

The defendant, W. H. Wheeler, put upon the stand afterwards, stated that his homestead was laid off by the appraisers 2 January, 1889, and that he had no personal property at said date in excess of the exemptions allowed him by law and assigned him by the said appraisers.

No. 4. To show the insolvency of W. H. Wheeler and E. H.
(373) Jennings at the time of the alleged deeds, and also that after said date said Jennings did not consider the lands his own, plaintiff offered in evidence original tax returns, admitted by Wheeler and Jennings to have been signed by them, of Forsyth County for the years 1887, 1888, 1889, 1890, showing that the property was not listed by Jennings.

Defendants W. H. Wheeler and E. H. Jennings objected. Objection overruled. Defendants excepted.

No. 5. At the opening of the trial, and before the evidence was in, the plaintiff and the defendant tendered issues, the plaintiff admitting that the issues tendered by the defendant were about correct. His Honor stated that the issues tendered by the defendants would be adopted, which were as follows:

"1. Was the deed from W. H. Wheeler to Ann J. Wheeler made with the intent to hinder, delay or defraud the creditors of W. H. Wheeler?

"2. Did the said Ann J. Wheeler have any knowledge of any alleged fraudulent intention?

"3. Was the purchase by Ann J. Wheeler *bona fide,* and the consideration paid for the property a fair price for all the land at the time the deed was made?

"4. Was the deed from W. H. Wheeler to E. H. Jennings made with the intent to hinder, delay or defraud the creditors of W. H. Wheeler?

"5. Did the defendant E. H. Jennings have knowledge of any such alleged fraudulent intention?

"6. Was the purchase by E. H. Jennings *bona fide* and the considera-

tion paid for the property a fair price for the land at the time the deed was made?"

At the close of the testimony the court, of its own motion and by consent, struck out issues Nos. 3 and 6.

No. 6. It appears from the pleadings in the cause that the defendant admitted the execution of the deeds alleged to have been made by W. H. Wheeler to Ann J. Wheeler and E. H. Jennings, and the (374) relationship was admitted, to wit, that W. H. Wheeler was the son of Ann J. Wheeler and the father-in-law of E. H. Jennings.

Defendants then contended that they were entitled to the opening and conclusion in the argument. His Honor denied the defendants' motion and permitted the plaintiff the right to open and conclude, charging that the affirmative of the issues was on the plaintiff, and defendants excepted to the ruling declining to permit the defendants to open and conclude.

No. 7. After the close of the testimony, and after the argument had begun and one speech had been made for the plaintiff and two speeches for defendants, Mr. Ball, counsel for plaintiff, presented to the court written instructions—special instructions to the jury—and requested the court so to charge.

In his charge his Honor gave the instructions prayed for by Mr. Ball, and also fully arrayed the evidence for the defendants by calling attention to the fact that both W. H. Wheeler and E. H. Jennings swore that there was no intent on their part to defraud any one, and especially the plaintiff, in this suit; that they sought to show how Mrs. Wheeler was a creditor for a large amount of Dr. Wheeler, he having borrowed of her about $5,000 insurance money at one time and other sums of money arising from the sale of her Davie lands; that the statement of the insurance transaction was corroborated by Colonel Alspaugh, by whom the $5,000 insurance check was cashed; that the defendant Wheeler swore that the sale of the land to his mother was a fair and honest transaction and for a full and adequate price, and that R. J. Reynolds had testified with reference to the value of the lands, which the jury would consider.

The court also fully arrayed the testimony as bearing on the Jennings transaction, and charged the jury that while they were parties to the suit and hence interested in the result of the action, and on that account their statements were to be carefully weighed by the jury, (375) still if the jury believed that they spoke the truth their testimony was entitled to the same weight as if they were not parties.

There was evidence tending to show fraud in the said transaction, and evidence tending to show the absence of fraud, also evidence bearing *pro* and *con* upon the knowledge of Mrs. Ann J. Wheeler and E. H. Jennings of said fraud.

There was verdict for the plaintiff. Defendants moved for a new trial; for error in the rulings of the court as set out in exceptions above stated, Nos. 1, 2, 3, 4, 5, 6 and 7, and for misdirection to the jury in charging the jury *"as requested by plaintiff, which charge is recited above."*

The court, among other things, charged the jury:

"Every sale of property by a son to a father or other near relative at the time embarrassed with debts beyond his ability to pay them, is not necessarily fraudulent and void as to his creditors.

"If the mother honestly buys the land from the son in such circumstances, and pays for it at a fair price, such a sale is good and valid as to everybody, and it stands on the same footing as if it had been made to a stranger.

"There is no reason why a son unable to pay his debts may not sell his property to his mother or other near relative, and the only difference between a sale between near relatives and strangers is that close relationship, if the good faith of the transaction is questioned, is a circumstance of suspicion and evidence tending to show a fraudulent intent."

The court likewise charged the jury that when the grantee in an absolute deed, such as the one in suit, pays a valuable consideration, his title is good, although the grantor executed it with the intent to hinder, delay and defraud his creditors, if the grantee had no knowledge of the fraudulent intent at the time it was executed.

The court, by way of illustration, charged the jury that if a
(376) man, being insolvent, executed a deed to a near relative for a tract of land worth, say $3,000, and received only $2,500 therefor, this discrepancy between the real value and the price obtained was a suspicious circumstance, and that it was more suspicious as the discrepancy was greater.

The defendants excepted to this part of the charge.

The defendants asked no special instructions of the court.

Motion for judgment by defendants denied. Defendants excepted, and after judgment for plaintiff, defendants appealed.

Watson & Buxton for plaintiff.

J. S. Grogan and Glenn & Manly for defendants.

BURWELL, J. We will consider the defendants' exceptions *seriatim* as set out in the case on appeal.

1. It was a matter entirely within the discretion of his Honor to determine whether or not the cause should be tried before some of the mortgagees were brought in. The plaintiff was willing to try the case with the parties then in court. The defendants had excepted to the order made at the instance of the plaintiff to bring in the mortgagees, thus in-

sisting that they were not necessary parties. Plaintiff seems by his action to have conceded that that exception was well taken, in part, at least, and thereupon it was for his Honor to say if a trial should then be had. If any good cause for a postponement had been shown, no doubt it would have been granted. It appears from the record that the mortgages spoken of were put upon the lands prior to the alleged fraudulent transfer by the mortgagor to his mother and son-in-law. Their validity is not in any way affected by the verdict and judgment.

2. The fact that the plaintiff had examined the defendant W. H. Wheeler, under the provisions of section 581 of The Code, (377) did not compel the plaintiff to use that testimony on the trial, nor did it make that defendant in any sense the plaintiff's witness. But if so, we are unable to see how the defendants' cause could have been prejudiced by the questions and answers set out in this exception.

3. We think there was no good ground for this exception, but if there were, it was completely obviated by the subsequent testimony of the defendant, fully establishing the very fact which the plaintiff sought to prove by the evidence objected to here.

4. The tax return made by defendants was properly submitted to the consideration of the jury. If they really owned the land here in dispute, it was their duty to return it for taxation. That they failed to so return it was some evidence that they did not consider themselves as the owners thereof.

5. This exception was not pressed before us.

6. The defendants excepted "to the ruling declining to permit defendants to open and conclude." The decision of his Honor upon this point is not reviewable here. Rule 6.

7. His Honor might have insisted that the plaintiff's prayers for special instructions were handed to him after the time prescribed, and that he could not be required to consider them. That was his privilege under the rule. The defendants could have no right to object to his exercising that privilege, or his failure to do so.

8. This exception is "for misdirection in charging the jury as requested by plaintiff, which charge is recited above." A reference to the charge so "recited above," will show that it contains numerous distinct propositions. Exceptions should be specific. *Williams v. Johnston,* 94 N. C., 633. The evidence taken on the trial has not been sent up to us. It would be unjust to the appellees to allow the appellants, under such a general exception, to single out here some one of the propositions contained in that charge, and insist that there appeared error in giving it, when if a specific objection (378) had been noted, either on the motion for a new trial, or when the case on appeal was tendered by them, there might, perhaps, have been

incorporated in the case evidence produced on the trial or other parts of the charge that would show the pertinence and propriety of that which is here pointed out as objectionable. We cannot, therefore, consider this exception; it is too general.

9. We find no reasonable objection to the illustration which his Honor used in his charge to the jury. Inadequacy of price will not *per se* vitiate a sale made by an insolvent to a near relative, or to another, unless it is so gross that the court must sternly say to such puchaser that he got the property for nothing *(Fullenwider v. Roberts,* 20 N. C., 420), but inadequacy of price, if found to exist, is always a suspicious circumstance in the examination into any transfer of property, for the very good reason that men do not usually sell their land for less than it is worth, and when we find them doing so, especially when insolvent, it is not unreasonable to look at such a transaction with suspicious scrutiny. And certainly, the greater the discrepancy, the greater the suspicion, until it reaches that point where, because of excessive inadequacy, the law stamps the pretended sale as no sale at all. We find no error, and the judgment is

Affirmed.

Cited: Banking Co. v. Walker, 121 N. C., 116; *Craddock v. Barnes,* 142 N. C., 99; *Shober v. Wheeler,* 144 N. C., 403; *Martin v. Knight,* 147 N. C., 581; *S. v. Lane,* 166 N. C., 340; *Phillips v. Land Co.,* 174 N. C., 544.

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(379)

BOARD OF EDUCATION OF BLADEN COUNTY v. COMMISSIONERS OF BLADEN.

Taxes—Capitation Tax—Public School Tax—Pension Tax, Constitutionality of—Apportionment.

1. It is the exclusive right of the Legislature to determine and declare by whom and how the indigent of the State entitled to support shall be ascertained, and from what fund and by whom allowances for their support shall be made.
2. The act of the Legislature (ch. 198, Acts 1889) providing pensions for disabled and necessitous Confederate soldiers and their indigent widows was enacted in the discharge of a legal as well as moral obligation enjoined by the Constitution.
3. As the levy of the tax of nine cents made by the act of 1889 did not exceed one-fourth of the total State levy on the poll, the Legislature had the right to appropriate it to the particular class of the indigent of the State to which it related (disabled and indigent Confederate soldiers and their

indigent widows), and to provide by other legislation for the other poor through the county commissioners of the various counties.

4. Such levy of nine cents for pensions is authorized only as a tax for the maintenance of the poor, and cannot be imposed as an additional tax, but is a part of, and must be deducted from, the one-fourth of the capitation tax usually subject to appropriation for the support of the poor, three-fourths of the capitation tax being set apart by the Constitution for public school purposes.

5. Where a county board of education brought suit against the board of commissioners to recover the portion of the capitation tax paid over to the State for several years for the pension fund to the diminution of the educational fund instead of the general poor fund: *Held*, that while the educational fund should not have been diminished by such misappropriation, the county commissioners cannot be held liable for the same, either individually or as representatives of the county; nor, indeed, can the county treasurer who has paid such portion over to the State be held liable, as was held in the somewhat analogous case of *Liles v. Rogers*, *ante*, 197.

WINSTON, J., before whom the case was heard, at Fall Term, 1892, of BLADEN, rendered an elaborate and well considered opinion, and in conclusion adjudged as follows:

"That the commissioners of Bladen did not legally divide and (380) appropriate the poll tax for the years mentioned. Under the Revenue Act of 1891, chapter 323, Laws 1891, forty-five cents of the poll tax is set apart for the purposes of education irrespective of the constitutional application, but not in antagonism to the same. This amount deducted from the tax levied on each poll in Bladen County will leave $1.35 to be divided between the poor and the schools in the proportion of three to one. Hence, we have for education

Under the Revenue Act of 1891	$ .45
Under the Constitution, ¾ of the balance of the capitation tax, ¾ of $1.35	1.01¼
Total	$1.46¼

The judgment of the court, therefore, is that the plaintiffs do recover of the defendants the sum of 20¼ cents on each poll on which a poll tax was levied and collected," etc.

The application for a mandamus was continued and the cause retained, and defendants appealed.

The constitutionality of the Pension Act of 1889, chapter 198, is involved in the determination of this case.

The plaintiffs alleged:

1. That the plaintiffs are a corporation created by the General Laws of North Carolina, with power to sue and be sued.

2. That the defendants are a corporation created by the laws of North Carolina, with power to sue and be sued.

3. That the defendants did not require enough of the poll taxes which were levied to be appropriated and applied to the school fund of Bladen County for the years 1890, 1891 and 1892, the total levies on each poll for all purposes being $1.80, and of that amount only the sum of $1.26 was appropriated and applied to the said school fund, which
(381) amount so applied was less than three-fourths of the amount levied.

4. That out of the amounts levied upon polls and realized from that source, there was about five hundred and forty dollars applied to purposes other than the school fund in the county for the years aforesaid, which amount ought to have been applied by the defendants to the school fund of Bladen County.

Wherefore, the plaintiffs demand judgment:

1. For the sum of five hundred and forty dollars, and cost of this action.

2. That a writ of mandamus issue from this Honorable Court, commanding the defendants to apply the aforesaid sum already levied to the school fund of Bladen County in accordance with law and the prayer of the plaintiffs.

3. For such other relief as the plaintiffs have right to demand.

The defendants, answering the complaint, said:

"1. That the allegations contained in Articles Nos. 1 and 2 are admitted.

"2. That Article 3 of the complaint is admitted, except that portion that alleges the defendants did not levy up to the constitutional limit in the year 1890, and that part of said complaint is denied. In further answer to said Article No. 3, the defendants allege that under the Constitution, Art. V, sec. 2, the defendants had the right to apply twenty-five *per centum* of the capitation tax to the support of the poor of the county.

"3. That the allegations contained in Article No. 4 are denied."

The following are the facts agreed:

That the total levy on polls in Bladen County for the years 1890, 1891 and 1892 was one dollar and eighty cents on each poll. This includes the State and county levies. That said poll taxes were apportioned as follows for each of said years, viz:

One-fourth of total levy for poor	$ .45
(382) For Pensions, under chapter 189, Laws of 1889	.09
Schools	1.26
Total	$1.80

C. C. Lyon and Busbee & Busbee for appellants.
No counsel contra.

AVERY, J. Under the provisions of section 2, chapter 323, Laws 1891, a capitation tax of seventy-five cents was levied on every male person not exempt as herein declared, to be devoted to the purposes of education and the support of the poor, as may be prescribed by law, not inconsistent with the apportionment established by section 2, Article V of the Constitution of the State. This levy was made, as expressly stated, in contemplation of the statute (section 17, chapter 198, Laws of 1889), which devotes nine cents of the proceeds arising from the tax on each poll, together with three cents of the twenty-five derived from the tax on every hundred dollars in value of taxable property, to the payment of pensions of indigent and disabled soldiers, provided for in the same act. The county of Bladen supplemented the State capitation tax so as to make the aggregate $1.80 on every taxable poll, of which nine cents on each head was paid over to the proper authorities of the State. Of the sum remaining to be appropriated under the orders of the defendants $1.26 arising from each poll was paid over to the plaintiffs, and forty-five cents per capita to the support of the poor. The plaintiffs contend that three-fourths of the aggregate capitation tax, or $1.35 of the $1.80 derived from each poll, was devoted by the Constitution to "the purposes of education," and should have been paid over to them, while the defendants insist that one-fourth of the whole levy on polls, or forty-five cents of each poll tax, was properly expended for the support of the indigent in the county of Bladen.

The questions raised by the appeal depend upon the construction of section 2, Article V, of the Constitution, which is as (383) follows:

"The proceeds of the State and county capitation tax shall be applied to the purposes of education and the support of the poor, but in no one year shall more than twenty-five per cent thereof be appropriated to the latter purpose."

The application of the proportion of the capitation tax specified in the Constitution to the support of the poor must be made necessarily under the direction of the Legislature, whose exclusive right it is, in the exercise of the general police power, to determine and declare by whom and how the names of the indigent of the State who are entitled to assistance from the public, in order to their maintenance, shall be ascertained and, subject to the restrictions of the Constitution, from what fund and by whom allowances for their support shall be made. Counties are the creatures of the law-making department, and their powers may be enlarged, abridged or withdrawn at the pleasure of the Legislature, pro-

vided no right guaranteed by the organic law be infringed. *Lilly v. Taylor,* 88 N. C., 489; *Commissioners v. Commissioners,* 95 N. C., 189. If the Legislature were not clothed with power to alter, amend or repeal section 2, Article VII, the general supervision of the poor of the county would still be exercised only as may be prescribed by law. Another clause of the Constitution (section 7, Article XI) enjoins upon the Legislature the duty of making beneficent provision for the poor, the unfortunate, and orphans. The law which provides pensions for different classes of persons who were disabled during the war, and for certain widows (Laws 1889, ch. 198), was enacted, therefore, in the discharge of a legal as well as a moral obligation. As the unfortunate, blind, deaf and dumb, and insane are cared for in different institutions adapted in all their appointments to the wants of each class, so provision is made for the wounded and disabled soldiers, by aiding in furnishing a home, food, clothing and medical attention to some, and by giving pecuniary
(384) aid to others who are in charge of their relatives. The act under which nine cents of the whole levy of seventy-five cents on each poll is devoted, with three cents of the levy on every $100 in value on property, to the payment of these yearly stipends, shows by its terms an intent to provide only for old soldiers who are poor as well as disabled, and for no widows, except such as are indigent and unmarried. No person can become a beneficiary under the statute who owns or has disposed of by gift to wife, child, children or next of kin, or to any other persons since 11 May, 1885, property worth more than $500. Section 2. The whole number of poor pensioners is divided into four classes, with a view to increasing the allowance according to the extent of the disability resulting from wounds. The Legislature clearly has the power to delegate authority to the county officials to provide and care for one class of the indigent or unfortunate inhabitants of the State, and to disburse a part of the fund devoted by the Constitution to the support of the poor, by appropriating it more directly to another class, whose wants, in the opinion of the lawmakers, can be best supplied through public agencies of a different kind.

As the levy of nine cents did not exceed one-fourth of the total State levy on the poll, the General Assembly unquestionably had the right to appropriate it to this particular class of the indigent, and to provide by general or special legislation for the other poor through the county commissioners of the various counties. In other words, a sum not exceeding one-fourth of the amount levied by the State upon the poll could, without violating the Constitution, be appropriated with a corresponding amount, upon the equation plan of the tax derived from property, to the support of indigent soldiers and poor widows of soldiers. But if there is no warrant in the organic law for the appropriation, except the au-

thority given by section 2, Article V of the Constitution, to expend (385) twenty-five per centum of the sum derived from the capitation tax for the support of the poor, it would follow that the amount of this fund applicable to the maintenance of other classes of indigent persons would be correspondingly diminished. The language of the Constitution is plain and peremptory, and forbids the application of the fund arising from the tax on polls to any purposes other than to education and the support of the poor, or of any greater proportion for the maintenance of the poor than that prescribed in the instrument, until the levy reaches the limit of two dollars. So far, this Court, in construing the Constitution, has given its affirmative sanction to a levy on the poll in excess of the limit of two dollars made directly by legislative act only where the tax is intended to suppress insurrection or repel invasion, or to meet payments due on the public debt of the State, or a debt created before the adoption of the Constitution of 1868, while it has declared unconstitutional a levy by a county, even in pursuance of legislative authority, except for the payment of an ante-Constitution debt, or by virtue of specific authority under section 6, Art. V, to levy a special tax. *Board of Education v. Commissioners,* 111 N. C., 578; *Barksdale v. Commissioners,* 93 N. C., 472; *University v. Holden,* 63 N. C., 410. It is still an open question, however, whether the Legislature has the power to exceed the usual limit in order to provide for the maintenance of public schools as required by Article IX, section 3 of the Constitution. *Board of Education v. Commissioners, supra.*

We are of the opinion, therefore, that the Legislature had no authority to impose a tax of nine cents on each poll, except as a levy for the maintenance of the poor, under Article V, section 2, but that no constitutional inhibition prohibited the appropriation of one-fourth of any State tax levied upon each head to the support of the poor of any or all classes. As the organic law, in unmistakable terms, devotes three-fourths of such levy to educational purposes, it follows that what- (386) ever portion of the capitation levy (not to exceed one-fourth) is directly appropriated by the Legislature to any given class of the poor, to be disbursed by some agency other than the various boards of county commissioners, must be deducted by the county authorities (if less than one-fourth) from the twenty-five per centum of the capitation tax usually subject to appropriation by them for the support of the indigent, while three-fourths of the entire sum derived from that source must at all events be paid over to the Educational Board, who are constituted the custodians and disbursers of the school fund of the county.

We concur with the learned judge who tried the case below, in the opinion that the Legislature was warranted in making the levy of nine cents on the poll, only upon the idea that necessitous veterans consti-

tuted a portion of the poor within the contemplation of section 2, Article V of the Constitution. But we think, in the absence of any express statute providing otherwise, the county authorities may ascertain the amount of the capitation tax that is subject to appropriation for the poor of the county by deducting the amount of the State levy for indigent soldiers from the one-fourth of the aggregate levy for State and county purposes, as they may then determine what proportion of the same fund is left to be devoted to educational purposes in the county by deducting from the three-fourths of the aggregate levy the amount devoted by the Legislature to the State School Fund, and paid over to the State Treasurer. If it were a practical question, this would lead to some modification of the calculation adopted as a basis of the judgment rendered in the court below. But while there are urgent reasons for passing upon the question raised in this cause, especially as a guide to the auditor, who would otherwise be at a loss in giving the instructions which he is required to send out to the counties, the judgment of the court
(387) from which the defendants appeal, if treated as a final judgment, upon the idea that it leaves only a computation like that as to costs to be made, is nevertheless clearly erroneous. Judgment was demanded against the county commissioners of Bladen County for the sum of $540, the alleged amount of the tax for the years 1890, 1891 and 1892, which ought to have been applied for the maintenance of the public schools of the county, but which was applied to other purposes. It seems to us that there are several insurmountable objections to the rendition of such a judgment, or of a judgment that the plaintiffs recover a sum to be ascertained by a calculation on the basis of a given rate on each taxable poll of the county.

If the repeal of chapter 199 Laws 1889 by chapter 166, Laws 1893, restored the Acts of 1885 and the provisions of The Code in reference to education, which are not inconsistent with the last named act, or if this proceeding be governed in any respect by the Act of 1889, in any view of the question, it was the duty of the county treasurer, as treasurer of the county board of education, to collect from the sheriff "the whole amount levied (less such sum as may be allowed on account of insolvents for the current year) by both State and county for school purposes (The Code, sec. 2563), and to receive and disburse all public school funds." True, sec. 2563 of The Code was so amended by Laws 1889, ch. 199, sec. 28, as to provide that suit should be instituted "on relation" of the board of education of the county instead of "on relation" of the county commissioners; but we fail to find any statute or any principle of law under which an action would lie against the county commissioners, either as individuals or as a corporation, for money belonging

to the school fund which was paid over by the treasurer on his general account as treasurer of the county for the support of the poor of the county. If they had, in good faith, mistaken the law and ordered an improper division of the capitation tax between the county and the Educational Board, it is familiar learning that they would not thereby have incurred personal liability to the other board, be- (388) cause they would have been acting in a judicial capacity. *Thomas v. Wilton,* 40 Ohio State, 516; *Banker v. Commissioners,* 88 Ind., 267; *People v. Storking,* 50 Barb., 573; *Hill v. Charlotte,* 72 N. C., 55. On the other hand, the county is not liable for a misapplication of a fund of which the county commissioners direct the disbursement, under the general power delegated to them by section 753 of The Code, in good faith, but under a misapprehension of the law. *Long v. Commissioners,* 76, N. C., 273.

If the plaintiff board is entitled to recover judgment against the defendant board, which has the general oversight of county government, it would follow that the courts would be required, if it should become necessary, to enforce the levy of a sufficient tax upon the property of the county to replace the amount belonging to the school fund which has already been wrongfully but honestly expended for the support of the poor. The taxpayers of a county are under no legal obligation to submit to additional burdens in order to repay sums belonging to one fund that may have been, in good faith, mingled with another fund and diverted from the purpose for which it was intended. If, however, it had appeared that a part of the school fund had been transferred to the general fund of the county, and was still held by the county treasurer, subject to the orders of the defendant board, the plaintiffs would have been entitled to recover so much of the fund as was still unexpended, and to demand a writ of *mandamus* to compel the payment of such specific sum in order to its application to the purpose for which it was intended.

But it would seem that all of the money collected for educational purposes should have been paid over by the sheriff to the county treasurer in his capacity as treasurer of the board of education, and held by him, subject to the orders of said board. The Code, secs. 2563 and 2554. The defendant board, as such, had no power over that fund unless it was its duty to prosecute a suit to compel its payment to him (389) as a part of the county school fund), and the treasurer was not bound to transfer it, on the order of the county commissioners, to the fund held by the county for general purposes. So that the misapplication of the fund was made by the treasurer of the board of education, and he is not a party to this action. He was required by law (The Code, secs. 2558 and 2559) to make the most minute reports of his receipts

from all sources and his expenditures for all purposes, to the plaintiff board.

As silence on the subject might lead to the bringing of almost innumerable actions against the county treasurers, we deem it proper to say, further, that, in our opinion, if the plaintiff board had brought the action against the treasurer in his capacity as the custodian and disburser of its own funds, or upon his official bond, it would not have been entitled to recover. *Liles v. Rogers, ante,* 197.

For the reasons given, the judgment is

Reversed.

Cited: McGuire v. Williams, 123 N. C., 357; *Hornthall v. Comrs.,* 126 N. C., 32; *School Directors v. Comrs.,* 127 N. C., 265; *Board Education v. Comrs.,* 137 N. C., 315; *Board of Education v. Comrs.,* 167 N. C., 117.

JOEL TRIPLETT v. JOHN P. FOSTER ET AL.

Practice—Motion to Docket and Dismiss Appeal.

A motion to docket and dismiss an appeal made at the first term after the trial below, but after the call of the docket of the district to which the case belongs, will not be entertained when the appellant brings up and dockets his transcript at that term before the motion to dismiss.

Cranor & Buxton for appellee.

CLARK, J. This is a motion to docket and dismiss under Rule 17. This motion was not made at the close of the call of the docket of the district to which it belongs, but since. And now, during the same (390) term, being the first term of this Court after the trial below, the appellant has brought up the transcript of the appeal and docketed the same before the motion to dismiss was made. This brings the case directly under *Bryan v. Moring,* 99 N. C., 16, as explained in *Bailey v. Brown,* 105 N. C., 127, on p. 130.

If, notwithstanding his failure to docket in time for argument at this term, the appellant thus obtains a delay of six months, the appellee himself has been negligent in not moving to docket and dismiss at the close of the call of causes from that district, as he might have done. *Vigilantibus, non dormientibus leges subveniunt.*

Motion denied.

Cited: Paine v. Cureton, 114 N. C., 607; *Haynes v. Coward,* 116 N. C. 841; *Speller v. Speller,* 119 N. C., 358; *Rothchild v. McNichol,* 121 N. C., 285; *Smith v. Montague, ib.,* 93; *Packing Co. v. Williams,* 122 N. C., 407; *Benedict v. Jones,* 131 N. C., 474; *McLain v. McDonald,* 175 N. C., 419.

(391)

J. P. McLEAN, GUARDIAN, ETC., v. MRS. J. R. BREECE.

Guardian—Lunatic's Estate—Account—Jurisdiction—Practice.

1. Although the courts will not order the payment of a lunatic's debts contracted anterior to his lunacy, if it will deprive him or his family of maintenance, yet where, in the settlement of the guardian's account, the lunatic being dead and his only child of age, it appears that the guardian, in good faith, paid such debts without prejudice to the estate, the disbursement will be allowed.
2. Where a guardian of a lunatic, by the issuance of a summons and filing his final account, began a proceeding for a settlement of his ward's estate and no pleadings were filed, but the matter has pended seven years, during which time there have been three references and four reports, besides numerous orders and two final judgments below, and two appeals to this Court, an exception by plaintiff guardian to the final judgment on the ground that there are no pleadings in the cause will not be entertained, nor is it necessary, in such case, that pleadings be filed in this Court *nunc pro tunc.*
3. The clerk of the Superior Court has jurisdiction of settlements between guardian and ward and, of course, between the guardian and the ward's personal representative.
4. If an action, begun wrongfully before the clerk, gets into the Superior Court by appeal, or otherwise, the latter has jurisdiction, and can make any needful amendment of process to give effectual jurisdiction, as also this Court may do if necessary.

Proceeding for the settlement of a deceased lunatic's estate by his guardian, instituted before the clerk of Cumberland Superior Court by the guardian against the daughter of the lunatic, to which the administrator of the lunatic afterwards made himself a party, and heard on report of referee at January Term, 1893, of CUMBERLAND, before *Winston, J.,* from whose judgment against him the plaintiff appealed.

The exceptions are noted in the opinion of *Associate Justice Clark.* (For former appeal in same case, see 109 N. C., 564.)

N. W. Ray for plaintiff.

J. W. Hinsdale and C. W. Broadfoot for defendant.

CLARK, J. When this cause was here before (109 N. C., 564), the Court said, in reference to "vouchers numbered respectively in the account stated by the referee, Nos. 2, 5, 6, 7, 10, 11, 12, 13, 14, 15, 16, 17," and those for "sundry trips to Raleigh on account of ward," that "the referee must be required to inquire more particularly as to the nature and purpose of and the necessity for the expenditures and disbursements embraced by them." This the referee proceeded to do. On the coming in of the report the Court allowed defendant's exceptions to vouchers 11, 12, 13, 14, 15, 16 and 17, and ordered a reference to reform the account. As no appeal lay from such interlocutory order *(Wallace v. Douglas,* 105 N. C., 42), the plaintiff properly caused his exceptions to the rulings to be noted in the record. It is now brought up for review on the appeal from the final judgment. The referee found from the evidence that these vouchers (11 to 17 inclusive), were debts against the estate when (392) the guardian (plaintiff) took charge, that he paid them in good faith, and that they were correct and just claims against James Breece. The defendant excepted, because those disbursements were not "for the support and maintenance of the lunatic, or of his family, nor for necessary expenses of the ward or his wife and child, nor for their benefit, nor authorized by law or any previous order of Court." In sustaining this exception to the vouchers mentioned (11 to 17) there was error. This Court had already ruled in this case, 109 N. C., on page 567, that "when he (the guardian) in good faith pays debts that ought to be paid, and by so doing the ward's estate suffers no prejudice, he will be allowed credit for disbursements of assets in his hands in such respects." To same purport is *Adams v. Thomas,* 83 N. C., 521. It does not appear that the ward's estate or the maintenance of himself and family, suffered any prejudice by the payment of these just debts incurred by him anterior to his lunacy. It is true, both that the courts will not order payment of a lunatic's anterior debts if it will deprive him or his family of maintenance *(Smith v. Pipkin,* 79 N. C., 569), and that he is entitled to his personal property exemption; but none of these questions can arise; the lunatic is dead, and the only child is of age. The question is not as to reserving a sufficiency for maintenance, but whether in this final settlement the guardian shall be allowed for just debts paid in good faith by him. These credits were, therefore, erroneously stricken from the account and should be restored to it.

The plaintiff's second exception was made at January Term, 1893, for that in reforming the account the referee had failed to make a deduction of $41.75, allowed by the court in voucher number 10, from the sum total of the debits. It seems to us from inspection of the account that the deduction was made. But as the account must be reformed by

reinstating vouchers 11 to 17 inclusive, the inadvertence, if such there be in regard to this $41.75, will be corrected.

The plaintiff further excepted at the final judgment to any judgment being entered, upon the ground that there are no plead- (393) ings in the cause. This proceeding was instituted by the plaintiff seven years ago. It has been referred three times, with four reports made. There have been numerous orders and two final judgments in the court below, and the case is now for the second time in this Court. The objection came too late. *Stancill v. Gay,* 92 N. C., 455. This Court might permit pleadings to be filed here *nunc pro tunc* (The Code, sec. 965), but we deem it unnecessary, as it would serve no useful purpose.

The plaintiff further excepts in this Court, for the first time and *ore tenus,* on the ground of a want of jurisdiction, in that the action was instituted before the clerk originally. This he can do—Rule 27 of this Court. But the objection is unfounded. *Donnelly v. Wilcox, post,* 408. The clerk has jurisdiction of settlements between guardian and ward, and, of course, of settlements between guardian and the ward's personal representative. The Code, sec. 1619; *McNeill v. Hodges,* 105 N. C., 52. But had the action been "begun wrongly before the clerk, it having gotten into the Superior Court by appeal or otherwise, the latter has jurisdiction of the whole cause, and can make amendment of process to give effectual jurisdiction." *Capps v. Capps,* 85 N. C., 408; *Cheatham v. Cruise,* 81 N. C., 343; *Robeson v. Hodges,* 105 N. C., 49. The Court here in such case would amend the process if necessary. *R. R. Comrs. v. Telegraph Co., ante,* 213; The Code, sec. 965; or might remand the case that the amendment might be made in the court below. Where, however, a cause has been so long pending as this, without exception on that ground, it would be presumed that the requisite amendment of process had been in fact already ordered in the Superior Court.

The judgment thus modified as indicated, is affirmed. The costs of this Court will be taxed against the appellee. The Code, sec. 540.

Modified and affirmed.

Cited: Elliott v. Tyson, 117 N. C., 116; *McLeod v. Graham,* 132 N. C., 474; *Ewbank v. Turner,* 134 N. C., 80; *In Re Stone,* 176 N. C., 350.

(394)

W. D. SUMMERS v. ELIZA MOORE ET AL.

Resulting Trust—Parol Evidence—Fraudulent Conveyance.

1. Where, upon a purchase of property, the conveyance of the legal title is taken in the name of one person, while the consideration is given or paid by another at the same time or previously and as part of the same transaction, the parties being strangers to each other, the presumption, in the absence of rebutting circumstances, is that he who supplies the money intends the purchase for his own benefit, and not for another, and that the conveyance in the name of the other is a matter of convenience and arrangement for collateral purposes, and a resulting trust immediately arises from the transaction, and the person named in the conveyance will be a trustee for the party from whom the consideration proceeds.
2. In such case the burden is upon him who claims the resulting trust, and as the law gives a peculiar force and solemnity to deeds, it will not allow them to be overthrown by mere words, but only by facts strong, clear, and unequivocal.
3. Parol evidence is admissible to rebut a resulting trust, but the burden is upon the nominal purchaser, who must establish by sufficient testimony that it was intended that he should take a beneficial interest.
4. Although one who supplies the purchase-money and procures the conveyance to be made to another, for the purpose of hindering, delaying, or defrauding his creditors, cannot claim a resulting trust in a court of equity, which will not interfere between wrong-doers; yet where, subsequent to the transaction, the beneficial owner, under a mistaken idea that he was insolvent, instructed the nominal purchaser of the property to postpone the execution of a deed, which the latter was about to make, reconveying the land, such fact cannot have the effect of depriving the beneficial owner of his right to recover the property, his intention to defraud his supposed creditors not being accompanied by any act which changed his relation to the property.
5. Where land has been substituted for a part of that affected by a resulting trust, the owner may follow it and have it declared subject to the trust.

ACTION, brought by the plaintiff to have the defendants declared trustees, for the benefit of plaintiff, of a tract of land in McDowell
(395) County, N. C., known as the Duncan lands, brought to the Superior Court of McDowell County and removed for trial to Rutherford County, and tried at Spring Term, 1893, of RUTHERFORD, before *Armfield, J.*, and a jury.

The plaintiff alleges that the lands in controversy were sold by a special proceeding on the part of the heirs of J. H. Duncan, deceased, and were purchased at a sale under judgment rendered in said proceeding, through George J. Moore, defendants' ancestor, and nephew of the plaintiff, with moneys furnished by the plaintiff; and that the deed to said land was made by the commissioner at said sale to said George J.

Moore on 20 May, 1885, and that subsequent to said date to wit, 6 April, 1886, the said George J. Moore purchased the dower interest of the widow of the late James H. Duncan in the aforesaid tract of land with moneys furnished by the plaintiff W. D. Summers, and as his agent, and took title to the same in his own name.

The defendants, in their answer, denied that George J. Moore, their ancestor, bought said land as trustee for plaintiff and with plaintiff's money, and allege that if plaintiff paid for said land, he procured the deeds to be made to said George J. Moore to cheat and defraud his (Summers's) creditors.

On the trial plaintiff introduced J. B. Burgin, who testified that he surveyed the Duncan land for G. J. Moore, who requested him to make a survey of the outside boundaries, as he (Moore) might make a deed to plaintiff Summers, to whom the land belonged and who had furnished the money to pay for it. There being some difficulty in locating a part of the land, the survey was postponed until Summers, the plaintiff, could be present, and as the land belonged to Summers, Moore said he wanted him to see it surveyed. Witness said the purpose of the survey was to enable Moore to make a deed to Summers, who, as Moore declared, had furnished the money to purchase all the lands.

The plaintiff next introduced the deposition of A. W. Jameson, who testified as follows: "At the request of plaintiff, witness (396) prepared a deed from George J. Moore and wife to the plaintiff, W. D. Summers, for the lands in controversy; don't remember the consideration mentioned in the deed, nor the date, though it was five or six years ago. The same conveyed an estate in fee simple. Moore and wife were not present. The deed was given by witness to Summers; witness does not know what became of deed. Mr. Summers was solvent at the time said deed was written by me, and he had the reputation of being a man of means."

Austin Conley testified: "Moore bid off the Duncan land and asked me to go his security for $350; I objected, and he said that I need not be afraid, as he was just acting as agent for Summers in this matter, and that the money would be forthcoming. I signed the note, and when it was due Summers sent him the money and he paid the note off. After this, and before he (Moore) moved to the Duncan place, I went to see Moore to get a place for a church on the Duncan land. Moore said he could not deed the land; that the right was in Summers. We asked him to write to Summers; he wrote, and in a few days we got an answer to make us a deed for a church site, and he made us the deed, but it was not probated till after Moore's death; it was found in his possession."

George Barnes testified for defendants: "I had a talk with Summers on the river opposite the Duncan property; and as we walked along

Summers said if he was George Moore he would fix some way to cross the river for the convenience of foot persons going to mill. Moore died in May, 1888. I saw Moore and the plaintiff together between the 1st of February and the last of April, and they were engaged in running over their books in a little store they had together and which was run in the name of Moore & Summers till Summers went home, and after that it was in the name of George J. Moore. Moore told me after Sum-
(397) mers left there that he was holding the Duncan place under a title in his own name. I think I know Summers's handwriting; the letters shown me are in Summers's handwriting."

The defendants introduced W. D. Summers, the plaintiff, as a witness, who testified that the letters shown him were in his handwriting.

George Barnes recalled: "Moore told me that the plaintiff furnished the first stock of goods. Moore owned no land before he got the Burgin land; he had some personal property; he said the plaintiff was a good friend and had helped him. My mother is a creditor of Moore. I run a grog-shop and have been indicted."

The defendants next introduced a letter from the plaintiff to George J. Moore, as follows:

"STATESVILLE, N. C., 28 January, 1886.

"GEORGE: Yours to hand. I want you to have the deed that I made to you for the Burgin land registered, for I am going to see trouble by being security for C. L. Summers. I am afraid that it will take everything I have in this county to pay my own debts and the three thousand ($3,000) dollars of security money. The mill tract or Duncan tract I want you to keep the deed in your own name so that it can't be reached for any of my debts or security debts. The blank which I gave you to sign, don't sign it, but let the deed stay in your own name. I am seeing a heap of trouble. I will have to raise 300 dollars this week some way or other, but I don't know how. Write soon.

"Your Uncle, W. D. S.

"P. S.—I wish you would take my name off the flour sacks and brand everything in your own name. Also let everything go in your own name in the store.

"Your Uncle, B."

The defendants introduced in evidence a deed from Austin
(398) Conley to George J. Moore and wife, Eliza Moore, dated 3 March, 1888, which was admitted to cover a part of the lands sought to be uncovered in this action and embraced in the judgment. Also a deed to Moore from Duncan for the dower, dated 6 April, 1886. Also a deed from Greenlee, commissioner for the Duncan land, to Moore, dated 20

May, 1885. Eliza Moore, wife of said George J. Moore, died after her said husband.

Plaintiff in reply introduced W. A. Culbertson, who testified: "I live in McDowell County; I worked for Moore at the mill on the Duncan place; he was then living on the Burgin place; I repaired the mill, and he paid me and asked me for a receipt, and I gave it to him; he said he wanted this receipt for Uncle Billy (the plaintiff) to show what he (Moore) did with the money; he said the property belonged to Uncle Billy and he (plaintiff) does the paying, 'and when you work for me you must let me know eight or ten days before you want your money, for I have to send to Uncle Billy for the money'; he said that Uncle Billy had furnished the money to buy the property; I worked for him on the Burgin place on the pump line; I did some repairs on the sawmill; Moore said he was going to move across to the Duncan place; I asked him why; he said, 'The property is Uncle Billy's, and what he says I will do; he wants me to move over and take care of the property.' I heard Moore say about the church lot, that he could not make a deed till he sent to Uncle Billy, for the property was his; Mr. Little asked him to write to Summers about it."

Cross-examined: "I worked on the mill in the spring and fall of 1886, and on the Moore (deed); I saw that Summers's name was off the flour sacks at Moore's death; think Moore moved to the Duncan place in August, 1886 or 1887; Moore went into business with Dysart not long before he died."

Mr. Murphy testified: "Moore told me that Uncle Billy wanted to get me to build a house on the Burgin place, and asked me to (399) go home with him and see Summers; I went, and made a bargain with Summers, and built a house on the Burgin land; Summers paid for it; Moore told me that Summers paid for the land; after this, in April, 1887, Moore told me Uncle Billy wanted me to do some more work for him; I sent the price of it by Moore, and in a few days Summers said go on and do the work; I did it on the Duncan property, and Summers paid for it through Moore; Moore's wife wanted a nursery and a stairway in the Duncan house, and Moore said he would not have it done until Uncle Billy came, for the property belonged to Uncle Billy, and he had no right to make a bargain about it; when Summers came he agreed to the work and paid me for it; Summers said to Moore if I needed anything out of the store to let me have it; Moore said the goods were his and Uncle Billy's."

W. D. Summers testified in his own behalf: "I wrote the letter of 28 January, 1888, just after I had learned of an appeal bond in the case of *C. L. Summers v. Watts and others;* that plaintiff was under the impression that he had signed a *supersedeas* bond on a $6,000 judgment,

which turned out afterwards he had never signed, and that he was only liable for a $25 appeal bond, instead of the *supersedeas* bond, as he had supposed, and that he deemed himself insolvent by reason of the supposed liability, and that plaintiff wrote the letter introduced in evidence while under such mistaken impression. When the land deed was made to Moore I had money on hand and was in debt but little and had property to pay all my debts; the money was paid for the Duncan lands about the middle of April, 1885; the judgment of Reynolds was my own debt; I have secured the Reynolds judgment by a mortgage on the Duncan property; I have paid and secured all of my individual debts, except some security debts; I could pay all my debts today, outside of
(400) the Duncan property, with property I own in Morganton, security debts and all; all the debts where I was security for C. L. Summers are paid; I thought I was insolvent in 1888, when I wrote the letter; I was not insolvent in 1886."

His Honor submitted to the jury two issues, as follows:

"1. Did George J. Moore, deceased, as agent of the plaintiff, and with the plaintiff's money or means purchase the lands described in the complaint as the Duncan place?"

The jury answered "Yes."

"2. Did the plaintiff, at the time the deed for the lands was made to Moore, or at the time he assented thereto, give said assent for the purpose of hindering, delaying or defrauding his creditors?"

Jury answered "No."

The defendants tendered and asked to have submitted to the jury the following issue:

"3. Did the plaintiff procure the said George J. Moore to destroy the deed which said Moore had signed, or procure the said Moore not to execute a deed conveying the lands to plaintiff to hinder, delay or defraud the creditors of plaintiff?"

His Honor refused to submit this issue to the jury, and the defendants excepted.

The defendants' counsel asked his Honor to charge the jury:

"1. If George J. Moore caused to be prepared a deed to the plaintiff for the land in controversy, and that deed was destroyed by direction of the plaintiff, for the purpose of defrauding the creditors of plaintiff, the plaintiff cannot recover, for he who asks equitable relief must come into court with clean hands."

His Honor declined the instructions as asked, and defendant excepted.

The defendants asked the court to charge the jury if the title
(401) to the lands in controversy was made to George J. Moore with the knowledge, consent or approval of plaintiff, he would not be trustee for plaintiff, even though plaintiff paid for the land, for in that

case it would be a gift, unless it was agreed at that time that George J. Moore should be trustee, and there was no fraud.

This instruction was declined as asked for, and defendants excepted.

His Honor then charged the jury as follows upon the points excepted to:

"That if the plaintiff, at the time the deed was made to George J. Moore for the land, or at the time the plaintiff assented thereto, gave such assent, or procured the deed to be so made, for the purpose of hindering, delaying or defrauding his (plaintiff's) creditors, or any of them, plaintiff could not recover in this action; but if, after the making of said deed to Moore, plaintiff conceived the idea of allowing the deed to remain in Moore's name, for the purpose of hindering, delaying or defrauding his (plaintiff's) creditors, this fact would only be evidence tending to throw light on what the plaintiff's motives were at the time the deed was originally made to Moore, or the time the plaintiff assented to it."

To this part of the charge the defendants excepted.

Defendants' counsel orally asked his Honor to charge the jury that to entitle the plaintiff to recover, the evidence must have more than a mere preponderance; that it must be strong, clear and convincing, and that it must consist of facts and circumstances *dehors* the deed, and inconsistent with George J. Moore's ownership of the land.

His Honor gave these instructions as asked for, and told the jury that the law gave a peculiar force and solemnity to deeds and would not allow them to be overthrown by mere words, but only by facts, and that these facts must be strong, convincing and unequivocal; he told the jury that plaintiff contended he had shown that Moore obtained the money to pay for the land from plaintiff; that Moore had the land sur- (402) veyed for the purpose of making a deed for Summers; that he had the house repaired by plaintiff's direction; that he moved on the land, saying that he was going to occupy it for plaintiff, etc. That if the jury found that the plaintiff had established these things by the evidence, they were facts and circumstances *dehors* the deed tending to show that Moore was not the owner of the land; and they were of a character to comply with the first part of the rule of law, and also with the second part; that is, that the evidence must be strong, clear and convincing; but he told the jury that they were the sole judges of what the witnesses had said, and of how much it weighed, and that the burden of proof was on the plaintiff. Defendants excepted.

His Honor read the whole of the testimony to the jury, and commented upon it.

There was a verdict and judgment for plaintiff, and defendants appealed.

Defendants excepted to including the Austin Conley land in the judgment.

P. J. Sinclair, Armfield & Turner for plaintiff.
Justice & Justice for defendants.

SHEPHERD, C. J. It is a well-established principle that where, upon a purchase of property, the conveyance of the legal title is taken in the name of one person while the consideration is given or paid by another at the same time or previously, and as part of the same transaction, the parties being strangers to each other, a resulting trust immediately arises from the transaction, and the person named in the conveyance will be a trustee for the party from whom the consideration proceeds.

"The rule has its foundation in the natural presumption, in
(403) the absence of all rebutting circumstances, that he who supplies the purchase-money intends the purchase for his own benefit, and not for another, and that the conveyance in the name of another is a matter of convenience and arrangement between the parties for collateral purposes." 1 Perry Trusts; 2 Story Eq. Jur., 1201; Bispham Eq. Juris., sec. 79; Lewin on Trusts, 143. The above quotation from Mr. Perry, which is fully sustained by the authorities we have cited, is sufficient to meet the proposition of the defendant, that if the plaintiff consented that the title should be taken in the name of George J. Moore, the transaction amounted to a gift, and there could be no resulting trust. An examination of the authorities will disclose that in many of the cases the title was intentionally taken in the name of the third person as a matter of "convenience and arrangement" of the parties, and it is manifest that the exception of the defendant in this respect cannot be sustained.

Undoubtedly, parol evidence may be received to rebut a resulting trust, but the burden of proof is upon the nominal purchaser, and he must establish by sufficient testimony that it was intended that he should take a beneficial interest. 1 Perry Trusts, 140; 2 Sugden Vendors, p. 139. There is no evidence in this case of any such purpose, nor, indeed, is there any evidence from which we can clearly infer that the plaintiff knew or assented to the title being taken in the name of the said Moore. Neither is there any force in the exception addressed to the charge as to the intensity of proof. His Honor charged "that the burden of proof was on the plaintiff," and that "the law gave a peculiar force and solemnity to deeds, and would not allow them to be overthrown by mere words, but only by facts, and that these facts must be strong, convincing and unequivocal." This, we think, was a substantial compliance with the rule laid down in *Harding v. Long,* 103 N. C., 1, and the cases there

cited. We are also of the opinion that the facts relied upon, *dehors* the deed, were sufficient to authorize the finding in favor (404) of the resulting trust.

The issue as to whether the title was taken in the name of Moore for the purpose of hindering, delaying or defrauding the creditors of the plaintiff, was answered in the negative. Had it been answered in the affirmative, it is clear that the plaintiff would have no standing in a court of equity. *Turner v. Elford,* 58 N. C., 106. But it is insisted that this result must follow from the conduct of the plaintiff some two or three years after the creation of the trust. It seems that a deed from Moore to the plaintiff had been prepared, but not executed, and that the plaintiff, under the mistaken idea that he was liable as surety upon a *supersedeas* bond for $6,000, instead of an appeal bond for $25, wrote to the said Moore, for the purpose of avoiding the payment of the supposed liability, not to execute the said deed but to let the legal title continue in his name. His Honor held that this, in connection with other circumstances, might be considered by the jury in determining the issue above mentioned as to the intent with which the deed was originally made to Moore, but that, in the absence of any fraudulent intent existing at that time, this subsequent conduct of the plaintiff could not defeat his equitable rights in the said land. The principle invoked by the defendant is that, as between wrongdoers, the courts will not interfere, but will leave each in the position which his own acts have placed him. There must, of course, be some act by which his relation to his property is changed; otherwise there is nothing upon which the principle can operate. In the present case the plaintiff did nothing which in the least altered his relation to the land. The legal title had not been made to him, and by postponing the execution of the conveyance he parted with nothing. The mere intention to defraud, unaccompanied by some change or disposition of property, cannot have the effect of depriving the owner of his interest therein. We have examined the authorities cited by defendants' counsel, but they do not establish his contention. Very clearly the case of *Warlick v. White,* 86 N. C., (405) 139, is not in point. In that case a deed had been made by the husband directly to the wife and, being lost, the court held that it would not be upheld in equity as against the heirs of the husband. There was no valuable consideration, and the Court refused her relief, because, while her husband was in the army, she had adulterous intercourse with a negro, the fruit of which was a mulatto child, born soon after the death of her husband. In our case the entire consideration proceeded from the plaintiff, and, whatever his intentions may have been, in view of his supposed insolvency, he has done nothing, as we have said, by which his equitable rights in the property were changed.

As to the property substituted for a part of that affected with the trust, it is settled that the plaintiff may follow it as he has done in this case. See authorities cited in *Edwards v. Culberson,* 111 N. C., 342.

We have carefully examined the whole record, and are unable to discover any ground which entitles the defendants to a new trial. It may not be improper to observe that the conclusion reached is in furtherance of justice, as the plaintiff, it seems, has actually charged this property with a mortgage to secure some of his creditors, while the defendants are relying upon a mere technicality to defeat the rights of those creditors, as well as the plaintiffs, and get the property without having paid for it.

Affirmed.

Cited: S. c. 115 N. C., 700; *Gorrell v. Alspaugh,* 120 N. C., 366; *Harris v. Harris,* 178 N. C., 11.

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(406)

S. L. KIGER v. E. T. HARMON.

Chattel Mortgage—Payment by Installments—Foreclosure—Claim and Delivery—Jurisdiction—Practice.

1. Where a note secured by chattel mortgage is payable by installments, and some, though not all, of the installments are due, an action for the possession of the property and for judgment on the installments due is not premature, since the mortgagee is entitled to have the possession of the property to be applied on the overdue installments.
2. When it is not alleged and shown that the value of the property sought to be recovered in an action of claim and delivery is worth "not more than $50" the Superior Court alone has jurisdiction, as it would have had it concurrently with a justice of the peace if of less value than $50.
3. Where property, the subject of a chattel mortgage, has been replevied in claim and delivery proceedings, and has been wasted, its value, unless admitted to be equal to the amount due under the mortgage, is the subject of inquiry before the jury.
4. A demand for judgment for the possession of mortgaged property is properly joined with a demand for judgment for the debt secured thereby.

CLAIM AND DELIVERY to recover certain personal property mortgaged to plaintiff by defendant, heard at May Term, 1893, of FORSYTH, before *Boykin, J.*

The plaintiff, in deference to the opinion of his Honor that the action was premature, submitted to a nonsuit and appealed.

The facts necessary to an understanding of the decision of the Court are sufficiently adverted to in the opinion of *Associate Justice Clark.*

E. B. Jones for plaintiff.
No counsel contra.

CLARK, J. Though the note sued on purports to be due one day after date, the mortgage and contemporaneous agreement contains (407) a stipulation that it shall be paid in installments of ten dollars per month. Upon the trial the plaintiff was permitted, without objection, to amend so as to allege and prove that the agreement was to pay ten dollars per *week*. The note and mortgage must be construed together and as making one contract. With the amendment allowed (if the jury should find there was such a mistake as to justify correcting the mortgage) the weekly installments of ten dollars, beginning 1 July, 1892, when the first weekly installment was to have been paid, down to 7 October, 1892, when this suit was instituted, would have amounted to $150. The third section of the complaint admits that $130 had been paid within that time. According to the complaint there would have been, therefore, a balance due on the installments of $20 when suit was brought. The court erred, therefore, in holding that the action was premature. The plaintiff had a right under the mortgage to claim possession of the property to be applied on the installments due. It not being alleged and shown that the property was worth "not more than $50," the Superior Court alone had jurisdiction, as it would have had it concurrently with a justice of the peace if of less value than $50. *Noville v. Dew,* 94 N. C., 43; The Code, sec. 887.

It will be noted that there was no agreement here that upon failure to pay one installment all the installments should become due and payable, as in *Capehart v. Dettrick,* 91 N. C., 344; *Kitchin v. Grandy,* 101 N. C., 86; *Whitehead v. Morrill,* 108 N. C., 65. The verified complaint not having been answered, the plaintiff was entitled to judgment for balance due on installments up to issuance of the writ, and for possession of property that it might be sold (or so much as was necessary) to be applied on the judgment then obtained. *Moore v. Woodward,* 83 N. C., 531. But as it was alleged that the property had been wasted since the bond in claim and delivery had been given, the (408) value of the same, unless admitted to be as much as $20, is the subject of inquiry before a jury. *Rogers v. Moore,* 86 N. C., 85. The demand for possession of property and for judgment for the debt secured thereon is properly joined. Clark's Code, (2 Ed.), pages 210-214, and cases cited. Even if this had been a misjoinder, the objection was waived if not taken by demurrer or answer. *Finley v. Hayes,* 81 N. C., 368; *Burns v. Ashworth,* 72 N. C., 496; *McMillan v. Edwards,* 75 N. C., 81.

Error.

Cited: Hocutt v. R. R., 124 N. C., 216; *Gore v. Davis, ib.,* 235.

G. M. DONNELLY AND WIFE v. JOSEPH O. WILCOX.

Judgment—Estoppel—Collateral Attack—Nonsuit—Amendment.

1. The clerk of the Superior Court, having jurisdiction of proceedings against a guardian for a settlement, a judgment rendered therein is an estoppel to an action in the Superior Court between the same parties and upon the same question, and cannot be attacked collaterally, but can be impeached for fraud only by a direct proceeding for that purpose.
2. Where in a suit by a ward against a guardian for an account and settlement it appeared that a judgment had been rendered in a proceeding before the clerk between the same parties and on the same question, and that defendant guardian had paid the amount adjudged to be due and obtained a receipt therefor, and plaintiff assailed the receipt as having been obtained by fraudulent representations as to the amount due the ward, but did not attack the judgment for fraud, or ask that it be set aside: *Held*, that the plaintiff was properly nonsuited, though the court below might have granted, if it had been asked for, an amendment assailing the judgment for fraud.

ACTION, tried before *McIver, J.*, at Spring Term, 1893 of ASHE.

His Honor being of the opinion that a judgment rendered by (409) the clerk of the Superior Court in a proceeding between the same parties for the same purpose (an account and settlement of defendant as guardian of *feme* plaintiff) was in force, and not having been impeached by the pleading, and could not be attacked collaterally, and was a bar to this action, the plaintiffs submitted to a nonsuit and appealed.

The pertinent facts are stated in the opinion of *Associate Justice Clark.*

No counsel for plaintiffs.
R. A. Doughton and E. C. Smith contra.

CLARK, J. The clerk of the Superior Court had jurisdiction of the proceeding against the guardian for a settlement. The Code, sec. 1619; *Rowland v. Thompson,* 64 N. C., 714; *Rowland v. Thompson,* 65 N. C., 110; *Sudderth v. McCombs,* 65 N. C., 186 (which also holds that the Superior Court at term would not have original jurisdiction of such action); *McNeill v. Hodges,* 105 N. C., 52. The judgment rendered by the clerk in the former proceeding was between the same parties and upon the same question now litigated, and is an estoppel to the present action (*Williams v. Clouse,* 91 N. C., 322; *Collins v. Smith,* 109 N. C., 468), unless impeached for fraud by a direct proceeding. It can make no difference that the decree was rendered by consent. It seems to have

been regular and formal. That action was instituted to procure a settlement from defendant of the balance due by him as guardian, and the notice therein was issued at the instance of the plaintiff. The pleadings in this action do not impeach and attack said judgment as fraudulent, but assail and impeach a receipt given by plaintiffs to defendant for the balance found by the decree to be due and directed to be paid. The amount admitted by the complaint to have been paid was the exact amount of the judgment, and his Honor properly held that the judgment could not be attacked collaterally, and that it had not (410) been impeached by the pleadings.

We are not advised why the plaintiffs did not thereupon ask an amendment, which lay in the discretion of the court (The Code, sec. 273), so as to assail the judgment itself for fraud. The judgment of nonsuit must be

Affirmed.

Cited: McLean v. Breece, ante, 393.

J. W. DIXON ET AL. v. E. J. STEWART ET AL.

Action for Recovery of Land—Estoppel—Lease to One in Possession of Land—Practice.

1. The doctrine of estoppel which prevents a tenant from denying his landlord's title to the leased premises applies not only to those cases where the landlord himself having possession, delivers up that possession to the tenant, but also to those where one, being already in possession of land, agrees to assume the relation of tenant towards another who asserts title thereto, provided such agreement is not induced by fraud or mistake.
2. Inasmuch as the doctrine of estoppel, as applicable to tenant in possession, goes no further than to require the tenant to first surrender his possession before denying title of his landlord, it is recommended as important in cases where recovery of land is had under this doctrine that the record should show the ground of the recovery, so that the judgment will not work another and more effective estoppel on the defendant.

ACTION for the recovery of land, tried at August Term, 1892, of MOORE, before *Winston, J.*

There was evidence that tended to show that in 1873 the defendant Stewart had leased the land in controversy from one Lane, under whom the plaintiff claimed, and whose deed to plaintiff for the premises was in evidence without objection thereto. The evidence also tended to show that Stewart was in possession long prior to the year 1873. He testified

that he had never leased the land from Lane or the plaintiff, nor
(411) had he agreed to become their tenant, or hold for them; that he was put in possession by one Moody forty or fifty years before the trial. No deed was shown either to Moody or from Moody to the plaintiffs, or either of them. The defendants introduced a deed made to them by the sheriff of Moore County, dated 28 February, 1873, and covering the land in controversy.

The following is the report of his Honor's charge, and the exceptions thereto:

"The court, among other things, charged the jury that the counsel on both sides have solemnly and very properly admitted that the title is out of the State. You will hence not consider that branch of the case. The plaintiff must recover on the strength of his own title." The judge here read the special requests to the jury, and charged them plainly that the question of color of title, under a paper title, did not arise in the case, and that in no aspect of the case could the plaintiff recover, unless the jury shall find from the evidence that the defendants are in possession of the land as tenants of the plaintiff. That if the defendants entered into possession of the land as tenants of the plaintiff or of Lane, then the plaintiff is entitled to the possession of the land, unless the defendants have made it appear that they have had the land twenty years after that relation ended or after the last payment of rent.

"The court here fully arrayed the testimony on both these heads, and again, after reading the special requests, added and charged that the plaintiff's case rested solely on the question of tenancy, and unless such relation was shown by the plaintiff to exist between him or them under whom he claimed and the defendants, he could not recover."

The defendants requested his Honor to charge the jury as follows:

"1. That if the defendant, E. I. Stewart, went into possession of the land under a parol gift from A. S. Moody, and remained in ex-
(412) clusive possession for forty years, this gives him a good title against the world." His Honor refused to charge the jury as requested, and the defendants excepted.

"2. That if the defendant, E. I. Stewart, went into possession of said land under a parol gift from A. S. Moody, and remained in the exclusive possession for forty years, this gives him a good title against any one except A. S. Moody." His Honor refused the instruction, and the defendants excepted.

His Honor charged the jury that "if the plaintiff, or those under whom he claims, have been in the open, notorious, continuous and adverse possession for seven years, under color of title, before this action was brought, and if the defendants were the tenants of the plaintiff, his title is perfect, and the plaintiff has shown no possession for seven years un-

der color of title, and cannot recover unless the defendants were the tenants of Lane."

The defendants excepted to this part of the charge, upon the ground that there was no evidence to sustain it, and for the further reason that there was no evidence that either McNeill or Stewart was a tenant of J. I. Lane.

His Honor further charged the jury that if the defendants, or those under whom they claim, have at any time acquired the title to the lands in dispute by color of title or by adverse holding of the same for twenty-one years adversely, then the plaintiff cannot recover unless he shall establish in himself a complete title, acquired after the acquirement of such title, by showing that the defendants thereafter became the tenants of the plaintiff, or those under whom he claimed.

The defendants excepted to this part of the charge, upon the same grounds assigned to first part of charge, viz., that there was no evidence to support it.

His Honor further charged the jury that "if the defendants were the tenants of Lane, then the possession of the defendants is Lane's possession until twenty years after that relation ended and after the last payment of rent," reading from The Code and explaining (413) the same.

The defendants excepted to this part of the charge, for the reason that there was no evidence to support it, and no evidence of any payment of rent.

His Honor further charged the jury that the plaintiff has shown no possession for seven years under color of title, as requested by defendants, adding "unless the jury shall find that the defendants were the tenants of Lane."

The defendants excepted to the latter part of this charge, upon the ground that there was no evidence of the tenancy of the defendants.

His Honor further charged the jury "that the purchaser of Tyson's title at sheriff's sale, and the holding under the sheriff's deed, if exclusive, and seven years possession under said deed, gives the defendants a good title," as requested by defendants, adding "unless the purchasers at the sheriff's sale were the tenants of Lane, as explained in the charge."

The defendants excepted to the latter clause of said charge, upon the ground that there was no evidence that the said purchasers were the tenants of Lane.

There was judgment for the plaintiffs, and the defendants appealed.

J. C. Black and W. E. Murchison for plaintiffs.

J. W. Hinsdale, Strong & Strong and W. J. Adams for defendants.

BURWELL, J. On the trial some exceptions were taken, as appears from the record, to the introduction of certain deeds by means of which the plaintiffs sought to show that the title to the land in controversy, which was conceded to be out of the State, had become vested in him. His Honor admitted these deeds in evidence over the objection of the defendants, but, upon consideration of them and of the plaintiffs' evidence as to possession under them, he decided that the plaintiff
(414) had failed to show by a complete chain of title, or by possession under the deeds introduced, a title in himself to the land "good against the world," and he so charged the jury, and told them, in effect, that plaintiff, having failed to establish a title in that way, could not recover unless he had established facts which constituted an estoppel on the defendants and prevented them from disputing his title, and had thus proved in himself a title good enough for his purposes in this action. This ruling renders it unnecessary to consider the exceptions mentioned above, for the evidence, though admitted, was afterwards declared to be of no effect.

The jury found that the plaintiffs did have a title good against the defendants by estoppel, and there being no exception to the admission of any of the testimony bearing upon this branch of the case, we have only to ascertain if the charge to the jury upon this subject was correct.

It is familiar learning that a tenant will not be allowed to deny that his landlord has title to the leased premises in an action by the latter against the former for possession or for rents, and this general rule has application, we think, both to those instances where the landlord himself having possession, delivered up that possession to the tenant, and also to those instances where one who is himself in the actual possession of land agrees to assume the relation of a tenant as to the land towards another who asserts some title to it, there being no proof that this agreement was induced by fraud or mistake.

Bigelow Estoppel, 527, says: "There has been some conflict upon the question whether the bare taking a lease of land of which the tenant was already in possession may estop him to deny his lessor's title. It is agreed in all the cases, as we have seen, that if the tenant was induced to take the lease by mistake, fraud or misrepresentation on the part of the lessor, he may dispute his title. . . . The conflict arises
(415) in cases in which there is a simple question growing solely out of prior possession and later acceptance of a lease by the same person. In New York and Kentucky it is held that the estoppel prevails, while in California the contrary doctrine has been held in two recent cases upon great consideration. But even in that State it is held that the estoppel arises if the tenant does not prove a paramount title either in himself or in some one under whom he claims." And on page 534

the author continues: "The only room for the question raised in California is either in the case of an original lease, or when the attornment is made to a stranger to the title of the lessor. In such a case, is bare possession in the tenant, without mistake, fraud or the like in the leasing or attornment, sufficient to remove the estoppel? The landlord may still have changed his position, reasonably induced by the lessor's acceptance of a tenancy. There would then be the elements of an estoppel *in pais;* and without stopping longer than to refer to the fact that the doctrine that the act of the party against whom the estoppel is claimed must have been *wilful* in a literal sense, if it ever prevailed, has been overruled, it is enough to say that the case might present features quite as conclusive as those in the case of an estoppel of a tenant who has received possession from his landlord; for taking possession from a landlord is only one way in which a change of position may take place. It is immaterial what may be the nature or extent of the change, provided there has been a substantial change in fact, so that the landlord would be placed in a less advantageous position by allowing the denial of his title than he would have occupied had not the tenancy been created."

If we were to adopt the rule laid down in the case cited by defendants' counsel *(Franklin v. Merida,* 35 Cal., 558), which is set out in the foregoing quotation from Mr. Bigelow, as modified by the latter case referred to by him *(Holloway v. Galliac,* 47 Cal., 474), which rule is thus stated in the latter case: "A tenant is estopped by a lease which he takes when in possession, unless he proves paramount title in (416) himself or another under whom he claims"—the plaintiffs would not be helped, for they base their claim of title solely upon "adverse possession for forty-three years of the land in controversy," and also on "an adverse possession under color of title from 20 February, 1873, to the commencement of this action." Under the charge of his Honor the verdict of the jury has a double effect. It establishes the fact that defendants held the land from 1873, the date of the alleged lease, as tenants of plaintiffs' vendor, and thus destroys defendants' claim of title by possession by establishing the fact that from 1873 the possession was not adverse. Hence, they proved no paramount title, and the estoppel would be left to work its effect.

But we think reason and the authorities sustain the rule which is approved by the eminent author quoted heretofore, and that the defendants were estopped in this action to deny the plaintiffs' title, if in 1873 the defendant Stewart was in the actual possession of the land, and agreed to become the tenant of plaintiffs' vendor. The defendant, McNeill, testified that he "never had any possession, except through Stewart." The jury find that Stewart was holding as tenant of plaintiffs' vendor. The salutary doctrine of estoppel requires that possession shall be surren-

dered to the landlord before the tenant can set up a title adverse to him. The rule goes no further. After the tenant has surrendered possession he may turn upon his former landlord and assert a better title than his if he has one. Hence, it may be important in cases where the recovery is had under this rule of practice, that the record should show the ground of the recovery, so that the judgment will not work another and more effective estoppel on the defendant.

We have not deemed it necessary to advert to the fact that his Honor, in one part of his charge, said that the defendants would be
(417) estopped *if they entered into the possession of the land as tenants* of the plaintiffs' vendor. The defendants contend that there is no evidence of such entry into possession, but that all the testimony shows that if the alleged lease was made and accepted by the defendant, Stewart, it was made and accepted while he was in possession. We need not give this matter consideration, because we have decided that the estoppel works, even though the lessee was in possession at the time the lease was made and accepted.

We find no error, and the judgment is

Affirmed.

Note.—BURWELL, J. The case on appeal states the date of the deed from J. J. Lane to plaintiff, under which he claims the land in controversy, as 24 February, 1891, which is later than the date of the summons. No objection to this deed was taken on the trial on this account. We have caused a copy of this exhibit to be added to the record, and from it we learn that the date of the said deed is 24 February, 1890, and thus it appears that, by a clerical error, 1891 was put for 1890.

A. T. CURTIS v. PIEDMONT LUMBER, RANCH, AND MINING COMPANY.

Practice—Instructions to Jury.

Where in the trial of an action the testimony of the plaintiff, who was the only witness as to the material issue, is of doubtful import and susceptible of two constructions, it is error to instruct the jury that if they believe the witness he is entitled to recover.

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

ACTION, tried at Fall Term, 1893, of MCDOWELL, before *Boykin, J.*, and a jury.

A. T. Curtis was introduced as a witness in his own behalf, and testified as follows: "Had contract with John L. Martin, (418) treasurer of defendant, and resident manager of the company. He had the general management of the defendant's business in this State. He told me he was manager; Mr. Claywell so told me. He gave me the checks of the company on New York bank, and they were paid. In June, 1888, I delivered 24,000 feet of logs there. These logs were paid for. I delivered 90,000 feet of large logs at $12 per thousand, 40,000 feet of small logs at $10 per thousand, at Old Fort, N. C., according to contract with Martin. I complied with all instructions given me by Martin. These were reasonable prices for the logs. He was paying more than this for other logs of the same kind farther up the road. He ordered me to brand all logs with his brand, "P." I did so. They paid me $150 and $125 on these logs. Claywell said they were the finest logs he ever saw, and that the company would pay me soon. The large logs were hewn on two sides. They stayed on yard there from June till September. They were damaged very much. There were great cracks in the logs. They were soft yellow logs, liable to injury by exposure. Claywell said they would be shipped at once. This was in October. He did not ship the logs at once. Claywell was an agent of the defendant. I sawed the logs into lumber and sold it. I got $1,200 for the lumber. Had to move logs about a fourth of a mile. It cost $400 to saw and haul logs. The amount now due is $455. The market price for sawing is $3 per thousand. The hauling was done as cheaply as possible, so was the sawing. I handled lumber carefully, and sold it for a good price. I made all I could out of it. The first suit was brought 27 July, 1890. The plaintiff took nonsuit, and brought this action 10 August, 1892. The company never refused to receive the logs. I delivered them as directed, and branded them as directed. It was under this same contract I sold four car-loads to company (419) and that the company shipped them. I was paid $275 on the logs not shipped. Martin was there and saw logs a number of times. The logs were to be paid for at a certain price per thousand feet. Martin never measured logs, nor did Claywell. I measured the logs as I bought them from different parties. Neither Martin nor Claywell were present. I was paid for all the logs I shipped. All these logs were for shipment. It was arranged between Martin and me that I should measure. I sawed the logs into lumber in order to get my money out of them. I swore in the complaint in the first action that the company refused to receive the logs. They have never received them. I tried to get the company to take the logs. I notified the company if they did not take the logs in thirty days I'd take them. They did not do it, and I sawed the logs into lumber. They paid me the $275 on general account. The company

did not receive the logs. They did receive them by instructing me to brand the logs as I delivered them, which I did. I sawed up the logs because the company would not pay me for them. If they had accepted the logs I could not have had them sawed. They accepted the logs by not paying for them. The company did not take the logs. Martin said he would pay for the logs when he sold them. When I say the company did not receive or accept the logs I mean that they did not ship them."

Curtis recalled: "I measured the logs that were shipped."

A letter from John L. Martin to the plaintiff was introduced in evidence by the plaintiff, showing the payment of $100 on account of the logs delivered on the yard.

Here the plaintiff rested.

The defendant introduced no evidence.

It was admitted that the contract sued on was not in writing, and the defendant, at the time of the introduction of evidence in regard
(420) thereto, objected to the same on ground that the same was not in writing, and was void under section 683 of The Code.

His Honor stated that he would charge the jury that, if they believed the evidence, the plaintiff was entitled to recover.

The defendant's counsel stated that, under this intimation, they did not desire to argue the case to the jury, and that they conceded that if the plaintiff was entitled to recover anything he was entitled to recover $455, with interest, but that, in their opinion, plaintiff was not entitled to recover any amount, and they asked his Honor to so charge.

The court charged the jury that, if they believed the evidence, the plaintiff was entitled to recover, and the defendant excepted to this charge.

Verdict and judgment for plaintiff, and appeal by defendant.

Locke Craig for plaintiff.
Isaac Avery and S. J. Ervin for defendant.

MACRAE, J. This is substantially the same action as that which was heard in this Court at September Term, 1891, *Curtis v. Piedmont Co.*, 109 N. C., 401. It was then held that there was no evidence to go to the jury to prove a contract in writing, signed by defendant's officer, and hence the plea of the statute (section 683, requiring certain contracts of corporations to be in writing) should have been sustained. After the above decision the plaintiff submitted to a nonsuit in the Superior Court and brought the present action. The cause of action set out in this complaint is nearly identical with that in the former action.

The only question open, and which has not already been adjudicated,

is whether the contract declared upon is such a one as should have been in writing, under section 683 of The Code. (421)

When it was here before, the late *Chief Justice Merrimon* pointed out that the statute in question applies to executory contracts, and not to those in which defendants have availed themselves of property actually sold and delivered to them.

In the present action his Honor instructed the jury that if they believed the evidence, the plaintiff was entitled to recover. To this charge there was an exception, and we think there was error.

The testimony relied upon to prove that there was an executed contract, a sale and delivery, was that of the plaintiff himself, and was not clear upon this point.

If the plaintiff had testified to the sale and delivery of the logs, there being no testimony to the contrary, the instruction given by his Honor would have been undoubtedly correct. But, without meaning at all to reflect upon the plaintiff, his testimony still leaves it unsettled whether the contract was an executed one or not, and is not so direct as to warrant the instruction given.

New trial.

Cited: S. c., 114 N. C., 530.

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(422)

WINSTON FULTON v. RUFUS ROBERTS ET AL.

Execution Sale—Homestead—Resident—Domicile—Burden of Proof.

1. A sale of land under execution on a judgment recovered on a debt contracted since 1868 against a resident of this State entitled to a homestead is void unless a homestead has been allotted, notwithstanding the fact that the tract of land so sold is other than that upon which the judgment debtor resides and not contiguous thereto.
2. Although an instruction to the jury, in the trial of an issue relating to the right of a party to homestead, confounds the definitions of "residence" and "domicile," yet it is a harmless error and not subject to exception when an accompanying and more specific instruction as to the restricted meaning of the words "a resident," as used in Art. X, sec. 2 of the Constitution, must have led the jury to understand that one who actually removed from the State for a limited period, even *animo revertendi*, would forfeit his right to a homestead by failure to occupy the place protected by the Constitution.
3. The right to homestead exemption in this State ceases only when, by reason of a change of residence, it begins in another State, or when a similar occupancy of a place of residence here by one coming from another

State would entitle him to the benefit of sec. 2, Art. X, of the Constitution.

4. The burden is upon one claiming an exemption in lands, sold under execution against him, to show that no homestead had been allotted to him. When this is done, the presumption of the regularity of the judicial proceedings and sale is rebutted.

5. When it is admitted or proven that a judgment debtor has been a resident of this State, the legal presumption is that the status continues, and the burden of showing a change of domicile, when it becomes material to do so, rests upon him who asserts the change.

ACTION to recover possession of land, tried upon a single issue, before *McCorkle, J.*, and a jury, at the August Term, 1890 of SURRY.

The plaintiff claimed under a sheriff's deed, made in pursuance of a sale of the *locus in quo,* made by S. H. Taylor, sheriff of Surry County, to satisfy an execution in his hands against the property of defendant Rufus Roberts.

The defendants resisted plaintiff's recovery, and claimed that the sheriff sold the property without first having allotted homestead to the defendant, Rufus Roberts, and that the title was therefore void.

The plaintiff contended:

"1. That under the admissions filed of record there was no necessity for laying off homestead before the sale.

"2. That defendant, Rufus Roberts, was not entitled to have homestead allotted him, because at the time of said sale by the sheriff he was not a resident of this State."

The admitted facts filed of record are as follows:

(423) "It is admitted that at the time of sale by sheriff of the lot in controversy, that the lot was a lot on which there was a cabinet shop, one hundred feet by two hundred feet, in Mount Airy, and unoccupied, and that the defendant owned and occupied as a residence, if not a resident of Georgia, the Sulphur Springs Tract, of seventy-five acres of land, four miles from Mount Airy, and that this tract was worth $5,000 or more."

The following issue was submitted:

"*At the time* of the sale of the *locus in quo,*" on 27 April, 1881, "was the defendant Roberts a resident of North Carolina?"

Upon this issue alone there was a large amount of testimony offered by the plaintiff, tending to show that prior to said sale, the defendant, Rufus Roberts, had sold off at auction and privately all of his real estate, consisting of plantations and town lots in Mount Airy, except the lot in controversy and two or three other lots sold on same day by the sheriff, and except the Sulphur Springs tract, which tract he was offering for sale; also tending to show that he had bought real estate in Milledge-

ville, Georgia, and erected buildings thereon and farm near by; also evidence of declarations made by Roberts to various persons, both before and after the sale, claiming Georgia as his home, and disclaiming North Carolina, declaring he could not be induced to live here again.

The defendant testified in his own behalf that, while he went into the mercantile and farming business in Georgia, he had never abandoned North Carolina as his home, and offered much evidence to corroborate him and to sustain the affirmative of the issue.

There being no exception taken by plaintiff to evidence, it is deemed unnecessary to set it out in full.

After the close of the evidence and the argument of counsel, the judge charged the jury, in writing, as follows:

["The burden of satisfying you by a preponderance of testimony that the defendant Roberts was a nonresident at the time (424) of the sale is thrown upon the plaintiff.] The only issue you have to try is whether, at the time of the sale of the *locus in quo,* the defendant Roberts was a resident of the State of North Carolina.

["A resident denotes one who has a permanent dwelling to which the party, when absent, intends to return. The residence of a person continues until he acquires another by actually removing to another country with the intention of remaining in the latter altogether for an indefinite period or a definite period. Two things must concur to constitute residence: first, occupancy; secondly, the intention to make it a home. If these two concur, it makes no difference how short his residence may be in the new residence.]

"The words 'a resident of this State,' employed in the Constitution, Art. X, sec. 2, in respect to homestead, have a more restricted meaning than that usually given to domicile; to entitle a person to the constitutional exemption he must be an actual and not a constructive resident. Where the facts show an actual removal from the State, even for a definite period, the person so removing ceases, so long as he remains absent, to be a resident of the State in respect to his right to a homestead, although he may have the intent to return and resume his residence.

["So, if you find that defendant Roberts actually removed to the State of Georgia for a definite period or an indefinite period, and had his home there, then that would be his residence, and he would not be entitled to the homestead in this State, and you will answer No.]

["But if he only went to Georgia for the purpose of trading in the winter and returning in the spring to his home in North Carolina, and did not actually move to Georgia and settle there as his home, then he would be entitled to a homestead in this State, and you will answer the issue Yes."]

The jury found the issue "Yes," and the plaintiff's counsel
(425) moved the court for a judgment for the possession of the land upon his sheriff's title and the admissions filed of record insisting that there was no necessity, under the law, for the allotment of a homestead before the sale.

Motion refused by the court, and plaintiff excepted.

The plaintiff then moved for a new trial because of error in the instructions to the jury given by the court, and assigned as erroneous that part of the instructions appearing in brackets. Motion overruled, and plaintiff appealed.

Watson & Buxton and A. E. Holton for plaintiff.
Glenn & Manly for defendant.

AVERY, J. Two questions are raised by the appeal: (1) If it be admitted that the defendant, Rufus Roberts, was a citizen of North Carolina, could the sheriff lawfully sell, under the execution issued against him upon a judgment recovered on a debt created since 1868, a tract of land belonging to him other than that upon which he lived and distant four miles from it, when no homestead had been allotted to him? (2) Was the definition of "a resident," given in the instruction of the court to the jury, because of its inaccuracy or inconsistency, calculated to mislead them in passing upon the issue submitted?

While it may have been supposed by the framers of the organic law that a debtor would usually elect to have his homestead allotted in his dwelling-place and the surrounding land, "his choice is not positively restricted to that, nor to contiguous land." *Mayho v. Cotton,* 69 N. C., 289; *Hughes v. Hodges,* 102 N. C., 236; *Flora v. Robbins,* 93 N. C., 40. The Constitution guarantees the right of selection between different tracts in express terms, if as suggested in *Mayho v. Cotton, supra,* the power would not have been implied necessarily in the grant of
(426) exemption in a home worth $1,000. Constitution, Art. X, sec. 2.

The sale having been made to satisfy a debt created since the homestead exemption became a part of the Constitution, was void, therefore, if the defendant was, as a resident of this State at that time, entitled to the benefit of that privilege. *Long v. Walker,* 105 N. C., 90. It is true that the general definition of "a resident" given by the court was incorrect, and embodied the very terms in which this Court has defined "domicile," which is a much more comprehensive term. *Horn v. Horn,* 31 N. C., 99; *Plummer v. Brandon,* 40 N. C., 190. Generally, one who has acquired a domicile at a given place must have resided there with the intention of making it a home, and the fact that he temporarily resided elsewhere, with the purpose of returning to such home,

would not impair any right growing out of having become domiciled there. *Fleming v. Stroley,* 23 N. C., 305; *Commissioners v. Commissioners,* 101 N. C., 520. But, however erroneous the general proposition may have been, the more specific instruction as to the "restricted meaning of the words 'a resident,' " in Article X, section 2 of the Constitution, must of necessity have been understood by the jury and followed in answering the issue submitted to them. If the jury were made to comprehend what was meant by the words as used in the Constitution in reference to the right of exemption, and that their inquiry was limited to ascertaining whether the facts brought the defendant within the definition of a "resident," as the words are there used, and confounding of domicile with residence in the abstract proposition was a harmless error. The instruction which bore directly upon the issue was as follows: "The words 'a resident of this State,' employed in the Constitution, in respect to homesteads, have a more restricted meaning than is usually given to 'domicile.' To entitle a person to a constitutional exemption, he must be an actual and not a constructive resident. Where the facts show an actual removal from the State, even for a definite period, the person so removing ceases, so long as he remains absent, to be a resi- (427) dent of the State, in respect to his rights to homestead, although he may have the intent to return and resume his residence." Although a juror might have thought that, for some purposes "a resident" might mean one who is domiciled he could not fail to understand from the foregoing instruction that one who actually removed from the State for a limited period, even *animo revertendi,* would forfeit his right of exemption by failure to occupy the place protected by the Constitution for the purpose of furnishing him a home. Indeed, the explanatory proposition embodies substantially the language used by the Court in *Lee v. Moseley,* 101 N. C., 311, and in *Munds v. Cassidey,* 98 N. C., 563, to draw the distinction between a domicile, as understood in reference to the right of suffrage or of administration, and a resident, such as was essential to the retention of the right of exemption under the Constitution.

We see no error in the last paragraph of the charge. If the defendant did not actually remove to Georgia, and make it even a temporary home, but visited that State for the purpose of trading in the winter, and returning to his home in North Carolina in the spring, he acquired none of the advantages and must be subject to none of the disadvantages there incident, in contemplation of law, either to being a resident or domiciled during such a sojourn. Though he may have been accompanied by his family, he would not have been entitled to the benefit of similar exemption laws as a resident of Georgia and, adopting the test suggested by this Court, we must conclude that the right of exemption ceases here,

when, by reason of a change of residence, it begins in another State, or when a similar occupancy of a place of residence by one coming from a sister State to this State would entitle such person to the benefit of section 2, Article X, of our Constitution. *Lee v. Moseley, and Munds v. Cassidey, supra; Baker v. Leggett,* 98 N. C., 304.

It is not necessary to a decision of the questions involved in (428) this case to advert to the difference in the character of the residence or domicile, which would entitle one to the right of suffrage, protect him against attachment, or qualify him to administer on an estate. *Boyer v. Teague,* 106 N. C., 576; *Wheeler v. Cobb,* 75 N. C., 21; *Hannon v. Grizzard,* 89 N. C., 115; *Roberts v. Cannon,* 20 N. C., 398; *Carden v. Carden,* 107 N. C., 214; *Abrams v. Pender,* 44 N. C., 260.

The *onus* was upon the defendant to show that a homestead had not been allotted to him, as in the absence of any evidence beyond the proof of judgment, execution, levy, and sale, all apparently regular, the presumption would have been in favor of the validity of plaintiff's title. *Mobley v. Griffin,* 104 N. C., 112; *Buie v. Scott,* 107 N. C., 181; 2 Wharton Ev., secs. 1318 and 1319. But as soon as it appeared in evidence that a homestead had not in fact been allotted, the presumption in favor of the regularity of judicial proceedings was rebutted, as it would have been if the same fact had appeared upon the face of the record. *Mobley v. Griffin,* and *Buie v. Scott, supra.* It would not have been incumbent on the plaintiff, in a case where the record showed that no exemption had been allowed, to negative the possibility of nonresidence. But if it had not been decided in both of the cases cited that proof that no homestead was allotted upon what appeared, either from the date of the judgment or of the contract, to be a new debt, rebutted the presumption of regularity in the sale, another principle may be invoked, which is clearly decisive of the question as to the correctness of the charge. It was shown and admitted by both parties that the defendant had been a resident of Surry County, in the State of North Carolina, prior to his purchase of the property and engaging in mercantile business in Milledgeville, Georgia. That fact being settled, it was incumbent on the plaintiff to show that his place of residence was not still the same, because the law presumed the status once (429) shown to continue (2 Wharton, *supra,* secs. 1285 (429) and 1296), generally, and especially as to place of residence, and the duty resting upon a plaintiff to show his right to recover shifted therefore to Fulton, upon the rebuttal of the presumption in favor of the regularity in the sale, on which his *prima facie* case was dependent. The burden of showing a change of domicile, when it becomes material to do so, "unquestionably lies on the party who asserts the change." (5 Am. & Eng.

Enc., 865); and "it is presumed that the residence of a person continues to be in the place where it is proved to have been until the contrary is shown." 17 A. & E. Enc., 76.

We conclude, therefore, that in view of the admitted fact that defendant had resided in Surry County, the burden of showing that he had subsequently become a resident of another State when his land was sold rested upon the plaintiff, and there was no error in so instructing the jury.

Affirmed.

Cited: Jones v. Alsbrook, 115 N. C., 51; *Stern v. Lee, ib.,* 438; *Chitty v. Chitty,* 118 N. C., 649; *Allison v. Snider, ib.,* 956; *Bevan v. Ellis,* 121 N. C., 236; *Marshburn v. Lashlie,* 122 N. C., 240; *Reynolds v. Cotton Mills,* 177 N. C., 417.

HOWELL & HARDISTER v. W. C. JONES ET AL.

Surety on Bail Bond—Justification—Notice—Liability of Sheriff as Special Bail.

1. A bail bond should show on its face that the surety is a resident and freeholder within the State, or his justification should establish these facts.
2. A sheriff who accepts an insufficient undertaking in arrest and bail proceedings or who, after exceptions filed thereto by the plaintiff, fails to give notice of the time when and the place where the bail will justify, is liable as special bail to the plaintiff, and he will not be exonerated from liability by the fact that he acted in good faith in taking the insufficient bond, or by the fact that the plaintiff was near by and knew what was going on when an alleged justification was being made by the surety.

This was a proceeding in arrest and bail, in which it was sought to hold the sheriff of Stanly County liable as special bail, (430) heard before *Winston, J.,* at Spring Term, 1893, of STANLY.

Neither the bail bond, on its face, nor the justification of the surety showed that the latter was a resident and freeholder within the State. The plaintiffs having, in due time, served notice of exceptions to the bail taken by the sheriff, insisted that the sheriff was liable because he failed, after service of the notice of exceptions, to give plaintiffs, or their attorneys, notice of the justification of bail or the taking of other bail. His Honor found the following facts:

"The plaintiffs had no written notice of the time and place of taking the bond of P. S. Jones, with H. C. Crowell as surety, nor of the justi-

fication of said surety; but the plaintiff Howell was in a very short distance of the said place at the time, and had knowledge of the same, but no written notice. The same evening the said Jones left the State. The next day exceptions to said bond were filed by the plaintiffs. Said bond was justified by said H. C. Crowell, before the clerk of the court, at which time the said Crowell informed the sheriff of the facts set out in Crowell's affidavit, as follows:

"'H. C. Crowell makes oath that at the time he signed the bond the sheriff inquired what property he owned. He stated to the sheriff that he was the owner of certain property, viz: One sixty horse-power boiler and engine, and a ten-stamp mill, which is reasonably worth $2,000; and that affiant has the same in his possession, and claiming to own it, and that the title to the same has not been settled, and affiant still claims the same, and says that he has not lost it. That there were no conditions stated to the sheriff as to this affiant's justification of the bond, except that the only contest about the property was that the plaintiffs claimed to attach the same as the property of W. C. Jones; but that said W. C. Jones was not the owner of said property; but that
(431) the same is the property of this affiant, except the sum of $200 owed to Henry A. Judd.'

"He also stated to the sheriff that he had other property, both real and personal, amounting to almost $1,000, and personal property worth $300 or $400. He did tell the sheriff that unless the engine, etc., was his he could not justify, but that he claimed the same as his and does claim it still, and did justify accordingly.

"After notice of such exceptions the sheriff failed to notify plaintiffs or their attorneys, of the justification of bail, or giving of other bail.

"That execution has since issued against said surety and been returned, 'No goods to be found.' From the foregoing the court adjudges that the said sheriff acted in good faith, and that he cannot be held liable in this action."

Thereupon the plaintiffs appealed.

Brown & Jerome for plaintiffs.
Robbins & Long for defendants.

BURWELL, J. We do not think that the facts found by his Honor justify the conclusion that the defendant sheriff is not liable to plaintiffs as special bail, according to the provisions of section 313 of The Code.

The defendant was not to be discharged from arrest until he had given bail or deposited the amount mentioned in the order. The Code, sec. 298. No one but "a resident and freeholder within the State" is quali-

fied to act as such bail. The sheriff should not have accepted an undertaking that did not show on its face that the surety thereon had those qualifications, or if he did so, he should have required that the surety's justification should have established those facts. It was most reasonable that plaintiffs should except to such an undertaking. When notified by plaintiffs that they excepted to the undertaking given by defendants, it was his duty to give notice to plaintiffs as required in section 305. The evident intent of the statute is that it shall be a writ- (432) ten notice, in which shall be mentioned the time when and the place where the bail will justify. It is not found that any such notice, oral or written, was given to plaintiffs. The fact that one of the plaintiffs was near the place where the alleged justification took place and knew what was doing there, cannot, we think, exonerate the sheriff from liability. This second omission of duty prescribed for him by the law confirmed his liability to plaintiffs as special bail. He failed to carry out the plain mandates of The Code, made for his guidance and the protection of plaintiff's rights, and the "good faith" with which he acted cannot shield him from liability.

We confine ourselves to the consideration of the facts found by his Honor. It was unnecessary to send up in the record the various affidavits offered by the parties, since we cannot examine them to ascertain other facts that might tend to the sheriff's exoneration.

Error.

(433)

L. W. ZIMMERMAN v. H. ZIMMERMAN.

Divorce—Alimony Pendente Lite—Motion—Notice—Findings of Fact by Judge—Contempt.

1. The fact that a notice of a motion for alimony *pendente lite*, duly served upon the defendant, did not specify the time of hearing, will not invalidate the order allowing the same, it having been heard at a term of court at which the cause stood regularly for trial.
2. Application for alimony can be made by a motion in the cause, and a defendant is fixed with notice thereof. It is only when made out of term that a notice is necessary.
3. The requirement of section 1291 of The Code that in application for alimony the judge shall find such allegations of the complaint to be true as will entitle the plaintiff to the order applies only when such allegations are controverted, since, by that section, the defendant has the right to controvert the same, and it is sufficient if the judge find that no answer was filed and adjudge the alimony to be paid.

4. The provision of section 1288 of The Code that the allegations of the complaint in an action for divorce "are deemed to be denied" applies only to the trial upon the merits, since the facts must be found by a jury. On a motion for alimony the judge finds the facts.
5. Where a defendant in an action for divorce was served with notice of a motion for alimony and neither filed an answer nor appealed from the order granting it, and after applying to three different judges to get the order set aside failed to do so and allowed eighteen months to pass without paying the alimony, though possessed of sufficient unencumbered personal property to enable him to do so, he was rightly adjudged in contempt, and a sentence of thirty days imprisonment for wilful disobedience of the order of the court will be affirmed.

This was a motion to attach defendant for contempt, heard at Spring Term, 1893, of CALDWELL, before *McIver, J.*

From the judgment ordering him to be imprisoned for thirty days, the defendant appealed.

The facts are stated in the opinion of *Associate Justice Clark.*

S. J. Ervin for defendant.
No counsel contra.

CLARK, J. Prior to the Act of 1883 (ch. 67), which is now incorporated in section 1291 of The Code, the allegations of the complaint and petition were taken as true, for the purposes of the motion for alimony. The only question reviewable on appeal was the sufficiency of plaintiff's allegations. *Morris v. Morris,* 89 N. C., 109. But by the amendatory act of 1883, the husband, upon a motion for alimony, was permitted to deny the allegations of the complaint by answer or affidavit, and (434) the judge was required to find such of the plaintiff's allegations to be true as would entitle her to the order before granting the same. *Lassiter v. Lassiter,* 92 N. C., 129. Then on appeal the sufficiency of the facts found and not of the plaintiff's complaint was to be considered.

The order for alimony may be made in or out of term, but the defendant must have five days' notice thereof. In the present case the summons was issued and served July, 1891, returnable to the Superior Court of Caldwell County. The complaint duly verified was filed at September Term, 1891. On 1 March, 1892, the plaintiff filed in said court her petition for alimony, and caused the clerk of the court to issue notice to the defendant that she had filed said petition in the cause pending in that court, asking the court to make such order. This was duly served on 3 March. At the term of the court, which was held three or four weeks thereafter the court entered an order reciting, "This cause coming on to be heard, and being heard, and no answer having

been filed to the petition filed by the plaintiff," and directing the payment by defendant, as alimony, of $50 in cash, and $5 at the end of each month till the next term of the court. The plaintiff neither appealed from said order nor obeyed it. He contends that it is void and of no effect—(1) because the notice did not specify a time and place for its hearing, and (2) because the judge did not find the allegations of the complaint to be true.

If, upon such notice, the hearing had been at any other time and place than the regular term of court at which the action was pending, there would be some ground of objection to the order. It would, at least, have been irregular, and should have been set aside, on motion; but when the order was made in the cause and at the term of court, and especially at the term at which the cause stood regularly for trial, the defendant is fixed with notice thereof. *Hemphill v. Moore,* 104 N. C., 379; *Erwin v. Lowery,* 64 N. C., 321; Clark's Code (2 Ed.), 651. Notice is required to be given only when the application is heard out of term (435) time. *Coor v. Smith,* 107 N. C., 430. Application for alimony can be made by a motion in the cause. *Reeves v. Reeves,* 82 N. C., 348.

The requirement that the judge should find such allegations of the complaint to be true as would entitle the plaintiff to the order was brought into the statute by the amendatory act of 1883, *supra,* which gave the defendant the right to controvert the allegations of the complaint and petition, and it would seem to apply only when such allegations are controverted. But here they were not denied, and the judge does substantially find them "true and sufficient to entitle plaintiff to alimony" by reciting that no answer was filed, and adjudging that the defendant pay the alimony decreed. It will be noted that the provision of section 1288, that the allegations of the complaint "are deemed denied," applies only to the trial upon the merits, since that section adds that the facts "must be found by a jury." As to the motion for alimony, the facts are found by the judge. Section 1291 of The Code.

The defendant did not see fit to controvert the allegations of fact by a reply under oath, and he cannot be allowed to deny them collaterally by simply refusing to obey the order of the court. There is no hardship in this instance, certainly since such orders can be "modified or vacated *at any time,* on the application of either party." At any rate, the order was not void. If erroneous, the defendant should have appealed; and, if irregular, his remedy was to have it set aside, but until declared irregular and set aside, it was his duty to obey it.

The defendant's excuse, that he paid no attention to the notice because he thought it concerned the divorce only, which he was willing the plaintiff should obtain, deserves no consideration at the hands of any court. The defendant also avers that he made a motion to set

(436) aside the order, but that owing to other engagements of his counsel and the forgetfulness of one judge, six months elapsed and that he lost another six months because the next judge was engaged the whole term of the court in that county upon the trial of jury cases. It does not appear whether the judge was in fact applied to at that term. But the statute provides that the order may be "modified or vacated at any time," and therefore, of course, such motions, upon notice, may be heard at any place in the district. *Parker v. McPhail,* 112 N. C., 502. Besides want of diligence in pressing such motion, the defendant presumably has small ground to have the order set aside, since the third judge before whom it has come has failed to grant his motion, and there is no exception, nor appeal. Indeed, his Honor, in effect, renewed the order by granting the defendant ten days longer to pay the sum theretofore decreed, and in default thereof sentenced him to imprisonment for contempt.

It was not requisite to find the facts as to the contempt, because, as his Honor properly held, the answer to the rule, taking it to be true, was insufficient, and it being admitted therein that the defendant owned unencumbered personal property more than sufficient to pay said alimony, rightly adjudged him in contempt. *Smith v. Smith,* 92 N. C., 304. The value of the defendant's earnings was not considered but, if there had been a deficiency of property, should have been negatived to satisfactorily account for his failure to obey the order of the court. The defendant neither answered the petition for alimony, though served with notice by the sheriff, nor appealed from the order made thereon and has not pressed, with any diligence whatever, his motion to set aside the order. Till set aside or modified, it was his duty to obey it. Having failed to do so, he was guilty of a palpable contempt. It did not rest in the good pleasure of the defendant whether he should obey the order of a court of justice or not. If he chose to treat it as
(437) a nullity, he did so at his peril, if it should prove, as it has, that it was his opinion, and not the judgment of the court, that was at fault. In the nature of alimony, the order is urgent and exacts prompt observance. The defendant has delayed eighteen months, and though he has applied to three different judges the order has not been set aside, yet he still has not obeyed it.

The sentence of thirty days imprisonment for wilful disobedience of the order of the court is

Affirmed.

Cited: Moore v. Moore, 130 N. C., 334; *School v. Peirce,* 163 N. C., 426; *Jones v. Jones,* 173 N. C., 283; *White v. White,* 179 N. C., 597.

W. L. KELLY, ADMINISTRATOR OF MARTHA J. FULP, DECEASED, v. N. G. WILLIAMS ET AL.

Construction of Will—Executory Devise.

A testator devised the portion of his estate falling to his daughter Martha to a trustee, to be held, controlled, and managed by him for the sole and separate use of said Martha "so long as she remains unmarried, or so long as she may live, and if she should die without issue, then her share to be equally divided among all my children": *Held*, that the devise was of a fee to Martha, with a proviso that it should be held in trust during her life or maidenhood for her separate use, with an executory devise over to her brothers and sisters should she die without issue; upon her marriage and having issue, the fee became absolute.

This was a special proceeding, begun before the clerk of the Superior Court of Yadkin and transferred upon issues joined and heard before *Boykin, J.*, at Spring Term, 1893, of YADKIN.

A jury trial having been waived, his Honor found the following facts:

1. That Tyre Glenn died in Yadkin County in 1875, seized and possessed of the lands described in the petition, leaving a last will and testament, etc., and the lands described in the petition, under proper proceedings between the devisors, were allotted to the plaintiff's (438) intestate in the year 1882.

2. That the plaintiff's intestate intermarried with Peter Fulp in the year 1884, and had issue, one child—Mittie Fulp.

3. That Peter Fulp died in March, 1891, and Martha J. Fulp, the plaintiff's intestate, died in September, 1891, and Mittie Fulp, her only child, died, without issue, in March, 1892—all intestate.

4. That the plaintiff, W. L. Kelly, was, on 27 November, 1891, duly appointed and qualified as the administrator on the estate of Martha J. Fulp; that the personal estate is insufficient to pay the debts and costs of administration.

5. That the plaintiff's intestate is the person referred to in the will of Tyre Glenn, deceased, as Martha J. Glenn; that Thomas Glenn, the trustee, died in 1876.

6. That the defendants are the children and only heirs-at-law of the brothers and sisters of Martha J. Glenn.

The case turned upon the construction of the third clause of the will, which is as follows:

"*Item 3.*—After my death, and the payment of all my just debts, I give, will and bequeath and devise to my daughters, Martha J. Glenn, Harriet E. Duskin, Bertha Glenn, Fanny Glenn and Lilly Glenn, and

to my sons, William B. Glenn, Thomas Glenn and Tyre Glenn, all my real estate not herein disposed of to Fanny and Lilly, to be equally divided between them, to have and to hold the same to them and their heirs forever, and the lots given to Fanny and Lilly, as before mentioned, to be estimated at a fair valuation in equalizing the shares so as to make all of the above-named children equal in my real estate: *Provided, however,* that that portion of my real and personal estate that falls to Martha J. Glenn I give, will, bequeath and devise to my son, Thomas
(439) Glenn, in trust, to be held, controlled and managed by him as in his judgment he may deem best for the sole and separate use and behoof of my daughter, Martha J. Glenn, so long as she remains unmarried, or so long as she may live, and if she should die without issue, then her share to be equally divided between all my children."

The court held that Martha J. Glenn took a fee simple estate upon her marriage and birth of issue, and rendered judgment for the plaintiff, from which defendants appealed.

A. E. Holton for plaintiff.
No counsel contra.

SHEPHERD, C. J. We are of the opinion that the ruling of his Honor was correct. The proper construction of the will of Tyre Glenn, in respect to this controversy, is as follows: It devises a fee to Martha J. Glenn, with a proviso that it shall be held in trust during her life or maidenhood for her separate use, with an executory devise over to her brothers and sisters, should she die without issue. As soon as she married and had issue, the fee became absolute. *Saddler v. Wilson,* 40 N. C., 296; *Davis v. Parker,* 69 N. C., 271.

Affirmed.

J. H. McADEN, EXECUTOR OF R. Y. McADEN, v. R. T. NUTT ET AL.

Practice—Injunction—Findings of Fact by Judge.

1. In a motion by the defendant for an order for plaintiff to show cause why satisfaction of a judgment should not be entered, and for an injunction, the findings of fact by the judge are conclusive.
2. Where, on the hearing of a motion for an injunction, etc., the defendant objected to the reading by the plaintiff of an affidavit by defendants' counsel, on the ground that it related to matters privileged between attorney and client, and the affidavit was withdrawn without being read,

but after judgment refusing the motion and dissolving the injunction, the judge asked to see the affidavit, and read it: *Held*, that no harm could result to defendants therefrom.

This was a motion by the defendants to have satisfaction entered on the record of the judgment in the above-entitled cause, (440) and for a restraining order and injunction, which motion was heard before *Armfield, J.*, at his chambers in Charlotte, N. C., on 13 June, 1893, that being the return day of the order to show cause which had been previously issued.

The motion of the defendants was heard upon affidavits of the defendants Brower and Nutt, one Patterson and R. L. Haymore, on the part of the plaintiff, and the affidavits of the plaintiff J. H. McAden on his own behalf. The affiant R. T. Nutt stated in his affidavit that he had delivered to the plaintiff J. H. McAden a bond given by a third party to him (Nutt), the principal and interest of which now amounted to about $1,200, the bond having been executed in 1882, and that plaintiff McAden received the same in payment and satisfaction of one-half of the note upon which judgment was rendered in this action. This allegation was positively denied by the plaintiff in his affidavits, and he further stated and averred that the said bond was delivered to him and received by him, not in payment or satisfaction of any part of the said note, but as collateral security, and that under the agreement entered into at the time of the delivery of said note between him and Nutt, he was to collect what he could on said bond, and apply the amount to the payment *pro tanto* of said note. He further stated that the bond for $1,200 was delivered to him prior to the term of the court at which judgment was rendered in this case. The judge before whom this motion was made, after consideration of the said affidavits and the argument of counsel, found the facts to be as stated in the affidavits of the plaintiff McAden and above set forth. The said judge thereupon refused to grant the motion of the defendants, and to this ruling they excepted. The said judge also dissolved the restraining order heretofore granted, and directed that plaintiff might proceed to collect the balance due on the said judgment. The counsel for defendant asked (441) the court if the court would not give the defendants a trial by jury of the matters raised and disputed by the affidavits by continuing the matter over to the next term. The court declined to do this, and gave judgment refusing the motion and dissolving the restraining order. At the hearing plaintiff's counsel remarked that they had an affidavit of John E. Brown, Esq., who was counsel for defendant Nutt when the judgment was taken, corroborating the affidavit of plaintiff McAden, whereupon the counsel for defendant Nutt objected to the introduction of said

affidavit of Brown, as it related to matters privileged between attorney and client, and the counsel for plaintiff withdrew Brown's affidavit, and it was not read to the court until after the court had given the judgment. The court then, as a matter of curiosity, asked what was in Brown's affidavit, and it was then, after the judgment, read to the court; but it was not considered by the court in giving judgment, or any of its contents known until after judgment was rendered; nor did the court pass upon its competency or incompetency.

The defendants excepted and appealed.

Walker & Cansler for plaintiff.
R. L. Haymore and A. E. Holton for defendants.

PER CURIAM: We are unable to discover any error in the ruling of the court. The case is too plain to admit of discussion.

Affirmed.

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(442)

J. E. KELLY v. F. OLIVER.

Contract—Contemporaneous Agreement—Premature Action—Evidence.

In order to secure the continuance of plaintiff's school, several persons, less than twenty, signed a paper-writing agreeing to furnish the number of scholars set opposite to their names for the scholastic year ending 30 June, 1892, at a specified sum for each scholar "for the scholastic year." The defendant was the last to sign, agreeing to furnish two scholars, but furnished none. The plaintiff brought suit against defendant April, 1892: *Held*, (1) that it was error, on the trial, to exclude testimony offered to prove that at the time of signing the plaintiff agreed that the contract should not go into effect as to the defendant until twenty signatures should be procured, the agreement not being a contradiction of the terms of the contract but a contemporaneous agreement postponing its legal operation until the happening of a contingency; (2) that the contract was a special and entire contract and must be performed before plaintiff can recover, and therefore the action was prematurely brought.

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

ACTION, tried before *Armfield, J.*, and a jury, at February Term, 1893, of MECKLENBURG.

The action was brought to recover the sum of $160, alleged to be due by the defendant to the plaintiff, who was a school teacher, for tuition.

Plaintiff, as a witness in his own behalf, testified as follows: "I was teaching school in Charlotte; and began teaching in 1891. The defend-

ant signed the paper shown me; I saw him sign it. The paper was as follows: 'In order to secure the continuance of Prof. Kelly's school in Charlotte, we the undersigned agree to furnish the number of scholars opposite our respective names for the scholastic year beginning in September, 1891, at the sum of $80 for the scholastic year.' I began the scholastic year on 9 September, 1891, and kept my school open (443) until the end of the scholastic year, which was the last of May or the first of June, 1892. Defendant's pupils did not attend the school."

The defendant proposed to prove by the witness that before, and at the time of signing the paper, it was agreed between the plaintiff and the defendant that the paper should not be binding until the plaintiff had procured twenty (20) signatures to the paper.

This evidence, which defendant offered to introduce, was objected to by the plaintiff. The objection was sustained, and the defendant excepted.

Defendant asked the court to charge the jury that plaintiff could not recover, as his action was brought before the cause of action had accrued, the action having been commenced in April, 1892, and the paper showing that the scholastic year did not terminate until May or June, 1892, and that, therefore, the money was not due, if at all, until May or June, 1892, when the service contracted for was fully performed.

The court held that the money was due when the contract was made, or at least, at the beginning of the session, according to the legal construction of the said paper, and refused to give the instruction, and defendant excepted.

The court charged the jury that if they believed the evidence the plaintiff was entitled to recover, to which the defendant excepted.

There was a verdict for the plaintiff in accordance with the said instruction and charge for the full amount of his claim, and from the judgment thereon the defendant appealed.

Jones & Tillett and F. I. Osborne for plaintiff.
Walker & Cansler for defendant.

SHEPHERD, C. J. As the name of the defendant is the last on the instrument, it cannot be claimed that the other parties signed it in reference to his becoming a party. Neither does it appear that (444) any specific sum was to be raised, so that the release of the defendant would increase the liability of the others. This being so, it was competent for the defendant to show that, although he signed the instrument, it was not to go into effect, as to him, until the plaintiff had procured the signatures of twenty others to the same. This does not contradict the terms of the writing, but amounts to a collateral agree-

ment, postponing its legal operation until the happening of a contingency. *Penniman v. Alexander,* 111 N. C., 427. The contract sued upon is a special and entire contract, and must be performed before the plaintiff can recover. The scholastic year ended on the first of June, 1892, and this action was brought in April of that year. We think the action was prematurely brought. *Brewer v. Tysor,* 48 N. C., 180; *Lawing v. Rintels,* 97 N. C., 350. We have examined the authorities cited by plaintiff's counsel, and are of the opinion that they do not sustain his contentions.

There must be a
New trial.

Cited: Pratt v. Chaffin, 136 N. C., 352; *Hughes v. Crooker,* 148 N. C., 320; *Woodson v. Beck,* 151 N. C., 149; *Alexander v. Savings Bank,* 155 N. C., 127; *Anderson v. Corporation, ib.,* 134; *Bowser v. Terry,* 156 N. C., 38; *Garrison v. Machine Co.,* 159 N. C., 289; *Mercantile Co. v. Parker,* 163 N. C., 278; *Buie v. Kennedy,* 164 N. C., 299; *Rousseau v. Call,* 169 N. C., 177.

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(445)

A. & W. B. CRINKLEY v. B. I. EGERTON.

Vendor and Vendee—Landlord and Tenant—Mortgage.

1. Where land is sold on credit and a mortgage is executed by the vendee to the vendor upon the property to secure payment of the installments, the vendor, as mortgagee, has the right of possession. Hence it is competent for the parties to contract that the possession shall be held by the purchaser till payment made, and that in consideration thereof the relation of the parties shall be that of landlord and tenant. Such contract not being oppressive nor against public policy nor any statute, the courts cannot restrict the freedom of contract by declaring it invalid.
2. In such case the landlord's lien for rent takes priority of a mortgage for advancements, especially when the parties contract that the landlord's lien for rent shall be retained.
3. When no exception is made below that the mortgage and contract was not recorded, and it does not appear how the fact was, the exception cannot be taken for the first time in this Court. Every presumption is in favor of the correctness of the proceedings below. It devolves upon the appellant to assign error in apt time.

BURWELL, J., dissents, *arguendo,* in which SHEPHERD, C. J., concurs.

ACTION, tried at Spring Term, 1893, of WARREN, before *Hoke, J.*

The plaintiffs claim the proceeds of certain crops, and the only question involved is the construction of a contract, a copy of which is as follows:

"Contract made 30 December, 1887, by and between B. I. Egerton, of Macon, Warren County, N. C., of the first part, and Major Williams (a colored man), of Warren County, N. C., of the second part—

"Witnesseth, that said B. I. Egerton has leased to the said Major Williams for a term of ten years (beginning from this day) his tract of land lying in Warren County, N. C., known as the William and John Powell tract, adjoining the lands of S. P. Arrington, Mrs. Emma Egerton's heirs, and others, and containing sixty-six acres; the said Major Williams to pay the said B. I. Egerton, on or before November 1 of each year, beginning 1 November, 1888, and continuing to the termination of this lease, three bales cotton (lint), to weigh each 400 pounds, making a total of 1,200 pounds lint cotton, to be paid as rent for each of the ten years.

"The said B. I. Egerton agrees to and with the said Major Williams, *and as an inducement* for the said Williams to pay the rent promptly each year as it matures, that whenever he has been paid as much as six hundred dollars ($600), with interest on the same from this day at eight per cent, as rent on the said tract of land, that this lease is to terminate, and that he will make to the said Major Williams a good and sufficient deed in fee simple to the said tract of sixty-six acres (446) of land, but the said Major Williams shall lose the above option if he fails to pay the said B. I. Egerton the rent of 1,200 pounds lint cotton each year. In order to ascertain when the said $600 and interest has been paid, the said B. I. Egerton is to keep a correct account of all rents paid to him by the said Williams.

"This paper-writing is to be considered as a rent bond, and all crops that may be made on the said tract of land are bound for the said rent of 1,200 pounds lint cotton, as in cases of other agreements for rent between landlords and tenants.

"In witness whereof, the said B. I. Egerton and Major Williams have hereunto affixed their seals this December 30, 1887.

"B. I. EGERTON. (Seal)
"MAJOR X WILLIAMS. (Seal)

"Witness: W. G. EGERTON."

The plaintiffs contended that the above instrument created the relation of vendor and vendee between the defendant and Williams, but the court held that it created the relation of landlord and tenant between them, and plaintiffs excepted and appealed from the judgment rendered.

T. T. Hicks for plaintiff.
Batchelor & Devereux for defendant.

CLARK, J. The instrument is in all respects a valid lease of land for ten years at a stipulated rent of 1,200 pounds of lint cotton per year, but on condition that on the payment of rent to the value of $600, and interest, and as an inducement to the prompt and punctual payment of the rent, the lessor will thereupon make a conveyance in fee to the lessee of the land. There is nothing in morals or in law which prohibits or restricts the power of contracting so as to render this valid as a lease until upon the performance of the condition it shall be-
(447) come a sale; and being a valid lease, the landlord retains his statutory lien on the crop for the rents. There is naught which shows an intention of the parties to release it. On the contrary, there is an explicit agreement that "all crops that may be made on said tract of land are bound for said rent of 1,200 pounds lint cotton, as in other agreements between landlord and tenant." The intent to retain the landlord's lien was a moving inducement to this form of contract, which the parties had a legal right to enter into.

It is true that in *Puffer v. Lucas,* 112 N. C., 377, the Court held that, *as between the parties,* if the lessor attempted, after sundry payments made, to declare them forfeited and to retake possession of the property, the Court would, in equity in such case, hold the contract a mortgage and direct an accounting and sale as on a foreclosure. And, so it would here as to this land, should the landlord attempt to resume possession of it. But it was not held in *Puffer v. Lucas, supra,* that the lessor could not elect to let the lease remain in force and to collect the installments of rent by suit. Indeed, it approves *Foreman v. Drake,* 98 N. C., 311, which had held a contract, somewhat like the present, a contract of hiring and not a conditional sale. Nor, here, is there anything to prohibit the lessor electing to permit the lease to remain in force and collect his installments out of the crops by virtue of his landlord's lien. In both cases, it is only when the lessor elects to put an end to the contract of lease and resume possession of the property that the court of equity will hold him to account and settlement, as upon a proceeding to foreclose a mortgage. Of course, an assignee of the lessee, either by purchase from him or by purchase at execution sale, would have the same right as the lessee to call for an accounting.

A person may so use his own property as not to injure or in-
(448) fringe upon the rights of others, which society undertakes to protect. Upon this principle, one has the right and power to dispose of his property, when and how he may elect, if the law, for sufficient reason, has not declared the contract illegal, immoral or contrary to pub-

lic policy, and therefore void. Neither does any express provision of a statute, nor any reason founded upon public policy, prohibit the fair surrender of a contract of a purchase by a vendee and a voluntary change of his position to that of lessee without even a surrender of the possession. *Taylor v. Taylor,* 112 N. C., 27. Why should the converse of this proposition be hedged about with any restrictions except such as are plainly intended to prevent inequitable oppression, such as may ensue where the lessee is not allowed to retain possession until the time for the performance of the condition arrives.

This view is in consonance with the real intent of the parties, and especially reasonable since the mortgages on crops of future years being invalid (*Loftin v. Hines,* 107 N. C., 360), the owner of land would not sell it, on credit, if he must part with all liens upon the crop. This lien being only for rent does not come under the evil of a mortgage for the whole crop for future years, which is denounced by *Loftin v. Hines, supra.*

This case also differs from *Puffer v. Lucas, supra,* in that there were in that case no rents or crops issuing out of the leased property upon which the lessor possessed a lien by virtue of the statute. While the Court, with some hesitation, held in *Loftin v. Hines* that a mortgage upon the crops of future years was invalid, for the reason there given, there is nothing in that decision which restricts the freedom of contracts, so that a vendor of land who takes a mortgage on the land to secure the price may not stipulate that, until the mortgage is paid, the relation of the parties shall be landlord and tenant, to the extent that the landlord shall have his lien for the rent to be applied on the debt. This is because the mortgagee of the land, having the right of posses- (449) sion, may stipulate that the mortgagor may keep possession only on rendering rent. There is nothing oppressive in this when the rent is applied on the debt. This gives only a landlord's lien for rent, and not a mortgage on the whole crop, which is forbidden in *Loftin v. Hines,* in return for yielding possession. Such contracts are very common, and serve a most useful purpose. The court, in the absence of oppression or grave reasons of public policy, cannot interfere with the freedom of all persons to make their own contracts. *S. v. Moore, post,* 697. The cases of *McCombs v. Wallace,* 66 N. C., 481; *Parker v. Allen,* 84 N. C., 466; *Hughes v. Mason,* 84 N. C., 472; and *Killebrew v. Hines,* 104 N. C., 182, relied upon by plaintiff, are the reverse of this and have no application. Those cases were contracts of bargain and sale of land with a provision that in case of a failure by vendee for a specified time to comply with the terms of sale, the contract should be void and the vendee should pay rent or a forfeit. The Court, of course, held these to be contracts of sale, and as to the first three cases, held that, there being a dispute as to the for-

feiture, the Superior Court had jurisdiction. There being an equity, the justice of the peace could not administer it, and summary ejectment would not lie. As to the last case, it was held that the mortgagor could not upon default made, oust the lien upon the crop given to another by mortgagee for advances, while that relation existed. There was no stipulation in that case, as there is in this, reserving landlord's lien for rent *ab initio,* and to elect to assert it after default made was unjust to the party who had made advances. These were cases of sales with a power to resume possession upon default made. Such have always been decreed mortgages, but until the vendor elects to move they are deeds of bargain and sale, and the bargainor has no lien upon the crop. While in them it was held that there being an equity in the lessor, the justice of
(450) the peace could not summarily eject under The Code, sec. 1766, it was not held that the parties could not by their contract reserve the landlord's lien for rent under section 1754. *Taylor v. Taylor,* 112 N. C., 27, is equally inapplicable. It merely holds that when the relation of the parties is *simply* that of vendor and vendee, mortgagor and mortgagee, there is no landlord's lien for rent under section 1754, because there is "no agreement" reserving rent or creating the relation of landlord and tenant.

In the present case we have the relation of lessor and lessee established by the express contract of the parties. They had a right to so contract. Until the lessor attempts to retake possession, that relation continues. The lessor, by virtue of the nature of his agreement, and its express terms, retains the statutory lien upon the crops. There is no exception taken that the contract between Egerton and Williams was not recorded. Even if registration were necessary as to plaintiff, still, there being no exception, the presumption of fact is to be taken most favorable to the appellee. Such exception could not be taken for the first time in this Court, and, in fact, was not made either here or below.

His Honor correctly charged the jury that the instrument created the relation of landlord and tenant between Egerton and Williams, and that by virtue thereof Egerton had a lien on the crop for rent and advances out of the crop of 1891 superior to the agricultural liens held by the plaintiffs. The Code, sec. 1754.

No error.

BURWELL, J., (dissenting). It is conceded that the crop which the plaintiff seeks to recover of the defendant was grown by one Williams upon land of which he was in possession. The plaintiff claimed the property by virtue of duly registered mortgages thereon made to him by Williams for advancements of supplies. The validity of plaintiff's liens was admitted, but defendant alleged that his *statutory* lien for

rent (The Code, sec. 1754) was superior to those of the plaintiff (451) because Williams was his tenant.

To prove that Williams was his tenant, and also the amount due for rent, he introduced the contract between himself and Williams under which the latter held the land when the crop was grown and when plaintiff's mortgages or liens were made. He did not show that it was registered. It seems to be decided by the court that that contract created between the defendant Egerton and Williams the relation of vendor and vendee, or, at any rate, that it vested in Williams an equity or right to call for a title when he had fulfilled his part of that contract.

The rule of interpretation laid down with so much emphasis in the late case of *Puffer v. Lucas,* 112 N. C., 377, makes any other conclusion impossible, if that decision is to stand as an authority to guide us.

Hence, the relation of Egerton to Williams was not only that of landlord and tenant, but also that of vendor and vendee.

In *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, it was decided that section 1766 of The Code has no application to cases where the relation of vendor and vendee exists, although for some purposes the latter may also be a tenant in contemplation of law. Those decisions are founded upon the idea that if the tenant has an equity in the land, that section has no application—that he is not a tenant and his vendor is not a landlord within the meaning of that section.

Now, in *Taylor v. Taylor,* 112 N. C., 27, we decided that whenever the relation of the so-called landlord and tenant was such, by the terms of their contract, that, under the rule laid down in the cases cited above (which we there referred to), section 1766 had no application to any controversy about the possession, neither could section 1754 apply to any controversy about the rent. In other words, we distinctly affirm in *Taylor v. Taylor, supra,* that if such a relation existed as would prevent the recovery of the land under section 1766, the owner (452) or landlord, or vendor—call him what we may—could have no statutory lien for "so-called rent" under section 1754.

Upon careful consideration of these authorities *(Taylor v. Taylor, Puffer v. Lucas* and *McCombs v. Wallace, supra),* I cannot see how it is possible to escape the conclusion that the defendant has no statutory lien under section 1754 on the crop in controversy. He neither asserted nor attempted to prove any other right to hold it.

If it be contended that, though the defendant had no right to take and hold the crop by virtue of a lien under section 1754, the contract itself gave him a right to so take and hold it, the reply is that if he proposed to establish a right arising out of that instrument which would be better than plaintiff's title, it was incumbent on him to prove not only the exist-

ence of this contract, but that it was registered before plaintiff's mortgages. Between Egerton and Williams the so-called lease was valid without registration, but, considered as a lien on the crops of successive years in favor of the former, it could have no validity against the plaintiff, who also claimed under Williams, unless it was registered before plaintiff's mortgages. It was the duty of the defendant to prove that the contract was registered, if he wished to assert title under it as a lien or mortgage.

The interjection of the relation of landlord and tenant, with its statutory lien and peculiar legal remedies, into the relation of vendor and vendee, is such a blending of inconsistent principles that it is open to the objection of *Lord Brougham* as being "against the science of the law," and will, I greatly fear, lead to much confusion and uncertainty. I think it better to adhere to well defined principles.

SHEPHERD, C. J. I concur in the dissenting opinion of *Mr. Justice Burwell.*

Cited: Clark v. Hill, 117 N. C., 12; *Barrington v. Skinner, ib.,* 52; *Jones v. Jones, ib.,* 257; *Ford v. Green,* 121 N. C., 73, 74; *Mfg. Co. v. Gray, ib.,* 170; *Credle v. Ayers,* 126 N. C., 15; *Hamilton v. Highlands,* 144 N. C., 283; *Hauser v. Morrison,* 146 N. C., 252; *Hicks v. King,* 150 N. C., 371; *Eubanks v. Becton,* 158 N. C., 238; *McLaurin v. McIntyre,* 167 N. C., 353; *Burwell v. Warehouse Co.,* 172 N. C., 80.

(453)

MORGAN EDWARDS, ADMINISTRATOR OF T. M. DOBYNS, DECEASED, v. H. F. JONES.

Foreign Record—Certified Copy—Evidence—Estoppel by Judgment of Court in Another State.

1. The certificate of a clerk of a court of another State as to the record of a judgment therein should be, as in this State, in the form prescribed for such court, and the certificate of the judge thereof that the clerk's attestation is in due form is conclusive.
2. Full faith and credit should be given to a judgment of a court of another State when it appears from the certified record thereof that the court had acquired jurisdiction of the parties and the subject-matter, and no defense is available against it which might have been set up in the court in which the judgment was rendered.

ACTION, tried at Fall Term, 1893, of ALLEGHANY, before *Winston, J.* Defendant appealed.

The plaintiff alleged that he was the administrator of the estate of T. M. Dobyns, late a citizen of the State of Virginia, who died in 1872, having made and published his last will and testament, which has been duly admitted to probate in that State, and also in this; that one D. W. Dobyns was appointed executor of that will, and qualified as such executor in the State of Virginia, but was thereafter removed from said executorship by the proper court of that State, and one Marshall was duly appointed administrator *de bonis non cum testamento annexo* of the estate of T. M. Dobyns; that said administrator become plaintiff in the place of the removed executor in a suit then pending in the Circuit Court of Carroll County in the State of Virginia, in which the appellant was defendant. In that cause process had been duly served on the defendant, and he had appeared, by counsel, and filed an answer. At October Term, 1884, of said Circuit Court a judgment was rendered in that suit against the defendant, and to enforce the payment of that judgment this suit was brought by the plaintiff here, who has been duly appointed administrator of that estate in this State, it (454) being admitted that the defendant had no property in the State of Virginia, and is a citizen here.

Upon the trial the plaintiff offered in evidence a certified copy of the record of the aforesaid judgment, to which the defendant objected "on the ground that the judge's certificate is defective." The objection was overruled, and the defendant excepted.

The defendant offered evidence that tended to show that mistakes were made in taking the account in the Virginia suit of the dealings between him and T. M. Dobyns, who had been his partner, the object of the said suit being to effect a settlement of the partnership accounts. He said that he employed counsel, who represented him in that litigation, and that he went over the accounts with his lawyer, but did not discover then any mistakes, and did not appeal from the judgment rendered against him in that cause. He also testified that he had great confidence in the executor, and turned over to him his vouchers, but lost confidence in him before the suit was brought. On the whole evidence being in, the court charged the jury that the Virginia judgment was an estoppel, and that plaintiff was entitled to recover upon said judgment the amount of the claim, and gave judgment accordingly. The defendant excepted, and assigned as error—(1) the admission of the certified copy of the record of the Virginia court, and (2) for that, upon the whole evidence, the jury ought to have been permitted to say whether the Virginia judgment was procured through the fraud of the administrator Marshall, or of B. W. Dobyns, and whether the defendant Jones was bound by the same.

Strong & Strong and A. E. Holton for plaintiff.
R. A. Doughton for defendant.

BURWELL, J., (after stating the facts). The exception of the
(455) defendant to the introduction of the copy of the record of the judgment of the Circuit Court of Carroll County, Virginia, upon the ground that the certificate of the judge thereon was "defective, in that it states that the record is in due form of law, instead of in due form according to the law of this State," cannot be sustained. The attestation of the clerk should be, as here, in the form prescribed for the court in which the judgment was rendered, and the certificate of the judge that the clerk's attestation is in due form is conclusive. Black Judgments, sec. 878. This record of the judgment of a court of the State of Virginia being thus in evidence, and it appearing therefrom that the court that rendered that judgment against the defendant had properly acquired jurisdiction over the parties and the subject-matter, it followed that, as full faith and credit must be given to that judgment thus established, no defense against it was open to the defendant, except such as would have availed him in the court in which it was rendered, except, perhaps, fraud. Black Judgments, sec. 881. And of fraud vitiating this judgment there was no evidence whatever. It is final and conclusive on the merits. Nothing can be set up against it that, with proper diligence, might have been interposed in the action in which it was rendered. Hence, it was not allowable for the defendant to attempt to show in this action that he or his attorney in that cause had made mistakes or omissions that enhanced the amount of the recovery against him there. He was represented there by counsel. The court, as we have said, had jurisdiction of him and his cause. What was there determined by the judgment then rendered is finally settled. The amount there ascertained to be due from him to the estate of T. M. Dobyns should be paid by him to the ancillary administrator in this State that he may dispose of it according to law.

Affirmed.

Cited: Rainey v. Hines, 121 N. C., 321.

(456)

ANDREW FULBRIGHT ET AL. v. DANIEL YODER ET AL.

Deed—Omission of Words of Inheritance—Intention of Grantor.

Although words of inheritance are omitted in a deed, yet if the real intention of the grantor appear to be to confer a fee, that effect will be given to the limitation.

ACTION for partition of lands, commenced before the clerk and transferred to the Superior Court of CATAWBA, and heard before *Boykin, J.*, and a jury, at Fall Term, 1893, of said court.

The issue submitted, with the consent of all parties, was: "Were the words 'in trust for the sole benefit of the said Z. T. McCaslin, his heirs and assigns, forever, in fee simple,' omitted from the *habendum* clause of the deed by mistake, inadvertence or oversight, as alleged in the answer?"

The deed in question was as follows:

"This deed, made 12 October, 1860, between Matthew McCaslin and wife, Margaret, of the first part, and J. C. McCaslin, agent of Z. T. McCaslin, of the second part, all of the county of Catawba and State of North Carolina:

"Witnesseth, that the said Matthew McCaslin and wife, for and in consideration of one dollar to them in hand paid, and of natural good will and affection, hath bargained and sold unto J. C. McCaslin, in trust for Z. T. McCaslin, all that tract or parcel of land on Potts creek in Catawba County (describing it), containing eighty-three acres—all woods, ways, waters and watercourses—unto the said J. C. McCaslin, agent, his heirs and assigns, forever. The said M. McCaslin and wife hath a right to convey the same, and by these presents doth convey the same in fee simple unto J. C. McCaslin, agent. Witness," etc. (Signed by Matthew McCaslin and wife.)

The deed was duly acknowledged in open court, and recorded, with the private examination of the wife.

His Honor told the jury that the defendant Henry McCaslin must satisfy them by "clear, strong and convincing testimony" (457) that the words "in trust for the sole benefit of the said Z. T. McCaslin, his heirs and assigns forever, in fee simple," had been omitted from the *habendum* clause in the deed by mistake, inadvertence or oversight, as alleged in the answer.

That if he had done so, they should answer the issue "Yes"; otherwise, "No."

The jury returned for the verdict "Yes." Judgment was rendered for the defendants and the plaintiffs appealed.

C. A. Cilley for plaintiffs.
D. W. Robinson and M. L. McCorkle for defendants.

PER CURIAM: The case of *Holmes v. Holmes,* 86 N. C., 205, is similar to the one before us, and, according to the principles there laid down, Z. T. McCaslin took an equitable fee, although words of inheritance were omitted in the limitation. It is therefore unnecessary to pass upon the sufficiency of the evidence offered for the purpose of correcting the deed. While it must be admitted that the doctrine of the above-mentioned case is not supported by text-writers or the previous decisions of this Court, yet it is believed to be founded upon more equitable principles in arriving at the real intention of the grantor. It is also in accord with the spirit of recent legislation (The Code, sec. 1280) which declares that limitations without the use of the word "heirs" shall be construed as limitations in fee, unless a contrary intention plainly appears. In view of these considerations we do not feel inclined to overrule the said decision. Its application to this case, as well perhaps to the great majority of others, very clearly gives effect to the true intention of the parties.

Affirmed.

Cited: Clark v. Cox, 115 N. C., 96; *Helms v. Austin,* 116 N. C., 753; *Allen v. Baskerville,* 123 N. C., 127; *Smith v. Proctor,* 139 N. C., 320.

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(458)

E. W. STUBBS v. W. H. MOTZ ET AL.

Statute of Limitations—Practice—Pleading.

1. The limitation for the commencement of actions prescribed by section 155 (9) is three years from the *discovery* of the mistake, and not from the date of the mistake.
2. Under the present practice, a replication to the plea of the statute of limitations is necessary only when matter in avoidance is pleaded.
3. Where, in an action brought to correct a mutual mistake in a settlement of accounts, the defendant pleaded the statute of limitations, and it did not appear in the complaint that the mistake was discovered more than three years before suit brought, the plaintiff should have been permitted to prove, if he could, that such discovery was within three years before the commencement of the action.

4. A plea that a cause of action did not "arise" within the time prescribed by the statute for the commencement of an action, while not strictly accurate, will be construed under the liberal system of pleading in force under section 260 of The Code to mean that it did not "accrue" within that time.

ACTION, tried at Spring Term, 1893, of LINCOLN, before *Armfield, J.*, and a jury.

The facts are stated in the opinion of *Associate Justice Clark.*

D. W. Robinson for plaintiff.
No counsel contra.

CLARK, J. This action was begun 20 March, 1885, to correct errors alleged to have been made by mutual mistake of the parties in a settlement had between them 27 October, 1881. The defendant pleaded the statute of limitations. The plaintiff did not, in his complaint nor by replication, aver that the discovery of the mistake was within three years next before the commencement of the action. The court thereupon excluded evidence offered to prove such fact, and held, upon the face of the pleadings, that the action was barred, and instructed (459) the jury to find the issue in favor of the defendant. The plaintiff excepted, and this is the sole question presented by the appeal.

The Code, sec. 155 (9), provides a limitation of three years for "an action for relief on the ground of fraud or mistake," the cause of action not to be "deemed to have accrued until the discovery by the aggrieved party of the facts constituting such fraud or mistake." The limitation prescribed is not three years from the mistake, but from its discovery. When the date of the accruing of the cause of action appears in the complaint and the statute of limitations is pleaded, the court can, of course, pass judgment, unless matter in avoidance is pleaded as a new promise, or the like. It is only in such cases that a replication is now required (The Code, sec. 248; *Moore v. Garner,* 101 N. C., 374, 377), though under the former practice a replication was required whenever the statute of limitations was pleaded. Wood Limitations, 16.

The plea here that the "plaintiff's cause of action did not accrue within three years next before the commencement of the action," devolved upon the plaintiff the burden of proving that it did. *Moore v. Garner, supra.* As the date of the discovery of the mistake does not appear in the complaint, the plaintiff should have been allowed to prove, if he could, that it was within three years before this action was begun.

We note that the defendant's plea is not strictly accurate, as he pleads that the cause of action "arose" more than three years before suit

brought. Under the liberal system of pleading now in force, he has the benefit of meaning that it did not "accrue" within three years. The Code, sec. 260.

New trial.

Cited: Grady v. Wilson, 115 N. C., 347; *Davis v. R. R.,* 136 N. C., 121; *Peacock v. Barnes,* 142 N. C., 217; *Modlin v. R. R.,* 145 N. C., 227; *Tuttle v. Tuttle,* 146 N. C., 493; *Ewbanks v. Lyman,* 170 N. C., 509; *Taylor v. Edmunds,* 176 N. C., 329.

(460)

C. J. ALSTON v. M. F. MORPHEW.

Execution Sale of Personal Property.

Personal property, when sold under execution, should be present at the sale and in the possession of the officer, so that immediate delivery may be made to the purchaser. These requirements will be met, however, if the property is in plain view or so near that it can be personally inspected by all present at the sale who may choose to examine it.

Appeal at Fall Term, 1893, of McDOWELL, from *Boykin, J.*

A jury trial was waived, and the following facts were agreed upon:

"That on 29 October, 1892, one J. A. McDonald, J. P., in McDowell County, rendered judgment in favor of the defendant in this case (the plaintiff in that) against C. J. Alston, the plaintiff in this case, who was defendant in that for the sum of $139. On said judgment execution was issued and levied by A. L. Finley, a constable for Marion township, said county of McDowell, on the piano described in the complaint in this action, and, after advertisement, was sold at the courthouse door in the town of Marion, North Carolina. That said piano was levied upon in and left in a private room in the 'Hotel Thomas,' about two hundred and fifty yards from the courthouse door. It was left in charge of an agent of the constable, who held the key to said room. That at the time of the sale at the courthouse door as aforesaid the piano was in the said room where levied on. That when the piano was offered for sale, and during the crying of the sale by the officer, he announced the whereabouts of the piano and stated that bidders would be given half an hour to examine same, and that during the half-hour as many as three persons went and examined said piano. That there were about fifty persons at the sale. That no actual delivery of the piano was made by the officer to

the purchaser at the time of the sale, but the purchaser obtained (461) the same by claim and delivery against the proprietor of the hotel, who held the same under a claim of storage charges from the officer. The piano was an upright piano of average size."

Upon the facts as agreed, the court was asked to proceed to judgment, and judgment was thereupon rendered in favor of the plaintiff for possession of the piano, and defendant appealed.

Locke Craig for plaintiff.
Justice & Justice for defendant.

MACRAE, J. The uniform current of decisions in this State, from *Blount v. Mitchell,* 1 N. C., 80, are to the effect that, upon sales by sheriffs or constables of personal property under execution, the property should be present at the sale and in the possession of the officer, so that immediate delivery may be made to the purchaser. These requirements are fulfilled, however, if it is in plain view, or so near that it may be personally inspected by all present at the sale who may choose to examine it. The sale "must be conducted in such a manner that every person who may come up before the articles are knocked down by the auctioneer may see and examine them, so as to enable him to become a bidder if he choose. To hold otherwise would be to give some of the persons present an advantage over others, and thus prevent that fair and open competition which the law so much desires in sales of this kind." *McNeely v. Hart,* 30 N. C., 492. The reason of the rule is clearly stated in *Ainsworth v. Greenlee,* 7 N. C., 470: "The constable's authority to sell these goods was derived under a *fieri facias,* the execution of which the law requires to be done in such a manner as that by the sale the property is most likely to command the highest price in ready money. It is evident that for this purpose the bidder ought to have an opportunity of inspecting the goods and forming an estimate of their (462) value, without which it is not to be expected that a fair equivalent will be bid. The presence of the goods, too, in the possession of the officer, to which possession the levy gives him a right, assures the bidders that a delivery will be made to the highest bidder forthwith, and that so far the object of the purchase will be attained without litigation."

The present case is an apt illustration of the justice of the rule. The piano was left in a private room in a hotel, about two hundred and fifty yards from the place of sale; there were about fifty persons at the sale; an adjournment was had for half an hour in order to give all present an opportunity to visit the hotel and examine the piano. As many as *three* availed themselves of the invitation. It is alleged in the complaint, and not denied in the answer, that the property sold for $32.50, the said

sum being a small part of its actual value, although it is denied in the answer that the smallness of the sum bid was occasioned by the absence from the place of sale of the article sold. And it further appears that the purchaser did not obtain possession from the sheriff, but by means of a proceeding in claim and delivery. Who can tell that the apprehension of trouble in obtaining possession did not deter persons present from bidding at the sale?

The law, so firmly established by repeated adjudications, is in no way weakened by the case of *Wormell v. Nason,* 83 N. C., 32, where printing presses and stands, property of a ponderous nature, and then in actual use and operation, conveyed by *mortgage,* with a general power of sale unrestricted as to its place, were sold within fifty yards of the place where they were located and in use, the same being accessible to all who might wish to inspect them, and the sale was held to pass title, which, if impeachable at all, could only be questioned by the mortgagor and those claiming under him, in analogy to the rule in execution sales.

Affirmed.

Cited: Barbee v. Scoggins, 121 N. C., 143; *Phillips v. Hyatt,* 167 N. C., 574; *Nance v. King,* 178 N. C., 576.

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(463)

J. W. WILSON ET AL. v. LOCKE CRAIG.

Practice—Attachment for Contempt—Former Adjudication.

Where a proceeding to attach a party for contempt, because of an alleged disobedience of an injunction order, was terminated by a refusal of the motion and a dismissal of the rule, the adjudication constitutes a complete defense against the further prosecution of the matter upon an affidavit identically the same as that upon which the first motion was based.

AVERY, J., did not sit on the hearing of this case.

MOTION to attach the defendant for contempt in wilfully disobeying a restraining order, heard before *Boykin, J.,* at Fall Term, 1893, of McDOWELL. The facts are stated in the judgment rendered by his Honor, which was as follows:

"On the ____ day of _____, 1893, his Honor Judge J. D. McIver issued a rule against the defendant, Locke Craig, made returnable to Spring Term, 1893, of Yancey Superior Court, and by consent removed before the undersigned for hearing and determination at the

Fall Term, 1893, of McDowell Superior Court, requiring him to appear and show cause why he should not be attached for contempt for disobedience to a restraining order issued by his Honor Judge Spier Whitaker at chambers, in Raleigh, on 1 October, 1891.

"At the Spring Term, 1892, of the Superior Court of McDowell County, his Honor Judge J. F. Graves issued a rule in the same cause against the said defendant, requiring him to appear in Burnsville, Yancey County, on Friday of the Spring Term, 1892, of the said Superior Court, and show cause why he should not be adjudged in contempt of court, for a violation of the said restraining order so issued as aforesaid by Judge Whitaker. At the time of issuing said rule, the affidavit of J. W. Wilson, one of the plaintiffs, upon which (464) the said rule was based, was before the court and considered by the judge (his Honor J. F. Graves). On the return day of the rule a copy of the same, and the answer filed by the respondent Locke Craig, were presented to the judge. The said affidavit of J. W. Wilson, upon which the rule issued, was not then before the court. The plaintiff first moved before his Honor Judge Graves to continue the hearing of the rule until such time as the said affidavit could be produced. The motion was refused. The plaintiff then objected to the hearing of the rule, because the judge did not have the power to determine it in the absence of the plaintiffs' affidavit and the original rule. The restraining order of his Honor Judge Whitaker was not before the court at the hearing. This motion was refused by the court. The plaintiffs noted no exceptions. His Honor Judge Graves then proceeded to determine the matter, and after argument of counsel, discharged the said rule. The plaintiffs did not appeal.

"On the ____ day of _____, 1892, after the order of his Honor Judge Graves discharging the rule, a similar rule to the rule discharged by his Honor Judge Graves was issued by his Honor Judge Armfield, and on the return day thereof was considered by him, and after argument of counsel, was discharged, he being of opinion that plaintiff was estopped by the judgment of Judge J. F. Graves, but by reason of the failure of counsel to submit a judgment finding the facts and discharging the rule, no judgment was, in fact, signed by Judge Armfield. The plaintiffs noted an appeal from the ruling of his Honor Judge Armfield, discharging the rule, but the same was never perfected, because said judgment was never signed by him.

"Upon the foregoing facts, which are agreed to by the parties, the court is of opinion that the plaintiffs cannot further prosecute the rule returnable before the undersigned this day. Wherefore, (465) the said rule is discharged."

Plaintiffs appealed.

T. W. Mason and R. O. Burton for plaintiffs.
W. J. Peele for defendant.

PER CURIAM: It is conceded that the plaintiffs' affidavit, upon which this motion to attach the defendant for contempt is based, because of an alleged disobedience of an injunction order of the Superior Court, is identical with the affidavit upon which a similar proceeding was prosecuted against the defendant in 1892, before *Graves, J.* The record shows that that proceeding was terminated by the following judgment: "Motion to attach defendant for contempt of court. Motion overruled. Rule dismissed."

From this judgment there was no appeal. It, therefore, stands as an adjudication in defendant's favor of the very matter which plaintiffs seek again to have considered. The plaintiffs' affidavit filed in that proceeding, the defendant's answer thereto, and that entry constitute a complete defense against the plaintiff's further prosecution of this matter. It is an adjudication that the defendant was not guilty of the contempt charged against him then and now. If the plaintiffs were, for any cause, dissatisfied with that decision, they should have appealed from that judgment.

No error.

(466)

AARON LADD v. L. C. BYRD ET AL.

Action for Possession of Land—Homestead—Sale of Reversion—Right of Possession—Adverse Possession—Statute of Limitations—Burden of Proof.

1. The possession by a homesteader, or one claiming under him, of land which has been sold or held subject to the homestead right, does not become adverse so as to start the running of the statute of limitations until the purchaser's right of action and entry accrues on the termination of the exemption.
2. An action for the possession of land is conclusive as to title only where an issue involving title is raised and passed on by the jury; therefore,
3. Where land was sold in 1868 under a judgment on an old debt, no homestead being previously allotted, and in an action for possession by the purchaser it was decided that the debtor was entitled to a homestead in the land, which he had had allotted to him after said sale, and which he occupied until he died: *Held*, (1) that the purchaser was precluded by such adjudication from demanding possession until the falling in of the exemption, and hence the statute of limitations did not begin to run against him until then; (2) that the debtor and those claiming under him were estopped from denying, as against the creditor and those claim-

ing under him, that they occupied the land in dispute as a homestead, and not in their assertion of a title adverse to the creditor, so long as the homestead right subsisted.

4. Where in an action to recover possession of land a homestead right is shown to have existed, the burden is on the plaintiff to show that it has terminated, not only by the death of the homesteader but also by the arrival at full age of his youngest child.

ACTION to recover land, tried at Spring Term, 1893, of WILKES, before *Boykin, J.*

The plaintiff introduced a certified copy of a judgment of the Supreme Court of North Carolina, rendered at June Term, 1868, in favor of one Amos Ladd against Jesse P. Adams and others, on a debt contracted before 1860, and an execution in the usual form issued (467) thereon, tested January Term, 1868, and returnable to January Term, 1869, of said court, under which the land in controversy was levied on 2 August, 1868, and sold on 2 January, 1869, by the sheriff of Wilkes, as the property of the said Jesse P. Adams; and the plaintiff then introduced the sheriff's deed to him, dated 13 February, 1869, and registered 19 April, 1869, reciting the levy and sale under the execution, and fully describing the land—the deed being in usual form. It was admitted that the levy, sale and sheriff's deed covered the land in controversy. The summons in this case was issued 7 February, 1890.

The defendant contended that the plaintiff's right of action was barred by the lapse of time, and introduced the following testimony:

H. C. Douthit testified: "That Jesse Adams lived on the land in controversy in 1869, after the suit had been brought. Ladd went to Adams to demand the land. I was with him. He said to Adams that he demanded possession of the land. Adams said, 'I'll not talk to you this morning,' and went back into his house. Ladd said his counsel had advised him to demand possession. His wife and daughter were then living with Adams. Adams lived on the land until his death. His son-in-law Holdman has lived there since, a part of the time. Ladd has never been in possession, only Adams and his heirs."

W. S. Holdman, witness for the defendant, testified: "I married Jesse Adams's daughter, Martha. Have known Adams for thirty years. He lived all this time on the land, and died there in October, 1889. Since he died, my wife and I have been in possession, getting the rents and profits. Plaintiff has not been in possession at all."

The defendants then introduced the summons and complaint in the case of Aaron Ladd against Jesse P. Adams, brought to Spring Term, 1869, summons dated 30 March, 1869, being an action for the recovery of the land in controversy. (468)

The plaintiff then, for the purpose of explaining the possession, or rebutting the adverse possession, introduced the answer and case agreed and judgment of the Supreme Court to show that defendants have claimed and held the land as a homestead, and the same had been allotted.

It was admitted that judgment of nonsuit was rendered at Spring Term, 1871, in the case of *Ladd v. Adams,* in accordance with the ruling of the court upon the case agreed, and this ruling affirmed at January Term, 1872, on appeal to the Supreme Court.

The plaintiff asked the court to instruct the jury that if Jesse P. Adams lived upon the land, and held the same as his homestead, and the plaintiff acquired by reason of the ruling of the court in the case of *Ladd v. Adams,* and the prevailing opinion that Adams was entitled to his homestead in the land, as against this plaintiff, it would not be such an adverse holding as would bar plaintiff's action.

His Honor declined to give this instruction, and told the jury that, if they believed the testimony, the plaintiff was not entitled to recover.

There was no evidence as to whether the widow of Jesse Adams was dead, or as to whether the children of said Adams are yet minors.

In deference to this ruling the plaintiff excepted to the refusal of the court to give the instructions asked, and to that given, and submmitted to a nonsuit and appealed.

A. E. Holton and Watson & Buxton for plaintiff.
No counsel contra.

AVERY, J. Prior to the passage of the Act of 1870, when the reversionary interest could still be sold under execution, the judgment
(469) creditor might, at his option, recognize the claim of the debtor to a homestead by exposing to sale only such reversionary interest without affecting the validity of the sale or in any way impairing the right of the purchaser to the possession of the land on the expiration of the prescribed period of exemption. *Long v. Walker,* 105 N. C., 91; *Wyche v. Wyche,* 85 N. C., 96; *Barrett v. Richardson,* 76 N. C., 423. When made expressly "subject to the homestead," it was held that the sale was valid and "passed the reversionary interest only." In such cases it is clear that those holding under and enjoying the right of exemption, and their assignees, are in privity with a purchaser whose right to possession is postponed by the clemency of the execution creditor, and their possession in no event becomes adverse to his claim till his right of entry and of action accrues on the termination of the exemption. *Corpening v. Kincaid,* 82 N. C., 202; *Lowdermilk v. Corpening* 92 N. C., 333. The same principle prevails as that which governs in the

case of life tenants and remaindermen or reversioners. The statute does not run until the new claimant can maintain an action for the possession and fails to bring it. *Melvin v. Waddell,* 75 N. C., 361; *Staton v. Mullis,* 92 N. C., 623; *Avent v. Arrington,* 105 N. C., 377.

But in the case at bar it seems that the present plaintiff, Ladd, recovered a judgment against one Adams on an old debt, and at a sale under execution thereon, on the 2d day of August, 1868, made without allotting a homestead to the debtor, became the purchaser and took the plaintiff's deed for the land. When, however, the plaintiff attempted to enforce his right by an action for possession, it was decided that Adams, the debtor under whom the present defendants claim as heirs-at-law, was entitled to a homestead in the land (*Ladd v. Adams,* 66 N. C., 164), and the plaintiff was forced to submit to judgment of nonsuit, in accordance with the view which then received the sanction of this Court, that the homestead provisions of the Constitution operated retroactively. Notwithstanding the fact that the decision of the (470) Supreme Court of the United States subsequently rendered led to the overruling of that doctrine, Adams, having had his homestead previously allotted so as to embrace the whole tract of land in controversy, continued to occupy it till his death, in 1889, and since his death the defendants have held possession, claiming as heirs-at-law of Adams.

We think that the judgment in the former action is conclusive upon both parties to the extent only that the plaintiff (having failed to raise the Federal question by appeal to the Supreme Court of the United States) was precluded from demanding the possession till the falling in of the exemption, while the defendant and those claiming under him were estopped from denying as against the plaintiff and those claiming under him that they occupied the land in dispute as a homestead and not in the assertion of a title adverse to that of the plaintiff, so long as the homestead right subsisted. The creditor, though he acquired a good title under the sale, has recognized by his inaction the validity of the allotment of the homestead, and is in no worse plight than if he had not proceeded to sell until Adams died, in 1889. If the sale had not been made until that time a good title would have passed, as has been expressly held by this Court. *Cobb v. Halyburton,* 92 N. C., 652. It would therefore be strangely inconsistent with the doctrine laid down in the cases cited, that the creditor who sold subject to the homestead, when not bound to do so, or who calmly awaited, without action, the termination of the exemption and thereby recognized its validity, was not barred when the right expired, should we hold that another creditor who did not sleep upon his rights, but was compelled to acquiesce in the ruling of the highest Court of the State, is either concluded by the adjudication that the defendant was entitled to his homestead or is barred

by the lapse of time during the occupancy under the claim of ex-
(471) emption. The judgment of nonsuit was affirmed solely upon the ground that the homestead was valid—not because the reversionary interest could not be subjected for the debt. The sale was valid, and unquestionably a good title passed to plaintiff by virtue of the sheriff's deed. *Long v. Walker, supra.* Actions for possession are conclusive as to title only where an issue involving the title is raised and passed upon by the jury. *Allen v. Sallinger,* 103 N. C., 14. Therefore the judgment in the former proceeding binds both parties as to the validity of the allotment of the homestead to Adams, and no further. *Cobb v. Halyburton, supra.* Although the ruling of this Court in *Ladd v. Adams, supra,* is admitted now to have been erroneous, those who claim under and in privity with Adams will not be heard, after his enjoyment of the benefits of the exemption to which the court declared him entitled up to the time of his death, to claim all of the advantages of an adverse holding during an occupancy which was protected by the courts as lawful only upon the idea that it was not adverse to the claims of creditors. But it did not appear as a fact whether the homesteader Adams left surviving him any minor children or whether he left a widow. The action for possession cannot be maintained while one of the children of Adams is still a minor. *Cobb v. Halyburton, supra.* The homestead right having been shown to exist is presumed to continue, and the burden was upon the plaintiff to show that it had terminated. The burden is always upon the remainderman, whose estate is expectant upon the determination of a life estate, to show that his right of action had accrued by the termination of the particular estate, when suit was brought. *Lewis v. Mobley,* 20 N. C., 467. The plaintiff must show title good against the world, and after it appeared that Adams was entitled to homestead and had it allotted to him, and the plaintiff acquiesced in the adjudication in his favor, and it appeared that there were children of Adams surviving him, it became thereupon incumbent upon the plaintiff
(472) to prove that the exemption had terminated, or the attainment of the age of twenty-one by the youngest of such children. Holdman, a witness, married Martha, a daughter of Jesse Adams (we know not when), but since the death of Adams the homesteader, in 1889, said Holdman and his wife have been in possession. Another witness had testified that in 1889 Adams and his wife and daughter were living with him on the land. It does not appear whether her name was Martha, or whether she was a daughter by the same or a different marriage. There is no testimony tending to show her to be the same person as Martha, who married Holdman and first appears upon the scene as an occupant of the land since 1889. If it had appeared that Martha was the only surviving child at the death of Adams, we could not, even then, have

jumped to the conclusion that she was the same daughter who was with her mother in 1869, nor could we conclude, because she was married in 1889, that she had necessarily attained her majority (on the 7th of February, 1890), when this action was brought. The general rule is that a party whose right depends upon the death of another must either show, by direct proof, that such person is dead, or raise the presumption that he is dead by proving that he had not been heard of in seven years. 1 Greenleaf Ev., sec. 41. We think, in the same way, that as the burden is on a plaintiff who sues, as remainderman, to offer evidence that will at least raise a presumption of the death of the life tenant, so one who sues for the reversionary interest in a homestead must, when it appears that the homesteader has a child or children, offer testimony, not only to prove that the homesteader is dead, but that the exemption has terminated by reason of the age of the child. Besides the evidence in relation to Martha, the judge who tried the case below seemed to rest his ruling, in part, upon the ground that "there was no evidence whether the *children* of the said Adams are yet minors." From this statement we might reasonably infer that there was evidence of the existence of other children besides Martha, though the testimony as to her (473) was sufficient to shift the burden of proof to the plaintiff. We see no force in the suggestion of inconvenience likely to arise as to families moving out of the State, when we recollect that any person not heard of for seven years is presumed to be dead. There can be no great hardship in holding a plaintiff to the duty of complying with that rule. While, therefore, the court erred, if we are to understand his Honor as holding that the possession of the defendants was adverse to the plaintiff, it was not error to instruct the jury that the plaintiff could not recover because the action appeared to have been prematurely brought.

The judgment is

Affirmed.

Cited: Stern v. Lee, 115 N. C., 431, 444; *Thomas v. Fulford,* 117 N. C., 689; *Oates v. Munday,* 127 N. C., 446; *Joyner v. Sugg,* 132 N. C., 589, 592.

PARKS & NICHOLS v. S. R. ADAMS.

Attachment—Judgment—Garnishee.

1. An attachment was levied on a debt alleged to be due from A to the defendant, which the latter averred had been assigned by him to B before the levy. B asked to be made a party in order that he might assert his right to the debt or fund. The court refused to allow him to interplead unless he would give bond for costs, which he failed to do, but took no exception to the ruling excluding him as a party. Upon the trial there was a verdict for the plaintiff and a judgment thereon for his debt against the defendant, and an order condemning the fund in A's hands to its satisfaction. A neither excepted nor appealed: *Held*, that B's rights are not affected by the judgment, he not being a party to the action, and that he has no standing as appellant here; and further, that it does not concern the defendant, under the circumstances, whether the attached debt is applied as directed or not, that being a matter affecting only the interest of A, who has not appealed, and of B, who is not a party nor bound by the order.
2. An affidavit upon which a warrant of attachment has issued, and which does not allege that the defendant has property in this State, is not defective on that account.

ACTION for the recovery of money, heard at Fall Term, 1893, (474) of McDOWELL, before *Boykin, J.*

A warrant of attachment was issued in aid of the principal relief sought by the plaintiffs, and a motion was made by the defendant before the clerk to vacate the same.

One W. S. Dodd claimed the fund attached, and at the hearing of the said motion leave was granted by the clerk to the plaintiffs and the defendant to file affidavits raising an issue of title to the fund.

Before the jury were impaneled the plaintiffs moved the court to strike out the affidavit raising the issue of title to the fund, for that the defendant had not filed the bond provided for in section 331 of The Code, and the plaintiffs' counsel stated in open court that he had given the claimant Dodd's attorney full notice that he should require him to file the bond before any issue as to the title should be submitted to the jury, and this was not denied. The attorney for the claimant insisted that the filing of the affidavit by the plaintiffs was an implied waiver of the bond. His Honor offered the claimant the privilege of filing the bond, which he refused to do, and thereupon his Honor refused to allow the claimant Dodd to be made a party without bond, for the purpose of trying a collateral issue of title. No exception was taken to the ruling of his Honor. Verdict for the plaintiffs. Defendant's counsel then insisted upon his appeal from the clerk's order refusing to dissolve the

attachment, and asked that the judge should then hear the appeal. The court refused to vacate the warrant of attachment, and rendered judgment for the plaintiffs. The defendant excepted to so much of the judgment as provides that "the money in the hands of J. G. Neal, trustee, belonging to S. R. Adams, be and the same is hereby condemned to be paid in satisfaction of the said debt, interest and cost." Appeal by defendant and William S. Dodd.

P. J. Sinclair for plaintiffs. (475)
Justice & Justice for defendant.

BURWELL, J. An examination of this record shows very conclusively, we think, that neither of the appellants, Adams nor Dodd, has any cause to complain of the judgment they ask us to review.

The defendant, a nonresident, appeared in the action and filed an answer denying the alleged indebtedness to the plaintiffs. The issue thus raised was tried, the court having acquired, by his appearance and the filing of his answer, jurisdiction of the parties and the subject-matter. A verdict was rendered and a judgment was entered in favor of the plaintiffs against the defendant for the sum found by the jury to be due from him to them, and to none of this does the defendant object.

It may be noted here that this is not one of those cases in which the jurisdiction of the court is dependent upon the fact that property of the nonresident defendant has been seized under process issuing in the action. In those cases, if it appears that the defendant's property has not in fact been levied on and taken, the very foundation of the court's jurisdiction has failed, and any judgment in the cause is, of course, a nullity. The contest here is not about the main action between the plaintiffs and the defendant, but solely about the regularity and effect of the ancillary proceeding of attachment, which the plaintiffs called to their aid.

The record states that there was an "appeal by defendant and William S. Dodd." The latter had asserted that the debt or fund alleged to be due to the defendant, by one Neal, trustee, on which the plaintiffs claimed that they had acquired a lien by virtue of the levy of their warrant of attachment, was really due to him because of an assignment of it to him by the defendant, and he had asked the court to allow him in this action to contest with the plaintiffs for the ownership of this money or debt. The court refused to allow him so to do. He took no exception to that ruling. Thereafter he was out of the (476) case. His rights, if he has any, to this fund, are not affected by the judgment, and he has no standing as a party to the cause, and none as an appellant here.

It may have behooved the debtor Neal, trustee, in whose hands was the attached fund or debt, to have it well settled, in the face of the conflicting claims of the plaintiffs and of Dodd, to whom he should pay the money. But he, for good reasons, no doubt, neither asked for the protection of such a judicial determination, nor does he appeal from the judgment which we are here called upon to review.

Thus the defendant Adams is left to be the sole appellant in this cause. He alone objects to the judgment and to the ruling of his Honor. He insists that the affidavit upon which the warrant of attachment was issued was defective, in that it did not allege that the defendant "had property in this State." The case of *Windley v. Broadway,* 77 N. C., 333, sustains him in this, but the inadvertence of the court, in its ruling there, is corrected in *Branch v. Frank,* 81 N. C., 180, where the provisions of The Code in this regard are fully and correctly set out. The point, therefore, was not well taken.

The judgment, after declaring that the plaintiffs recover of the defendant Adams the amount found due by the verdict, provides "that the money in the hands of J. J. Neal, trustee, belonging to said S. R. Adams, be and the same is hereby condemned to be paid in satisfaction of said debt, interest and costs of this action, to be taxed by the clerk." And the exception is to this proviso alone, and comes, as we have said, from the defendant Adams alone. Neal, trustee, is content. Now if this exception of the defendant is founded upon the hypothesis that this fund or debt, because of his transfer of it to Dodd, does not belong to him (the defendant), and did not belong to him when the warrant was legally levied upon it, then we have, as it seems to us, an ex-
(477) ception on the nonresident defendant's part, because another man's property is to be applied to the satisfaction of his indebtedness to plaintiffs. The rights of the defendant's transferee, who is no party to this judgment, and is not bound thereby, may well be left, as they must be, to his own care.

And if the exception is founded upon the hypothesis that this fund or debt does still belong to him, in spite of his alleged transfer to Dodd (which, the defendant insists, was made by him *bona fide* and before the attachment of plaintiffs' lien), then it would seem that, after a verdict in plaintiffs' favor, establishing their right to recover, the court having jurisdiction by appearance of the defendant, it did not lie in his mouth to raise objections to the manner in which the officer who was charged with the execution of the warrant of attachment had performed his duty. He owes the plaintiffs. Upon this theory Neal, trustee, owes him. The latter does not complain of the order which directs him to apply what he owes to or holds for the defendant to the satisfaction of plaintiff's judgment. It is for him—not the defendant—to be careful

that the sheriff's receipts for this fund shall be a valid acquittance to him from all claimants, including the defendant, and as to him the provision of The Code, sec. 489, furnishes an easily secured and safe protection, independent of any reliance upon the attachment proceedings.

We purposely omit to express any opinion as to the effect of the alleged levies of the warrants of attachment to create liens in the plaintiffs' favor on the debt or fraud, for those are matters that may affect the rights of the defendant's transferee, Dodd, and they do not in any way concern the rights of the defendant. It would serve no good purpose to discuss them here.

Affirmed.

Cited: Foushee v. Owen, 122 N. C., 363.

(478)

WESTERN CAROLINA BANK v. NATT ATKINSON ET AL.

Pleading—Frivolous Answer—Practice.

An answer to a complaint in an action on a note cannot be said to be frivolous which formally denies that the plaintiff is the owner and holder of the note, and thus puts plaintiff to proof of that fact.

ACTION, heard before *Armfield, J.,* at August Term, 1893, of BUNCOMBE.

The complaint was as follows:

"1. That the plaintiff is a corporation duly chartered and organized under the laws of North Carolina.

"2. That heretofore the defendant Natt Atkinson made his promissory note, in writing, in words and figures as follows:

" '$1,284. ASHEVILLE, N. C., 14 January, 1893.

" 'Five months after date, without grace, for value received, I promise to pay to the order of P. F. Patton twelve hundred and eighty-four dollars, borrowed money, negotiable and payable at the Western Carolina Bank, Asheville, N. C., with interest, after maturity, at the rate of eight per cent per annum. NATT ATKINSON.

" 'Due 14 June, '93.'

"And thereby promised to pay to the order of the defendant P. F. Patton the said sum of $1,284, as aforesaid, on 14 June, 1893.

"3. That thereafter the defendant P. F. Patton indorsed the said note and delivered the same so indorsed.

"4. That thereafter the defendants C. E. Graham and N. A. Reynolds indorsed the said note and delivered the same so indorsed; and thereafter, and before its maturity, the said note lawfully came into the hands of the plaintiff, for value, and the said plaintiff is now
(479) the holder and owner of the same.

"5. That at the maturity of said note it was duly presented for payment, but was not paid, of all which all the defendants had due and sufficient notice.

"6. That no part of said note has been paid.

"Wherefore, the plaintiff demands judgment against the defendants for the said sum of $1,284, with interest thereon from 14 June, 1893, and the costs of this action."

The defendants Atkinson, Graham and Reynolds filed no answer.

The defendant P. F. Patton, separately answering the complaint of the plaintiff, says:

"1. That as to the allegations contained in the first paragraph of said complaint, he has no knowledge or information sufficient to form a belief, and he therefore denies the same to be true.

"2. That the allegations contained in the second paragraph thereof he admits to be true.

"3. In answer to the third paragraph of said complaint, this defendant says that he admits indorsing the note referred to in the second paragraph of said complaint, but denies indorsing the said note to the plaintiff Western Carolina Bank.

"4. That as to the allegations contained in the fourth paragraph of said complaint, this defendant has no knowledge nor information sufficient to form a belief; therefore he denies the truth of the same.

"5. That the allegations set forth in the fifth paragraph of said complaint are not of this defendant's knowledge, nor has he sufficient to form a belief as to the truth thereof; he therefore denies the same to be true.

"Wherefore, the defendant P. F. Patton prays judgment that he be allowed to go without day and recover his costs, to be taxed by the clerk."

This answer was adjudged to be frivolous, and judgment was
(480) rendered against all the defendants, according to the prayer of the complaint, and Patton alone appealed.

Thomas A. Jones for appellant Patton.
No counsel contra.

BURWELL, J. In Hall v. Carter, 83 N. C., 249, it is said that "an answer should never be held frivolous, and judgment given in disregard of it, unless, as stated in some of the New York cases, it be so clearly and palpably bad as to require no argument or illustration to show its character, or, in other words, such as to be capable of being pronounced frivolous or indicative of bad faith in the pleader on bare inspection." It cannot be said that this answer, on bare inspection, indicates bad faith in the pleader, for in the fourth paragraph it formally denies that the plaintiff is the owner and holder of the note sued on, and thus properly put him to proof of that fact, which is essential to his recovery. True, that fact may be established by the mere production of the note on the trial of the issue thus raised (*Pugh v. Grant,* 86 N. C., 39), but, by the rules of evidence under the pleadings in this action, that formal act must be done before the defendant is required to rebut the presumption of ownership which arises from the mere possession of the instrument. *Pugh v. Grant, supra.*

Error.

(481)

JAMES M. CAMPBELL v. P. F. PATTON ET AL.

Practice—Pleading—Frivolous Answer—Fraud—Innocent Purchaser of Note Before Maturity.

1. Although an answer to a complaint in an action on a note does not set out the allegations of fraud with that particularity that the rules of pleading ordinarily require, yet if it seems intended to raise a serious question of fraud it will not be stricken out as frivolous, for, if filed in good faith, the defendant is entitled to have the facts alleged in it either admitted by demurrer or tried by a jury.
2. Where the complaint in an action by the indorsee of a note does not state that the plaintiff purchased the note for value and before maturity, an answer by the defendant that the execution of the note by him was procured by the fraud of the payee puts upon the plaintiff the burden of proof to establish the fact that he was the purchaser for value, and before maturity, and without notice of the alleged fraud.

ACTION tried at August Term, 1893, of BUNCOMBE, before *Armfield, J.*

The allegations of the complaint are as follows:

"1. That on 10 July, 1890, the defendants P. F. Patton and Natt Atkinson executed their three promissory notes in writing for the sum of $2,500 each, payable respectively one, two and three years, with interest from date at the rate of 8 per centum per annum, payable semi-

annually, to the defendant C. E. Graham, and made payable to his order.

"2. That before the commencement of this action the defendant C. E. Graham indorsed said notes for full value to the plaintiff.

"3. That all of said notes are past due, and no part thereof has been paid, except the interest to 10 January, 1893."

The answer of the defendant Patton is as follows:

"1. That the allegations set forth in the first paragraph of the complaint he admits to be true.

"2. That the allegations contained in paragraph two thereof (482) are not of his own knowledge, nor has he information sufficient to form a belief in the truth thereof, and he therefore denies the same to be true.

"3. That the allegations contained in the third paragraph thereof he admits to be true."

For a further defense this defendant says:

"1. That on or about 10 July, 1890, or just prior thereto, the defendant Natt Atkinson approached this defendant and represented to him that if he, this defendant, would join him, the said Atkinson, in purchasing a certain piece of land, situated in the western portion of the city of Asheville, belonging to the defendant C. E. Graham, for the price of $9,000, he, the said Atkinson, could sell the same for a much greater sum; and led this defendant to believe that he had at that time arranged for selling the said land at a greatly advanced price, much in excess of the said sum of $9,000.

"2. That, induced by the representations so made by the said Atkinson, and having then great confidence in the said Atkinson, this defendant consented to join the said Atkinson in the purchase of the said land for the said sum of $9,000, and the notes, which are the subject of this action, were given for the balance of the purchase-money for the said land.

"3. That this defendant is informed and believes that at the time the said representations were so made to him by the said Atkinson as aforesaid, to the effect that the said Atkinson had already arranged to sell the said land, as is set forth in the first paragraph of this further defense, the said Atkinson had not obtained a purchaser for said land, nor had he arranged to sell the same, as was represented by him, but that the said Atkinson was acting as the agent of the said C. E. Graham, the owner of the said land, and that they combined to cheat and defraud this defendant by inducing him to purchase said land at a price (483) far in excess of its true value, to wit, $5,000.

"4. That by the false and fraudulent representations and inducements of the said Atkinson and Graham made to this defendant,

as aforesaid, this defendant was induced to purchase said land and to execute said notes.

"5. That he is willing, ready and able to cancel the deed made to him so far as my interest was conveyed to him, and reconvey all interest that he may have acquired by reason of said sale to him.

"Wherefore, the defendant P. F. Patton prays judgment that the said notes be delivered up and canceled; that the plaintiff take nothing by his suit; that he recover his costs, and for such other and further relief as under the circumstances of this case the court may deem just."

This answer was adjudged to be frivolous, and, the other defendants having failed to plead, judgment was granted against all the defendants according to the prayer of the complaint, and the defendant Patton appealed.

Busbee & Busbee for plaintiff.
Thomas A. Jones for defendant Patton.

BURWELL, J. The answer of defendant Patton avers that he was induced to sign the negotiable promissory notes sued on in this action by a fraudulent conspiracy between the payee, C. E. Graham, and his co-defendant, Natt Atkinson. The allegations of fraud are not as definite and particular as the rules of pleading would probably require them to be made, but the answer certainly contains enough to relieve it from the charge of being frivolous. It seems intended to raise a serious question, and when that appears the courts will not readily decide such an answer to be frivolous. *Erwin v. Lowery,* 64 N. C., 321. If it was filed in good faith and is not clearly impertinent, the defendant is entitled to have the facts alleged in it either admitted by demurrer or tried by a jury. Courts do not encourage the practice of moving for judgment upon the answer as being frivolous. *Womble v. Fraps,* 77 N. C., 198. But if we consider the motion for judgment in this action for that (484) cause as intended to raise the issue of law that the matters therein alleged, if true, could not affect the plaintiff's right to recover, there was error in granting it. For what is therein alleged, if proved, would be a good defense to the notes, if they were held by Graham, the payee, and, if proved to the satisfaction of the jury on the trial of this cause, those facts so established will impose upon the plaintiff, who is the indorsee of Graham, the burden of establishing the fact that he is a *bona fide* purchaser for value and without notice of the alleged fraud in the inception of the notes. Daniel Neg. Inst., sec. 166; *Carver v. Myers,* 75 Md., 406 (32 Am. St., 394, and note); *Bank v. Burgwyn,* 108 N. C., 62. If it had been averred in the complaint that the plaintiff had purchased the notes for value, and *before* maturity, and that allegation had been

admitted or not properly denied, then it would have been incumbent on the defendant to allege and prove, not only a defense good against the payee and indorser Graham, but also that the plaintiff indorsee had notice of that defense when he purchased them. The plaintiff in his complaint (paragraph 2) does not allege that he purchased the notes before maturity, but only "before the commencement of this action." His failure to aver a purchase before maturity relieved the defendant of the necessity of making the allegation of notice, but, if on the trial, the pleadings being unchanged, the plaintiff satisfies the jury that he did purchase the notes for value before maturity, the burden of proof will again shift, and it will be incumbent on the defendant to prove that the plaintiff had notice of his defense. *Bank v. Burgwyn,* 110 N. C., 267. The second paragraph of the answer, while not strictly according to the requirements of The Code, sec. 243, seems to us a sufficient denial of the allegations of the second paragraph of the complaint. That denial was itself sufficient to make an issue.

Error.

Cited: Discount Co. v. Baker, 176 N. C., 547.

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(485)

STEVENSON & TAYLOR v. THE FIDELITY BANK OF DURHAM.

Dealings Between Banks—Agency—Collection of Commercial Paper—Purchaser for Value.

Where one bank, as the agent of a customer, sent a draft for collection to another bank between which and the former the business arrangement was that each should daily remit for the items sent by and collected for the other, the collecting bank was not a purchaser for value by reason of the fact that it had a balance against the forwarding bank and had no right, as against the owner of the paper, to apply the proceeds to the credit of the account of the forwarding bank, especially when, before the paper was collected, the latter bank had failed and suspended business.

ACTION, heard before *Bryan, J.,* at September Term, 1893, of NEW HANOVER, upon an agreed statement of facts, which was substantially as follows:

The plaintiffs, merchants doing business in Wilmington, on 12 June, 1893, drew a sight draft on W. K. Proctor, of Durham, N. C., for $200.20, payable to W. L. Smith, cashier of the Bank of New Hanover, at Wilmington, and deposited the same for collection in said bank. The

draft was not credited to the plaintiffs on the books of the bank, and was not to be so credited until collected. The said bank indorsed the same, "for collection, account of Bank of New Hanover, Wilmington, N. C., W. L. Smith, cashier," and forwarded the same to the defendant, the Fidelity Bank, of Durham, which received it on 15 June, 1893. The drawee "accepted" the same on that day, and paid it on 19 at 11 o'clock a.m. The Bank of New Hanover made an assignment at 9 o'clock a.m. on 19 June, 1893, of which defendant was not notified until 5 o'clock p.m. of that day.

The defendant credited the Bank of New Hanover with the proceeds of said draft, and had no notice that the said draft was deposited by the plaintiffs with the Bank of New Hanover for collection only (486) and had no knowledge or notice of any fact or circumstance of the drawing and deposit of the draft, except what appears from the draft itself. The Bank of New Hanover was indebted to the Fidelity Bank, the defendant, on 19 June, 1893. The Bank of New Hanover and the Fidelity Bank had for some months prior to 1 June, 1893, forwarded each to the other drafts and other bills of exchange and negotiable papers for collection on account of the bank forwarding such papers, and had charged and credited each other with said items, and the debtor bank had from time to time remitted balances due the creditor bank, and kept mutual open and running accounts the one against the other. But some time prior to 1 June, 1893, there was a change in the arrangement between these banks, and it was mutually agreed to close the mutual account, and that each bank should remit to the other daily the respective items when collected. However, in fact, the Bank of New Hanover did not remit daily each item when collected, as appears by the appended statement. The Bank of New Hanover, in payment of amounts due the Fidelity Bank, tendered said defendant its drafts on New York as follows, viz., 12 June, $178.90; 14 June, $191.10; 16 June, $40.17, which were accepted subject to payment, and promptly presented for payment, but protested for nonpayment.

His Honor gave judgment for the plaintiffs, and defendant appealed.

George Rountree for plaintiffs.
J. S. Manning for defendant.

MACRAE, J. The ingenious argument of defendant's counsel is based entirely upon the assumption that the defendant was a purchaser of commercial paper for value and without notice of any equities between the original parties thereto, and before maturity. If (487) such had been the case, there can be no question that the defendant would have been entitled to hold the avails to its own use. If the

course of dealings between the two banks had continued as it had been prior to June, 1891, the forwarding by the one to the other of commercial paper for collection on account of the bank so forwarding, the charging and crediting each other with said items upon a mutual running account, and the remission by the debtor to the creditor bank of balances from time to time, the question would have arisen whether one bank became the purchaser for value of the paper received by it for collection by reason of the fact that the balance of account was against the remitting bank.

Even if this were the case presented to us, we should be inclined to adopt the rulings of the New York Court of Appeals in *McBride v. Bank,* 26 N. Y., 450: "It is not a purchaser for value by reason of its having a balance against the remitting bank, for which it had refrained from drawing, and from having discounted notes for the latter upon its indorsements, in reliance upon a course of dealings between the banks to collect notes for each other, each keeping an open account of such collections, treating all the paper sent for collection as the property of the other, and drawing for balances at pleasure"; or that of the Supreme Court of the United States in *Bank v. Bank,* 6 Howard, 212, where the above-stated principle seems to be somewhat modified. In substance, the Court say that the receiving bank is not entitled to retain against the real owners unless credit was given to the transmitting bank, or balances suffered to remain in its hands to be met by the negotiable paper transmitted, or expected to be transmitted, in the usual course of dealings between the two banks. See 2 Morse Banking, sec. 591, *et seq.,* where the subject is largely discussed.

If this were an open question it would not affect the case be-
(488) fore us. By the case agreed it appears that, up to June, 1891, there had been such a course of mutual dealings and running accounts between the two banks as is referred to above, but, some time prior to 1 June, 1893, there was a change in the arrangement between these banks, and it was mutually agreed to close the mutual accounts and that each bank should remit to the other, daily, the respective items, when collected. However, in fact, the Bank of New Hanover did not remit daily each item when collected, as appears by the appended statement. And it further appears that, by this change of the course of dealings between the banks, although the agreement was not strictly complied with by the Bank of New Hanover, the said bank did remit to the Fidelity Bank its drafts on New York in payment of the balances against the former and in favor of the latter bank, and that the draft in question was sent *for collection.* It was by the dishonor of the New York paper sent in payment of balances that the defendant became the loser. And we are of the opinion that the defendant was act-

ing in the capacity of subagent in the collection of the plaintiff's draft. *Bank v. Bank,* 148 Mass., 553. Under the arrangement that then existed between the two banks, the defendant could in no sense be considered a purchaser for value of the draft in question. The defendant was the agent of the Bank of New Hanover to collect the draft, and if it had authority to credit the said bank with the avails of the collection it was only so while the bank was a going concern. But the bank became insolvent before the agency was completed and the money received, so that no authority existed to credit the money on general account. 2 Morse Banking, sec. 568.

As we hold that in no event was the defendant a purchaser of the draft, it will not be necessary to follow the argument of counsel upon that line. There is

No error.

Cited: Boykin v. Bank, 118 N. C., 568.

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(489)

LAWRENCE WARD AND WIFE v. J. A. SUGG ET AL.

Usurious Contract—Illegal and Void Contracts—Innocent Purchaser Before Maturity—Forfeiture of Usurious Interest.

1. When a note is declared *void* by a statute it is void into whosesoever hands it may come; but when the statute merely declares it *illegal,* the note is good in the hands of an innocent holder.
2. The purpose and effect of section 3836 of The Code, which provides that "the taking of a rate of interest greater than is allowed shall be *deemed a forfeiture* of the entire interest," was to make void, *ipso facto,* all agreements for usurious interest; therefore,
3. A note embracing usurious interest is void, as against the maker, in the hands of a purchaser before maturity for value and without notice, to the extent to which the contract is usurious.
4. The remedy of the innocent holder, as to the interest, is against the payee who has indorsed the note to him, and not against the maker who is the victim of an oppression denounced by the statute. The law will not lend its aid to enforce a contract which is "deemed forfeited" by the very fact of making it. If this were otherwise, the protection intended by the statute would be delusive and nugatory.

APPEAL from *Shuford, J.,* at March Term, 1893, of PITT, to enjoin a sale threatened to be made under a mortgage, securing, among other

notes or bonds, one for $400, described in the pleadings, and to have said note or bond declared usurious and void.

Upon the pleadings the following issues were submitted to the jury:

"1. Was the $400 note executed for an amount agreed to be paid over and above the debts, and for an usurious charge for the use of the money? Answer: 'Yes.'

"2. Is the defendant Harrington the *bona fide* owner of the $400 note, due 1 January, 1893, and did he acquire the same before maturity in due course of business for value and without notice of any facts impeaching its validity? Answer: 'Yes.'"

Evidence was introduced by both parties tending to show the
(490) correctness of their allegations, and his Honor charged the jury fully upon the matter. There was no exception to the charge or to the testimony as admitted. Upon the verdict the plaintiffs moved for judgment in their favor, and the defendant moved for judgment for the amount of said $400 note, etc. The court refused to give judgment for the plaintiffs, and gave judgment in favor of defendant Harrington, and the plaintiffs excepted, assigning as error the refusal of the court to give judgment for plaintiffs, and the giving the judgment for defendants. Plaintiffs appealed.

James E. Moore for plaintiffs.
T. J. Jarvis for defendants.

CLARK, J. The jury found that the $400 note in suit was wholly given for an usurious charge for use of money, and that the present holder acquired it before maturity for value and without notice. The question, whether it is valid in his hands is not an open one in this State. Such note is held to be void into whatever hands it may pass. *Ruffin v. Armstrong,* 9 N. C., 411; *Collier v. Nevill.* 14 N. C.. 30. Such was also the law in England until it was, in some respects, modified by the Act of 58 George III, and is still the law in New York and other States, except where modified by statute. Randolph on Commercial Paper, sec. 525; 3 Parson Con. (5 Ed.), 117; *Powell v. Waters.* 8 Cowen 669; *Wilkie v. Roosefelt,* 3 John Cas., 206; *Solomons v. Jones,* 5 Am. Dec., 538; *Oneida v. Ontario,* 21 N. Y., 495, cited by *Smith, C. J.,* in *Rountree v. Brinson,* 98 N. C., 107; *Callanan v. Shaw,* 24 Iowa, 441.

When the statute makes a note void it is void into whosesoever hands it may come, but when the statute merely declares it illegal the note is good in the hands of an innocent holder. *Glenn v. Bank,* 70 N. C., 191, 206. Hence it was argued strenuously that the authorities above cited were good under our former statute, which made the contract
(491) void, but that the present statute merely makes the contract ille-

gal. It does not seem to us. The former statute (Rev. Code, ch. 114; Rev. Stat., ch. 117) denounced the contract as void as to the whole debt, principal and interest. The present statute (The Code, sec. 3836) makes it void, not as to principal, but as to the interest only. It provides that "the taking, receiving, reserving or charging a rate of interest greater than he is allowed . . . *shall be deemed a forfeiture* of the entire interest . . . which has been agreed to be paid," with a further provision that, if such interest has been paid, double the amount can be recovered back by the debtor. The only difference between the two acts is that formerly the whole note was forfeited and of no avail, and now only the stipulation as to the interest is *ipso facto* deemed forfeited and void. But the point has already been adjudicated by this Court.

In two cases this Court—and by most eminent judges—has expressly held that the words, "deemed a forfeiture," in the Act of 1876-7 (now The Code, sec. 3836) *makes void* the agreement as to interest. If any attention is to be paid to the doctrine of *stare decisis*, the precedents in our own Court do not leave this open to debate.

In *Bank v. Lineberger*, 83 N. C., 454 (on page 458), *Ashe, J.*, quotes this section in full, and says: "The purpose and effect of this statute were not only to *make void* all agreements for usurious interest, but to give a right of action to recover back double the amount after it has been paid." *Dillard, J.*, in *Moore v. Woodward*, 83 N. C., 531 (on page 535), says: "They (the notes there sued on) are both wholly for illegal interest, if the allegations of the answer be true, and, if so, then the sentence of the law is that they are *void*;" and further says: "The device of taking a distinct bond and mortgage for the interest does not take the case out of the operation of the statute." The opinions of such judges speaking for a court, constituted as the bench then was, are surely entitled to be considered the law in this State until (492) changed by legislation. And in *Glenn v. Bank*, 70 N. C., 191 (bottom of page 205), *Rodman, J.*, says: "It is admitted law" that "notes vitiated by an usurious or gaming consideration cannot be enforced in the most innocent hands, *but are always and under all circumstances void.*"

In 1 Daniel Neg. Inst., sec. 198, it is stated that, where the statute provides that "in an action brought on a contract for payment of money it shall appear that unlawful interest has been taken, the plaintiff shall forfeit threefold the amount of the unlawful interest so taken, it was held to apply to the innocent indorsee of a note, who received it in due course of trade; and, as a general rule, all contracts founded on considerations which embrace an act which the law prohibits under a penalty are void," citing *Kendall v. Robertson*, 12 Cush., 156; *Woods v. Armstrong*,

54 Ala., 150. In *Kendall v. Robertson,* the Massachusetts law had undergone a change similar to ours, and *Shaw, C. J.,* says: "The former law extended the entire forfeiture to any holder of the note, though an innocent indorsee. The natural conclusion is, in the absence of express words changing the operation of the law, that it was the intention of the Legislature to extend such partial forfeiture in like manner, and attach it as before to the note, although held by an innocent indorsee without notice. In both cases the intention of the Legislature appears to have been the same, to suppress a mode of lending regarded as dangerous and injurious to society, by attainting the contract, and attaching the penal consequence to the contract itself, whenever set up as a proof of a debt." And at last term of this Court (*Moore v. Beaman,* 112 N. C., 558), it is said: "The contract, usury being pleaded, is simply a loan of money, which, in law, bore no interest."

Our own decisions upon our own statute should govern, even though a court of another jurisdiction upon a somewhat similar statute
(493) had ruled differently. But in fact the case relied on to that effect (*Oates v. Bank,* 100 U. S., 239), merely holds that the contract, being not void *in toto,* but only as to the interest, "being legal in part, and vicious in part, the *former* will support a contract of indorsement." But here the note is solely for usury and, being wholly vicious, the case cited is authority against its validity in the hands of the assignee.

The note for the usurious interest being in the hands of an assignee, he and not the maker must suffer. The law regards the maker not as *in pari delicto* with the payee but as the victim of an oppression which the law has denounced and prohibits under penalty. *Bank v. Lutterloh,* 81 N. C., 144. If, by passing the note off before maturity and for value, the indorsee may recover on it, the statute is useless, as the protection intended and the penalty and prohibition are alike rendered nugatory. The victim would have no recourse but to suffer in silence. The usury would be collected in spite of the law which had declared the "entire interest forfeited" *ab initio,* by the fact of "charging or reserving" it. On the other hand, the innocent indorsee has his recourse upon the payee who has indorsed the note to him (Daniel on Neg. Inst., sec. 807), a recourse which would more surely protect him, being against the party who has money to loan, not to borrow. At any rate, the fact that the indorsee's sole remedy, as to the interest, is against the payee and indorser, not against the maker, will cause such lenders to be more chary of shouldering off upon innocent parties the collection of their usurious contracts.

The only case in our Reports that seems to mitigate against the otherwise uniform tenor of our decisions on this subject is *Coor v. Spicer,* 65 N. C., 401, which held that a mortgage given to secure a usurious

bond might be enforced in the hands of an innocent purchaser for value. The case recognizes the general rule, but takes mortgages out of it upon the supposed wording of the statute. Rev. Code, ch. 50, sec. 5 (now The Code, sec. 1549). Aside from the fact that this is (494) held expressly otherwise in the latter case of *Moore v. Woodward,* 83 N. C., 531, an examination of section 1549 will show that *Coor v. Spicer* was a palpable inadvertence. The statute cited (The Code, sec. 1549) in fact does not purport to protect the innocent holder of a mortgage note which is tainted with usury, but the "purchaser of the estate or property" at sale under the mortgage, who buys without notice of the usurious taint in the debt secured. It would be a fraud for the mortgagor to stand by and let him purchase without giving him notice, but the maker can give no notice usually to the assignee of the note. There is a broad distinction which runs through all the cases everywhere between contracts upon an illegal consideration as to which, the parties being *in pari delicto,* the courts will aid neither party, but will protect the note in the hands of a holder for value without notice, and a contract which, in whole or in part, is declared void or forfeited in its inception which can acquire no validity by being passed on to other hands. *Henderson v. Shannon,* 12 N. C., 147; *Glenn v. Bank, supra.* As to usurious contracts, the law regards the maker, not as *in pari delicto,* but as acting "in chains" (1 Story Eq. Juris., sec. 302), and to permit his contract, which is deemed exacted under duress, to come under the general rule in favor of innocent holders for value of commercial paper, would be to nullify the protecting statute. The recourse of the holder is against the payee and indorser, who is more likely by far to be able to respond than the maker.

The statute makes the "taking, receiving, reserving *or* charging usury, 'when knowingly done,' i.e., intentionally done, and not by a mere error of calculation, a *forfeiture* (not merely forfeitable) of the entire interest which the note carries with it, '*or* which has been agreed to be paid thereon.'" The note in this case falls exactly within the evil denounced in the last clause. It is a written promise to pay the (495) usury reserved or charged on the note, and such charging or reserving is *ipso facto* a forfeiture which attaches either by the taking, receiving, reserving or charging, as the lawmakers evidently intended to prevent and head off all casuistry for which this class of lawbreakers have, in all times, been specially noted, and to carry out the legislative intent of *bona fide protecting* the public, not nominally, but in fact, from evasions of this law. But if in truth the forfeiture was limited to the "knowingly receiving," the holder of this note certainly knows now, and doubtless did before suit brought, that this note was given for usury "agreed to be paid," and his receiving it would, *eo instanti,* work

a forfeiture. Besides, if the maker should have voluntarily paid this note, the receiver of such payment knowing it was for usury, the statute gives the person, "by whom it was paid, or his legal representative," an action to recover back twice the amount. *Cui bono,* then, shall the debtor be compelled by law to pay the usurious note, when, instantly, he can recover back double the sum of the party to whom he pays it, as a punishment for knowingly receiving it. Such multiplicity of actions was not tolerated under the old practice, and certainly will not be under the present simpler and more practical system of procedure.

Bank v. Lutterloh, 81 N. C., was decided under the Act of 1866, and, to cure the defect in that act, the wording of the present statute is made explicit and gives the action to recover back. Under the Act of 1866 there was no forfeiture, as now, but simply interest could not be collected. While the "charging, reserving," etc., is now a forfeiture of the contract as to all interest *ab initio,* the recovery of double the sum paid is necessarily from the party to whom it is paid, for the language is "may recover back" double the sum paid, which can only be from the party receiving the money.

(496) With the policy of the lawmaking power the courts have nothing to do further than as it may throw light upon the meaning of the statute by considering the evil to be remedied. That is thus considered by *Taylor, C. J.,* in *Ruffin v. Armstrong,* 9 N. C., 411, 416: "It is not less important *now* than it was then to restrain the power of amassing wealth without industry, and to prevent those who possess money from sitting idle and fattening on the toil of others. It is not less important to prevent those who desire profit from their money without hazard from receiving larger gains than those who employ it in undertakings attended with risk, calculated to encourage industry and to multiply the sources of public prosperity. Nor is it less important to facilitate the means of procuring money on reasonable terms, and thereby to render the lending of it more extensively beneficial."

In a matter so capable of oppression as the lending of money, the Legislature has deemed it wise to regulate the limit of what is a reasonable exaction for its use, since all interest is the creation of statute. *Beaman v. Moore, supra.* As to lenders upon a lawful rate of interest, the Legislature has looked upon them with a favorable eye and of late years has raised the limit from six to eight per cent. But there is nothing in the action of the Legislature, nor in the circumstances of the day, which indicates that this is a propitious time to relax the restrictions placed heretofore upon the illegal exactions of those who would use their money contrary to law, and yet call upon the law to aid them, directly or indirectly, to secure their unlawful gains.

Error.

BURWELL, J., (dissenting). I cannot agree to the conclusions of the Court in this appeal, and deem it proper to give the grounds of my dissent. By the terms of the statute which was in force in this State before the Act of 1866, all contracts founded upon an usurious consideration were declared to be *void,* and according to all the authorities, promissory notes thus expressly avoided are void in the hands (497) of indorsees for value without notice.

By the Act of 1866 the legal rate was fixed at 6 per cent, with a proviso allowing 8 per cent to be charged for money loaned, if the contract was in writing, and signed by the party to be charged, and it was therein enacted that if a greater than the legal rate was charged, the interest should not be recoverable. This law, as was said by *Justice Dillard,* in *Bank v. Lutterloh,* 81 N. C., 144, introduced a new theory. It was an expression of the popular will. It did not declare the contract void in whole or in part. It did declare that the contract, so far as it related to interest, was not enforceable in the courts, that it could not be collected by law, and in effect it enacted that so much of the contract as concerned the rate of interest was *void,* the word "void" being used here as it is in *Moore v. Woodward,* 83 N. C., 531.

Speaking accurately, the contract for interest in excess of the *legal* rate was made by that act, not void, but *illegal.*

This act remained in force until 1875, when the Legislature adopted a law which distinctly declared "void" all contracts, both as to principal and interest, if a greater than the legal rate was charged. When this statute went into effect, what are called usurious contracts, and all notes, bonds, etc., founded on such contracts, were not only illegal, but *void.*

At January Term, 1874, of this Court, the case of *Glenn v. Bank* was decided (70 N. C., 191), and *Justice Rodman* said in his opinion filed in that cause: "If the statute declares a security void, it is void in whosesoever hands it may come. If, however, a negotiable security be founded on an illegal consideration (and it is immaterial whether it be illegal at common law or by statute), and no statute says it shall be void, the security is good in the hands of an innocent holder, or of one claiming through such a holder. The case of *Hay v. Azling,* 16 Ad. & Ellis, 423, is a notable illustration of the difference. Gaming securities were declared void by 9 Anne, ch. 14, sec. 1, and it was held that they were void in the hands of a *bona fide* innocent indorsee. The (498) act of 5 and 6 William, ch. 41, sec. 1, modified the act of Anne, and declared they should be illegal. The court held that after that act they could be recovered on by an innocent holder."

It is to be presumed that the Act of 1874-5, enacted as it was one year after that announcement of the rule of law, was framed by men acquainted with the decision, and that it was then provided that all

usurious contracts should be *void,* in order that they might be invalid in whosesoever hands they might come.

In 1876-7 another change was made in the law, and the statute then enacted is in force at this time. That act nowhere, *in totidem verbis,* declares *void* a contract for interest in excess of the legal rate. It is to be presumed that this enactment was also framed in distinct recognition of the rule laid down by the learned *Justice* in *Glenn v. Bank, supra,* and I think much significance is to be attached to the fact that, with this rule thus brought to its attention, the Legislature repealed a law which declared all such contracts *void,* and adopted one which omitted to so declare them. And here it may be well to note the often inaccurate, or, rather, misleading use of the word "void" in statutes and reports. *Parker, C. J.,* in *Somes v. Brewer,* 2 Pick., 183, says of the words "void and voidable," that they "have not always been used with nice discrimination. Indeed, in some books there is a great want of precision in the use of them." And he adds that, for the purposes of the case he was considering, "the term 'void' will be used to express that which is in its very creation wholly without effect, an absolute nullity." In *Baucom v. Smith,* 66 N. C., 538, *Pearson, C. J.,* said of the bond there in suit, that it "was void in the hands of the obligee for the illegality of consideration"; and then he adds: "Had the bond been assigned before it was due, the assignee for valuable consideration, (499) and without notice, could have maintained an action to enforce payment. This is settled. *Henderson v. Shannon,* 12 N. C., 147." Numerous instances of this use of the word "void" could easily be cited from our reports. *Justice Reade* makes similar use of the word in *Coor v. Spicer,* 65 N. C., 401. What he there says may well be quoted here: "Except as otherwise provided by statute, a negotiable instrument *void* as between the original parties, by reason of any illegality in the consideration, was nevertheless good in the hands of an indorsee for value and without notice."

If it be said that the effect of the provision of the Act of 1876-77 is to make *void* all contracts entered into contrary to its provisions, it is to be replied that, in the interest of commerce and trade, *bona fide* purchasers of commercial paper are favorites of the law of every enlightened nation, and, at this day at least, it is not allowable to destroy, *by an inference,* negotiable instruments in the hands of such purchasers. The rule is, as I understand, that if the maker of a negotiable note contests the right of one who has acquired it by indorsement, for value, before maturity, and without notice of any defense, to recover of him the amount of the note, he must be able to show a statute that, *in totidem verbis,* declares the note to be *void,* or one that makes the contract *illegal,* and, expressly or by *necessary* implication, declares that this *illegality*

shall avoid the contract and all securities given in fulfillment of such illegal contract, into whosesoever hands they may come, and thus render them unforcible in the courts. Story Prom. Notes, sec. 192; *Converse v. Foster,* 32 Vt., 828. In sections 807 and 808 of Daniel Neg. Inst., it is said that "in many localities negotiable instruments executed upon gaming or usurious considerations are upon the same footing as those executed for other illegal considerations—that is, void between the parties, but valid in the hands of a *bona fide* holder"; . . . and that "where the instrument was executed upon an illegal consideration, especially if illegal by statute (but not absolutely avoiding (500) the instrument), it throws upon the holder the burden of proving *bona fide* ownership for value, . . . and in all cases where the statute does not declare the instrument void, *bona fide* ownership for value being proven, the holder is entitled to recover." The reason of this rule is well stated in *Bank v. Prather,* 12 Ohio St. 497, as follows: "The cardinal principle of the commercial law which protects commercial paper, regular upon its face and negotiated before its maturity, cannot be otherwise vindicated; and this is of much more importance than that one who has received the benefits of the paper should be compelled to perform an engagement which he voluntarily made." In *Converse v. Foster, supra,* the rule, as I conceive it to be, is thus expressed by *Poland, J.*: "The English statute against usury and gaming not only impose a penalty for such illegal acts, but expressly declare that all notes, bills, bonds and other securities given for such illegal consideration shall be *utterly void.* All the cases that have been cited, and all that can be, so far as we know, both English and American, upon this subject, turn upon this very distinction and difference between the statutes. In those cases in which the Legislature has declared that the illegality of the contract or consideration shall make the security, whether bill or note, *void,* the defendant may insist on such illegality, though the plaintiff, or some other party between him and the defendant, took the bill or note *bona fide* and gave a valuable consideration for it. But, unless it has been so expressly declared by the Legislature, illegality of consideration will be no defense in an action at the suit of a *bona fide* holder for value without notice of the illegality." A recognition of the principle thus well expressed may be seen, I think, in the chapters of the Revised Code that relate to usury and gaming, and in the Act of 1874-75, above referred to.

In *Moore v. Woodward, supra,* the learned *Justice* who delivered the opinion says: "Under our present statute, while the (501) contract is valid as to the principal, a stipulation for usurious interest secured by a separate bond and mortgage therefor ought, *as between the parties at least,* on plea of the illegality, to bar the direct col-

lection of the same by an action therefor." In a former part of the opinion he had remarked that, under the provision of the Revised Code, an usurious contract was void, "in whosesoever hands it might come." His subsequent statement, quoted above, seems to indicate that he thought that contracts made in contravention of the provision of the present law, which he was discussing, were illegal and were void as between the parties, but being only illegal, were not void in whosesoever hands they might come—evidently having in mind the rule laid down by *Justice Rodman* in *Glenn v. Bank, supra.*

The Act of 1876-77 (The Code, sec. 3836), which we are construing, is, in all essential particulars, copied from the National Banking Act (Revised Statutes, sec. 5198). The words are almost identical. The forfeitures and penalties are the same. The Supreme Court of the United States has held, in *Oates v. Bank,* 100 U. S., 239, that that act "does not declare the contract under which the usurious interest is paid to be *void,*" and it is to be noted that this language is used by that Court in drawing a contrast between the act it was construing and the law of Maryland, which did declare all usurious contracts *void,* and therefore not enforceable even in the hands of *bona fide* indorsees. We therefore have an adjudication of the point under discussion from the highest court.

In conclusion, our statute does not expressly make void notes given for an usurious consideration. It is not a *necessary* inference from its provisions that the Legislature intended they should be so. I think, therefore, that, though the note here in suit is founded upon an illegal consideration, it is recoverable in the hands of a *bona fide* holder for value and without notice.

Cited: Bank v. McNair, 116 N. C., 554; *Meroney v. Loan Asso., ib.,* 889; *Smith v. Loan Asso.,* 119 N. C., 255; *Churchill v. Turnage,* 122 N. C., 432; *Faison v. Grandy,* 126 N. C., 830; *S. c.,* 128 N. C., 443; *Riley v. Sears,* 154 N. C., 517; *Elks v. Hemby,* 160 N. C., 22; *Owens v. Wright,* 161 N. C., 133, 142; *Whisnant v. Price,* 175 N. C., 614; *Ector v. Osborne,* 179 N. C., 674.

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(502)

G. W. WILLIAMS ET AL. v. J. R. JUSTICE ET AL.

While an arbitrator in a submission, under a rule of court, has a limited power to make amendments, it does not extend to the making of new parties, and when such are made without the consent of all parties the award will be set aside.

BURWELL, J., did not sit on the hearing of this case.

CREDITOR'S BILL referred, at Fall Term, 1892, of HAYWOOD, by consent, to W. B. Ferguson, an attorney of the court, as arbitrator.

The cause was heard at Spring Term, 1893, of said court, before *Graves, J.* Upon the plaintiff's motion to confirm the award and for judgment, the counsel for the defendants resisted the motion upon the ground that the arbitrator had no power to make E. P. Hyatt and F. T. Hyatt parties, he having objected at the time that it was allowed, and excepted thereto.

His Honor refused the plaintiffs' motion and set aside the award, from which ruling the plaintiffs appealed.

J. M. Moody for plaintiffs.
G. S. Ferguson for defendants.

PER CURIAM: While an arbitrator in a submission, under a rule of court, has a limited power to make amendments (Morse on Arb. and Award, 207), it does not extend to the making of new parties, and when such are made the award will be set aside, unless it appears that all parties consented. There are several defendants, and it appears that their attorney objected to the making of new parties. This, of course, must be taken as the objection of all of the defendants, and it is not insisted that more than one of them consented. As to this defendant (Chapman) he asked the court, in his answer, to hold that there was no cause of action stated in the complaint against him, and (503) prayed that, if the court held otherwise, the Hyatts should be made parties plaintiff. The arbitrator, over the objection of all the defendants, made the new parties upon the ground that the said defendant Chapman had asked for such an order, but this was not binding on the other defendants, and it must follow that his Honor was correct in his ruling.

Affirmed.

JULIA E. LYMAN ET AL. v. H. M. RAMSEUR ET AL.

Practice—Case on Appeal—Service.

1. Where there is no case on appeal settled by the judge, and it does not appear from the record that either the appellant's "case" or the "countercase" was served in time, or service thereof admitted, this Court will disregard both and affirm the judgment, unless error appears on the face of the record. If both had been served in time the appellee's countercase would be held as the case on appeal, since the appellant would be deemed to have acquiesced therein by not referring it to the judge to settle the case.

2. Where in a decree of confirmation of sale of land the purchase-money was directed to be paid into the clerk's office, and it was also provided that, upon the payment of said sum by the purchaser to the commissioner, the latter should execute to the former a good and sufficient deed, it is hypercritical to suggest that the purchaser is ordered to pay the purchase-money twice.

MOTION, made at March Term, 1893, of BUNCOMBE, before *Graves, J.*, to confirm the sale of the lands described in the pleadings, made by D. C. Waddell, as commissioner, who reported the purchase by W. M. Cocke, Jr., at $3,000.

The sale was confirmed and judgment rendered for $3,000 against Cocke, who, among other exceptions filed to the judgment thereon, objected as follows:

"3. For that the judgment contains inconsistent and repug-
(504) nant provisions, to wit, said Cocke is required by it to pay into the office of the clerk of the Superior Court by 15 April, 1893, the sum of $3,000, to be applied as by the judgment directed; and it it further adjudged that upon the payment to D. C. Waddell, commissioner, by William M. Cocke, Jr., the sum bid by him at said sale, to wit, the sum of $3,000, that the said D. C. Waddell, commissioner, shall execute and deliver to the said William M. Cocke, Jr., a good and sufficient deed of conveyance for the land so purchased by him at the said sale, and the said D. C. Waddell, commissioner, is hereby authorized and empowered so to do.

"Said Cocke cannot know how to obey these two inconsistent provisions of said judgment, unless he pays the sum of $6,000, $3,000 into the office of the clerk and $3,000 to D. C. Waddell, commissioner."

There was no demand for a judgment of $6,000 against said Cocke, and nothing in the report of the commissioner or in the record to warrant such judgment.

The facts with reference to the appeal are stated in the opinion of *Associate Justice Clark.*

Thomas A. Jones for plaintiff.
F. I. Osborne and Batchelor & Devereux for defendants.

CLARK, J. There is no case settled by the judge. There is before us simply the "case on appeal," prepared by appellant, and the "countercase" of the appellee. If it appeared that these had been served, or that service had been accepted within the time allowed by statute, the appellee's countercase would be held the case on appeal, since the appellant acquiesced in the same by not referring it to the judge to settle the case. *Owens v. Phelps,* 92 N. C., 231; *Jones v. Call,* 93 N. C., 170.

But it does not appear from the record that either case on appeal was served in time, and hence the court must disregard both, (505) unless such service in time is admitted. *Cummings v. Huffman, ante,* 267. As this is not admitted the judgment below must be affirmed, unless there is error upon the face of the record proper and the argument here was restricted to that point. Clark's Code (2 Ed.) 580, and cases there cited.

The only error upon the face of the record which is suggested on the argument, or which appears to us by inspection, is that there is a possible ambiguity or inconsistency in directing the $3,000 purchase-money to be paid into the clerk's office, and also directing that upon the payment of said sum by the purchaser to the commissioner, he shall execute to the purchaser a good and sufficient conveyance. It seems to us that the exception is hypercritical. There is but one $3,000 that is claimed. That was directed to be paid by the date mentioned in the judgment, and thereupon the commissioner was directed to convey the title.

No error.

Cited: Rosenthal v. Roberson, 114 N. C., 596; *Forte v. Boone, ib.,* 177; *McNeill v. R. R.,* 117 N. C., 644; *Roberts v. Partridge,* 118 N. C., 356.

WILLIAM REDMOND ET AL. v. J. A. MULLENAX.

Practice—Issues for the Jury—Discretion of Trial Judge—Defective Process, Amendment of —Blank Summons—Grant—Surveyor's Plat —Evidence—Exceptions to Charge.

1. The trial judge has power in the exercise of a sound discretion to settle the issues for the jury, and such exercise is not reviewable in this Court, unless the record shows that the form of the issues was such as to preclude the complaining party from having presented to the jury some view of the law arising out of the evidence.
2. Although a summons be informal in some respects, or even defective in failing to contain everything requisite under the statute, yet if it bears internal evidence of its official origin and of the purpose for which it was issued, its informality and defects may be cured by amendment; but where it is not signed or does not bear a seal or otherwise show its official character, it is nothing more than a *blank*, and a judge has no authority to permit to be amended.
3. The original plat of the survey required to be attached to a grant of land, when issued by the State, is made a part of the grant for the purpose of

indicating the shape and location of the boundary, and is evidence, though not conclusive, to be submitted to the jury as to the true shape and location of the land.

4. Only assignments of error made below and founded upon exceptions submitted in apt time will be considered in this Court.

(506) ACTION to recover land, tried before *McIver, J.*, and a jury, at Spring Term, 1893, of HENDERSON.

The plaintiffs claimed title under a grant from the State of North Carolina to one Tench Cox, dated 25 June, 1796, and *mesne* conveyances down to themselves.

The first call in the Tench Cox grant was: "Beginning at a poplar in the South Carolina boundary line, and runs north," etc. It was admitted that the poplar was the beginning corner. The last call but one was: "Thence south 106 chains to a stake in the South Carolina line." The last call: "Thence east with the South Carolina line to the beginning."

The defendant claimed title under a grant from the State to one Kuykendall, dated 2 February, 1882, and thence by *mesne* conveyances to himself.

The grant recited that the money to secure the same was paid into the State Treasury on 31 December, 1881.

The plaintiffs claimed that their southern boundary line was a direct line from the terminus of the last call but one, "south 106 chains to the beginning," which would include the land in controversy.

The defendant claimed that plaintiff's southern boundary line was a line running due east from a point on the line of 106 chains to the poplar, the beginning corner of the Cox grant, which would not include the land in controversy; that even if plaintiffs' contention as to boundary was correct, he had been in possession of said land under color of title for more than seven years prior to the commencement of this

(507) action.

The plaintiffs tendered the following issues:

"Are the plaintiffs the owners of and entitled to the possession of the land described in the complaint?"

"Where is the southern boundary of the plaintiff's grant, as described on the plat?"

"Has defendant had such possession of the land by him as to ripen his color of title into a perfect title?"

"Is defendant in the wrongful possession of any part of plaintiffs' land?"

"What damages are plaintiffs entitled to recover?"

The court submitted the following issues:

"1. Are the plaintiffs the owners and entitled to the possession of the land in controversy?" Answer: "No."

"2. Is the defendant in the unlawful possession of any part of said land?" Answer: "No."

"3. What damages are plaintiffs entitled to recover?" Answer: "None."

The plaintiffs excepted to the issues submitted.

The plaintiffs introduced in evidence certain Acts of the Legislature of North Carolina from 1803 to 1814, for the purpose of showing that the South Carolina line was not established, as contended, at the time of the issuing of the Cox grant in 1796. There was evidence tending to show that the land in controversy was west of the termination of the line of 1772. There was also evidence tending to show that the South Carolina line, as it was understood to exist at the time of issuing of plaintiffs' grant (Cox grant), was a line west from the poplar, to and beyond the line in plaintiffs' grant, and deeds running south 106 chains, being next to the last call in said grant.

The plaintiffs requested numerous special instructions to the jury, all of which were given by the court, except the following:

"If the plaintiffs on 15 January, 1889, applied to the clerk for a summons, and filed his prosecution bond, and the clerk issued (508) the summons, even without signing the same, and docketed the case in January, 1889, as shown by the record, this action of the plaintiffs would be sufficient to arrest the running of the statute."

This was refused by the court, because there was no evidence in support of the prayer asked, the evidence being that a blank summons was taken from the office of the clerk by Mr. Justice, agent for the plaintiff, which was taken to the office of Mr. Smith, one of the attorneys for the plaintiff, who filled out the summons and bond in his office; that the summons was never, in fact, issued or served. Plaintiffs excepted.

The clerk stated that he did not know when the entry on his dicket, "Issued 15 January, 1889," was made; that his custom was to make such entry when the summons issued. There was evidence that defendant left the State and went to South Carolina 16 January for the purpose, as he testified, of putting up tombstones to his child's grave; that he knew nothing about the suit until after his return.

The defendant asked the court to submit to the jury sundry special instructions, all of which were refused, except the following:

"The original plat in doubtful questions of boundary is evidence of the true shape of the land, and of the intent of the contracting parties as to the location of the lines, and such intent in such cases determines the true location." Plaintiffs excepted.

The defendant testified that he went into the possession of the land

in controversy on 8 January, 1879, and had been in the open and continuous possession since said time. There was no evidence to the contrary.

After the evidence was all in, the plaintiff moved that the clerk be allowed to sign the summons of 15 January, 1889, which motion
(509) was refused, upon the ground that the court had no authority to allow the same, it not being an amendment to the process.

Upon the question of location the court charged the jury that the rule is, if the beginning is admitted, or proved, and only courses and distances are given, the lines must be run by the course and distance, but if in addition to course and distance natural objects, marked trees, or lines of other tracts, are called for, these, when shown, will control, but if none such can be found then course and distance must control in fixing the boundary line or lines.

"Applying this rule you are instructed that if you find from the evidence that the last course of the Cox grant but one is the chestnut (144 on plat), the course and distance from that point south 106 chains to a stake in the South Carolina line will be controlled by that line as it was recognized and existed in 1776, if found; but if not found course and distance south 106 chains must control, and the southern boundary of the plaintiffs' land will be a direct line from that point to the beginning at the poplar, regardless of course and distance. If you find from the evidence and the instructions given that the Cox grant includes the land in controversy, you will respond 'Yes' to the first issue, unless you shall find the defendant has been in the continuous adverse possession for seven years under color of title before the commencement of this action, and if you so find, you will respond 'No' to the first issue. You are also instructed that this action commenced on 15 May, 1889, and defendant's color of title began 2 February, 1882."

Verdict and judgment for the defendant, and plaintiffs appealed.

Justice & Justice for plaintiffs.

T. R. Rickman and S. V. Pickens for defendant.

(510) AVERY, J. The court submitted the three issues usually adopted in actions for possession of land, and there was no error in the refusal to allow the jury to pass upon the more specific inquiries suggested by the plaintiffs. The court settled the issues in the exercise of a sound discretion, which, in that case, would be reviewable here only on condition that the party complaining could show from the record that the form of the issues was such as to preclude him from having presented to the jury some view of the law arising out of the evidence. *Denmark v. R. R.*, 107 N. C., 185; *Boyer v. Teague*, 106 N. C., 576;

Emery v. R. R., 102 N. C., 209; *Bonds v. Smith*, 106 N. C., 553. He has not attempted to show that he was deprived, by the ruling excepted to, of the opportunity to enlighten the jury upon the law applicable to the facts, and it is difficult to conceive how he could have done so. "An action is commenced as to each defendant when the summons is issued against him." The Code, sec. 161. Though the paper purporting to be a summons may be informal in some respects, or even defective in failing to contain all that, according to the requirements of the statute, should appear in it, its informality and defects may be cured by amendment if there is evidence upon its face that it has emanated from the proper office and was intended to bring the defendants into court to answer a complaint of the plaintiff. *Henderson v. Graham*, 84 N. C., 496; *Jackson v. McLain*, 90 N. C., 64. If the paper bear internal evidence of its official origin, and of the purpose for which it was issued, it comes within the definition of original process, and the broad discretion with which judges are clothed by section 273 of The Code may be freely exercised, subject only to the restriction that the alteration shall not disturb or impair any intervening rights of third parties. *Cheatham v. Cruise*, 81 N. C., 343; *Thomas v. Womack*, 64 N. C., 657. But, unless there is something upon the face of the paper which stamps upon it unmistakably an official character, it is not a defective summons, but no summons at all—no more than one of (511) the usual printed blanks kept by the clerks of the courts. The seal of the court is evidence throughout the State of the fact that a paper to which it is attached emanates from the tribunal to which it belongs, and though the clerk's signature is the prescribed evidence of genuineness as to all process to be served in the county in which his court is held, yet, if he issue to such county a summons in the usual form, attested by his official seal, but not subscribed, and containing his name only as printed in the body of the paper, the court has the power, after the defendant has entered an appearance, to amend by allowing the clerk to sign his name. *Henderson v. Graham, supra.* On the other hand, where a summons was issued to an adjacent county, signed by the clerk of the Superior Court, but not attested by the seal, and served upon the defendant, it was held that, after an appearance by virtue of such service, the court might, in its discretion, allow the seal to be attached, as it could also to final process upon which property had been sold in another county, and after it had been returned by the officer who sold. *Clark v. Hellen*, 23 N. C., 421; *Seawell v. Bank*, 14 N. C., 279; *Purcell v. McFarland*, 23 N. C., 34. The cases cited mark the extreme limit to which this Court has gone in recognizing as valid and perfecting by amendment defective process. We cannot extend the discretion of the court so as possibly to include a case where counsel obtains from the

clerk a form of summons, fills the blank in the body of it, and, after procuring the signatures of sureties on the undertaking indorsed thereon, places it in the hands of the sheriff without giving to the clerk the opportunity to pass upon the sufficiency of the security for costs, as the statute (The Code, sec. 211) requires him to do. The issuance of the summons in such a case is the act of the attorney—not of the clerk—and the paper is void as process and incurable by amendment. *Sheppard v. Lane,* 13 N. C., 148. Even between the parties, we cannot,
(512) by amendment, give such a paper relation back to the time when as an unsigned and unattested summons, it issued. The seal, though not required, or the signature, though not imparting authenticity in the county to which the summons issues, is evidence of the fact that the clerk has approved the prosecution bond or permitted the issuance on a proper affidavit; and when the defendant waives the informality or irregularity by appearing, the curative power of amendment may be invoked, but not when there is nothing upon the face of the paper to give assurance that it received the sanction of the clerk before it was delivered to the sheriff to be served. There was no error in the ruling of the judge that he had no authority to amend the summons. Here, however, the appearance was entered after the service of a second summons of later date and in proper form.

The surveyor is required by the statute (The Code, sec. 2769), upon receiving the entry and surveying its boundaries, to make two fair plats, one of which is to be attached to the grant when issued, and the other filed in the office of the Secretary of State. The original plat is thus made a part of the grant for the purpose of indicating the shape and location of the boundary, and is, of course, evidence, though not conclusive, to be submitted to the jury as to the true shape and location of the land. Even field notes of the original survey of the boundary line between North Carolina and Tennessee when properly identified, were declared admissible as tending to show the location of that line, when called for in a grant. *Dugger v. McKesson,* 100 N. C., 9.

Upon examining the record it does not appear that the plaintiffs excepted to the charge of the court on the question of the location of the boundary lines, on the ground that it was not sufficiently specific. The abstract propositions set forth in the record are correct statements of the general principles applicable in such cases, and in the absence of such exception, it does not appear that the charge did not embody more definite instructions directed to the facts in this case. The
(513) statement of the case on appeal does not purport to set forth the charge in full. We can only consider assignments of error made below and founded upon exceptions submitted in apt time. There is

No error.

Cited: Piercy v. Watson, 118 N. C., 978; *McBryde v. Welborn,* 119 N. C., 510; *Higdon v. Rice, ib.,* 631; *McNeely v. Laxton,* 149 N. C., 334; *Lumber Co. v. Hutton,* 152 N. C., 541, *Gunter v. Mfg. Co.,* 166 N. C., 167; *Petree v. Savage,* 121 N. C., 439; *Ins. Co. v. Woolen Mills,* 172 N. C., 536; *Miller v. Mateer, ib.,* 403; *Drennan v. Wilkes,* 179 N. C., 513.

R. B. LENOIR ET AL. v. VALLEY RIVER MINING COMPANY ET AL.

Ejectment—Tenants in Common—Written Agreement—Registration—Adverse Possession.

1. An instrument which is neither a conveyance of land nor a contract to convey, nor lease of land, but only an agreement for a division of the proceeds of sales thereafter to be made of land, and authority to one to take entire control and management of sales of land for the parties, is not required to be registered by the act of 1885 (ch. 147), and an objection to its admissibility as evidence on the ground that it was registered after the time prescribed by the said act of 1885 is untenable.
2. A party in possession of land as tenant in common with another cannot acquire title as to the interest of the other tenant in common by seven years adverse possession with color of title, since it requires twenty years of such possession to amount to an ouster of the cotenant. And it makes no difference whether the defendant in an action to recover possession of land is a rightful cotenant or not, for the plaintiff must show title against the world.
3. A tenant in common is not estopped by declarations of a cotenant against his interest without evidence of any authority of the cotenant to bind him.
4. Where plaintiffs, in an action to recover land, failed to establish title to the whole tract, but only showed that they were the owners of two-thirds, and did not show who was the owner of the one-third claimed by the defendant, so as to entitle them to a judgment in behalf of their cotenant if he should be some one other than defendant, the plaintiffs were entitled only to judgment for a two-thirds undivided interest in the land.

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

ACTION for the recovery of land, tried before *Hoke, J.,* and a (514) jury, at Spring Term, 1892, of CHEROKEE.

Plaintiff appealed. The case is sufficiently stated in the opinion.

W. W. Jones and T. F. Davidson for plaintiffs.
Edward McCrady and J. W. Cooper for defendants.

MACRAE, J. This case was here on appeal, and was held over for reargument at September Term, 1889 (104 N. C., 490). And at Febru-

ary Term, 1890, a new trial was granted, on the ground that his Honor had improperly excluded evidence offered by defendant tending to show color of title to an undivided one-third of the land in controversy, and possession thereunder for seven years. It comes up now upon the plaintiffs' appeal from a judgment that the plaintiffs are owners of only an undivided two-thirds of said land, and that they be let into possession of the same with the defendant, and that the plaintiffs pay costs.

On account, we presume, of delay in making up the case on appeal and the loss of the judge's notes, we regret to say that the interesting questions discussed on the argument are not very clearly presented in the case. According to the pleadings, the plaintiffs, about forty in number, aver that they are the owners and entitled to the possession of the land described in the complaint, and that defendant Jordan is in the wrongful possession thereof, and withholds the same from plaintiffs.

The defendant, the mining company, in answer, admits that defendant Jordan is in possession of said land as tenant of said mining company, but avers that his possession is not adverse to the plaintiffs.

(515) It avers that plaintiffs are the owners of an undivided share or part of said land, and that it, the said mining company, is the owner of an undivided one-third of the same, and that it was in possession as owner of said undivided interest for years before the plaintiffs acquired title to the other part thereof, and that for seventeen years there has been a joint possession of said land by plaintiffs and defendant, as tenants in common, and that defendant's possession has been in no way exclusive of plaintiffs'. It alleges further, in substance, that the plaintiffs, who had always admitted and recognized defendant's title to the undivided one-third of said land, have purchased a pretended title to the whole tract, and have taken a deed for the same to plaintiffs. The defendant demands judgment that it is entitled to sixteen forty-eights or one undivided third part of the premises described in the complaint, and to the joint possession of the same as cotenant with plaintiffs, and to the benefit of any deed or deeds, quitclaims, release or releases of any outstanding claims against said property, which may have been made to the plaintiffs or to any one or more of them since their cotenancy with this defendant.

The issues submitted by his Honor were—

"1. Are the plaintiffs the owners of the land sued for?"

"2. Are the defendants in the wrongful possession of such land?"

The plaintiffs offered in evidence—

"1. A grant from the State to S. W. Hyatt for the land in controversy, dated 20 May, 1853.

"2. A deed from R. H. Hyatt, the only heir-at-law, and Nancy A. Hyatt, the widow of S. W. Hyatt, to B. Y. McAden, 15 March, 1873,

by which they 'bargained, sold, transferred and quitclaimed unto the said Bartlett Y. McAden all their interest, right, claim and demand of and into' the land described in the complaint."

"3. A deed of the same character from B. Y. McAden to J. T. Lenoir, William Lenoir, Dr. B. B. Lenoir and Israel P. Lenoir, (516) 14 April, 1873."

"And the plaintiffs then introduced evidence to show that they had been in the actual occupation of the land in controversy, claiming the same adversely against the world since 14 April, 1873."

The defendant offered in evidence two deeds, by which it was made to appear that long prior to the execution of the deed from the widow and heir of S. W. Hyatt, the said S. W. Hyatt had conveyed to one A. J. Patton an undivided one-third of said land, on 6 June, 1855, and that in September, 1856, the coroner of Cherokee County had sold and conveyed under execution against said S. W. Hyatt, who was himself sheriff of Cherokee County, all of his interest in said land to A. J. Patton, and that in December, 1857, the sheriff of Cherokee, H. H. Davidson, had again sold and conveyed all the interest of said Hyatt in said land to Drury Weeks and John A. Robinson, thus showing that said heir-at-law and widow had no interest in said land at the time of the execution of their deed to McAden.

The defendant then offered in evidence many deeds showing conveyances through different parties and in different moieties from said Patton, Weeks and Robinson to the above-named Lenoirs. The connection of the other plaintiffs of record with the controversy is nowhere made to appear. We presume they are the heirs-at-law of the said Lenoirs. The defendant offered in support of its own title to an undivided third of said land a deed from W. N. Bilbo to the Valley River Mining Company, the defendant, purporting to convey said interest, dated 6 January, 1867.

The defendant then offered in evidence an agreement, dated 28 January, 1863, between W. N. Bilbo, A. O. Lyon and Drury Weeks, which was objected to by plaintiffs, "for the reason that the same had been registered after the time allowed by law," which objection was overruled by his Honor and plaintiffs excepted. The reason given (517) by his Honor for overruling the objection is, "the defendants, according to the evidence, being tenants in common, and no interfering interest having arisen."

We do not clearly apprehend the reasons above stated, but on examination of laws 1885, ch. 147, and of the "agreement" objected to, we hold that the instrument was neither a conveyance of land, nor contract to convey, nor lease of land, which by the terms of the aforesaid act, was required to be registered before 1 January, 1886. It is an agree-

ment between the parties for a division of the proceeds of sales thereafter to be made, and an authority or power to said Bilbo to take entire control and management of certain sales of lands and minerals for the parties. It is long and very obscurely expressed, and not necessary to be set forth in this opinion.

Two paper-writings attached to the above agreement, and described as receipts, were also offered in evidence by defendant, and objected to by plaintiffs upon the same ground as that of the objection to the said agreement; but we are of the opinion that they were not such instruments as were required by Laws 1885 to be registered.

Besides, the said agreement, with the two indorsements thereon, was not offered as a deed of conveyance constituting a link in defendant's chain of title to one-third of said land but as a declaration of said Patton, Weeks and Robinson to the effect that they were cotenants of said land. Such declarations might have been competent for the purpose of working an estoppel upon the persons making said declarations while in possession, and upon their privies; and it was the contention of defendant that plaintiffs derived their title to two-thirds of said land through Patton, and were bound by the said declarations; but in the view which we take of the case, as will be seen hereafter, we think they were immaterial and had no effect upon the event of the controversy.

(518) The defendants offered certain letters purporting to have been written by I. T. Lenoir in 1871, 1872 and 1873, for the purpose of showing the character of plaintiffs' possession. The other plaintiffs would not be estopped by declarations against interest of one of their cotenants without evidence of any power or authority in the person making such declarations to bind the others; but his Honor, after admitting the same, in effect, ruled them out when he declared them "immaterial, because plaintiffs failed to show possession sufficiently extensive or continuous to show ouster of defendants."

The reason is not clear to us, because it is stated in the case that "there was no evidence of any possession on the part of defendants until 1888, when Gus Jordan entered." But, as we shall show, it cannot affect the case to the prejudice of plaintiffs. "After the case was closed the court intimated and decided that the defendants had, by their deeds and the recitals in them, connected themselves with the common source of title, and that he would direct the jury on the evidence, if believed, to answer the first issue 'Yes, two undivided thirds,' and to the second issue 'No,' to which instructions the plaintiffs excepted."

We think that the response of the jury to the issues was right, although we do not clearly see from the evidence reported in the statement of the case, the foundation of the reasons given by his Honor for his instructions.

Plaintiffs must recover upon the strength of their own title, and not upon the weakness of defendant's. Conceding, for the time, that the deed from McAden to the Lenoirs for the whole tract would constitute color of title—though we are not unmindful of the able argument of defendant's counsel to the contrary—the evidence offered by defendants clearly showed that, at the time of the execution of the McAden deed, the plaintiffs were claiming title to an undivided two-thirds of said land by other deeds, as tenants in common with other parties, and were in possession under such claim. Can they then recover the (519) whole tract of defendants by seven years adverse possession under the McAden deed? A claim of title by adverse possession under color negatives the idea of a rightful title.

Plaintiffs, being in possession as tenants in common with others, could not acquire title as to the interest of the other tenants in common by seven years adverse possession. It requires twenty years of such possession to amount to an ouster of the cotenant. It makes no difference whether the defendant was the rightful cotenant or not, for the plaintiffs are to show this title *against the world* before they can recover the disputed one-third. Their title to the two-thirds is admitted.

The late *Chief Justice Merrimon,* in the opinion delivered by him in this case, 106 N. C., 473, says: "It was admitted by the defendant that the plaintiffs were part owners of the land. But this did not entitle them to be let into possession of the whole thereof as sole owners, or for themselves and others who might claim to be part owners as against defendant. As to the undivided one-third part claimed by it, the burden was on the plaintiffs to show title thereto in themselves, and, failing in this, the defendant having possession had the right to remain so, as tenant in common with the plaintiffs as part owners only."

In our opinion, that is the present status of the case. In discussing the rights of tenants in common among themselves, he further said: "The recovery of one such tenant is not generally a recovery of all of them, nor does such recovery entitle him to take possession for all."

In *Foster v. Hackett,* 112 N. C., 546, *Mr. Justice Avery* examined and discussed the question when one tenant in common can recover the whole tract for himself and his cotenants, and very clearly lays down the rule, citing many authorities: "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 (520) practice in ejectment applied to actions for the possession of land, recover the whole, though he claim sole seizen 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 hav-

ing a common interest, though it has never been determined in this State how far, if at all, in the action under the provision of the statute, the cotenants not actual parties would be concluded by the judgment." This is in accord with the opinion delivered by the same member of this Court in *Allen v. Sallinger,* 103 N. C., 14: "A plaintiff, showing title only to an undivided interest, may have judgment, without qualification, for the whole against one who has no title. . . . But the plaintiff who has proven title to one undivided seventh must, if he would have judgment for the whole, have shown on trial that the same evidence of title, or possession that established his own title, demonstrated the fact that others than defendant held, as cotenants, the other interest, and this action would inure to their benefit. But the burden is always on the plaintiff in such actions, and he must establish his right clearly to the judgment demanded, just as he is required to show title good against the world." *Overcash v. Kitchie,* 89 N. C., 384; *Yancey v. Greenlee,* 90 N. C., 317.

Applying these principles to the case as it is now before us, the verdict and judgment only establish that the plaintiffs are the owners and entitled to the possession of an undivided two-thirds of the land in controversy, and that the defendants do not wrongfully withhold possession thereof from plaintiffs.

The plaintiffs have failed to establish that they are the owners of the whole tract. They have not shown who are the owners of the other one-third claimed by defendant, so as to entitle them to a judgment in behalf of their cotenant, if he be some one other than defendant,
(521) and therefore they are only entitled to the judgment they had below, and which was not contested but admitted by defendant, that plaintiffs were entitled to that which they already have—a two-thirds undivided interest in the land.

In this view of the case, any errors, if such there were, as pointed out in the plaintiffs' exceptions, are harmless.

The judgment is

Affirmed.

Cited: Carson v. Carson, 122 N. C., 648; *Clark v. Benton,* 124 N. C., 200; *Morehead v. Hall,* 126 N. C., 216; *Allred v. Smith,* 135 N. C., 451.

J. C. PRITCHARD v. J. M. BAILEY.

Deed—Restraints upon Alienation—Deed of Trust—Intent of Grantor.

1. A provision in a deed that the grantee shall not sell the property during her life is repugnant to the grant and in contravention of the principle of public policy which forbids unreasonable restrictions upon the right of alienation.
2. Every part of an instrument must be considered in arriving at the intention, and where the language is susceptible of two constructions, the one less favorable to the grantor must be adopted; therefore,
3. Where a deed of trust was executed by a *feme covert* with the joinder of her husband conveying her land to secure the joint indebtedness of herself and husband, and empowering the trustee to sell the land in case of default in the payment of the debt, and the draftsman of the deed neglected to strike out of the printed form words to the effect that she joined in the deed for the purpose of releasing her dower and homestead: *Held*, that the true intent and meaning of the deed was that the *feme covert* conveyed the property in fee to the trustee.

This was an action on the part of the plaintiff for the recovery of the sum of $195, for purchase-money due and owing from the sale of a certain tract of land sold by the plaintiff, as trustee, to satisfy a certain note held by Mack Stadler & Co., of Cincinnati, Ohio, against S. D. Chambers and wife, S. M. Chambers, heard before *Graves,* (522) *J.*, at _____ Term of BUNCOMBE.

The following facts were submitted for the judgment of the court by agreement of plaintiff and defendant:

"On 26 February, 1890, S. D. Chambers and wife, S. M. Chambers, executed their joint note to Mack Stadler & Co., in the sum of $301.57, with interest at ____ per cent per annum, till paid, payable on or before 1 January, 1892. To secure the payment of the same they executed and delivered to the plaintiff J. C. Pritchard a deed of trust on a certain tract of land, empowering the said trustee, in case they should fail to fully pay and discharge said note, to advertise the lands therein conveyed, and sell the same to the highest bidder for cash, and apply the proceeds to the payment of said note, and pay any surplus to them; and upon such sale convey title to the purchaser. That after said note became due and payable, the said S. D. Chambers and S. M. Chambers failed, neglected and refused to pay said note or any part thereof. Thereupon, to wit, on 6 March, 1893, the said J. C. Pritchard, trustee, as aforesaid, after advertising the sale of said land, in accordance with the requirements and provision of said deed of trust, at the courthouse door, in the town of Marshall, offered said premises for sale at public auction to the high-

est bidder for cash for the purpose of satisfying said note, and the said J. M. Bailey, defendant above-named, became the last and highest bidder. He was so declared by the auctioneer. Immediately thereafter a demand was made on the said Bailey by plaintiff for the sum bid by him, to wit, the sum of $195. The said defendant refused to pay the same, alleging as a reason therefor, that the said J. C. Pritchard had no power to execute a deed in fee simple to the defendant. It is agreed that at the date of the execution of said deed of trust that the said S. M. Chambers was the owner of said premises by virtue of a deed executed to her by her father, Daniel Payne.

"It is also insisted by the defendant that the said S. M. Cham-
(523) bers never conveyed a title in fee simple to the said J. C. Pritchard in said deed of trust.

"It is agreed that should the court be of the opinion that plaintiff has the power under said deed of trust to execute to said J. M. Bailey a deed in fee simple for said premises upon the statement of facts, together with the inspection of said deed of trust, judgment shall be entered for said sum bid by defendant, together with costs, but if of a contrary opinion, he shall order a nonsuit."

The material part of the deed, dated 10 June, 1882, from Daniel Payne to Sarah M. Chambers was as follows:

"To have and to hold the aforesaid tract and all the privileges and appurtenances thereto belonging, to the said Sarah M. Chambers and heirs and assigns forever, to her only use and behoof; not to be sold during the life of said Sarah M. Chambers, then to belong to her heirs; and the said Daniel Payne covenants that he is seized of said premises in fee and has right to convey the same in fee simple; that the same are free from all encumbrances, and that he will warrant and defend the said title to the same against the claims of all persons whatsoever."

The material parts of the deed of trust from Chambers and wife to the plaintiff Pritchard were as follows:

"Witnesseth, for that whereas, the said S. D. Chambers and wife, Sarah M. Chambers, are indebted to the said Mack Stadler & Co., in the sum of $301.50, for which the said S. D. Chambers and wife, Sarah M., has executed and delivered to said Mack Stadler & Co., as aforesaid, his bond with even date of this deed in said sum of $301.57, payable on 1 January, 1892, with interest thereon from date, until paid, at the rate of 8 per centum per annum, payable annually on 1 January and January hereafter, and it has been agreed that the payment of said debt shall be secured by the conveyance of the land hereinafter described.

"Now, therefore, in consideration of the premises, and for the
(524) purpose aforesaid, and for the sum of one dollar to the parties of the first part paid by the party of the second part aforesaid,

said S. D. Chambers and wife, Sarah M. Chambers (the latter becoming a party to this deed to convey and pass all right of dower and homestead in said land and bar her claim thereto), have bargained, sold, given, granted and conveyed, and by these presents do give, grant, bargain, sell and convey to said J. C. Pritchard and his heirs and assigns, a certain tract of land lying and being in Madison County aforesaid, and more particularly described and defined as follows" (here follows the description, *habendum,* power of sale in case of default in payment of the debt, general warranty, etc.)

His Honor adjudged as follows:

"That the clause, 'not to be sold during the life of Sarah M. Chambers,' in the deed of Daniel Payne to Sarah Malinda Chambers, of 10 June, 1882, as appears by the case agreed, is repugnant to the estate conveyed by said deed, an unlawful restraint upon the power and rights of alienation and void, and that said deed is a conveyance of the fee simple, without lawful condition or qualification; and that the clause in the deed of trust from S. D. Chambers and Sarah M. Chambers to J. C. Pritchard, of 26 February, 1890, as appears by the case agreed, namely, the latter (meaning the said Sarah M. Chambers) became a party to this deed to convey and pass all right of dower and homestead in said land and bar her claim thereto,' does not have the effect to prevent the fee simple interest or estate of the said Sarah M. Chambers from passing to and becoming vested in the said J. C. Pritchard, but that the said J. C. Pritchard by said deed of trust became seized of the lands therein described in fee simple, and had a right to sell and convey the same under the power and in the manner in said deed provided, and to make to the purchaser a valid title in fee to said land.

"It is adjudged, that the contract between the plaintiff and defendant mentioned and described in the case agreed is a valid (525) and binding contract, and that the same be in all things specifically performed; and that the plaintiff execute and deliver to the defendant a good and sufficient conveyance in fee with proper covenants and in the usual form. And it is further adjudged, that the defendant upon the delivering or tender of said conveyance do pay to the plaintiff $195, with interest thereon from this date." Defendants appealed.

Charles A. Webb for plaintiff.
No counsel contra.

SHEPHERD, C. J. The deed from Daniel Payne to Sarah M. Chambers, executed in 1882, conferred upon her an estate in fee simple, and, under the doctrine declared in *Hardy v. Galloway,* 111 N. C., 519, and the authorities therein cited, the provision that she should not sell the

property during her life was repugnant to the grant and in contravention of the principle of public policy which forbids the imposition of unreasonable restrictions upon the right of alienaton. The property not having been conveyed in trust, but directly, to Mrs. Chambers, she acquired the legal title; and as she had the legal capacity to convey, with the consent of her husband, the only question remaining to be considered is whether the deed from herself and husband did actually convey to the trustee a fee simple estate in the land in controversy.

The indebtedness secured in said trust was, so far as we are informed, the joint indebtedness of herself and husband, and the recital shows that the sole object of the conveyance was to secure the payment of the same. The conveyance is in fee with a warranty that the parties of the first part are seized in fee, and the trustee is directed, in case of default, to sell the land at public auction and convey title to the purchaser —the surplus, after paying the indebtedness and expenses, to be paid to the parties of the first part. The husband having no title to the property, it is manifest that not only the whole purpose of the deed,
(526) but also its operative words, will be entirely defeated if the joinder of Mrs. Chambers was simply for the purpose of releasing the right of dower and homestead in the land.

It is a cardinal rule in the interpretation of writings that they shall, if possible, be so interpreted, *ut res magis valeat quam pereat,* so that they shall have some effect rather than none, and that such a meaning shall be given to them as may carry out and most fully effectuate the intention of the parties. Broom's Max., 413. Every part of the instrument must be considered in arriving at the intention, and it should be kept in mind that where the language is susceptible of two constructions, the one less favorable to the grantor is to be adopted. It is also a well-settled principle that, unless a contrary intent is manifest, "a deed must be construed in all its parts with respect to the actual, rightful state of the property at the time at which the deed is executed." 2 Devlin Deeds, 848-851.

Applying these rules to the case before us, we are entirely satisfied that Mrs. Chambers intended to convey her interest in the said land. It was her property, and the printed words (which it is agreed the draftsman neglected to strike out of the form) to the effect that she joined in the deed for the purpose of releasing her dower and homestead, when she could, by no possibility, have had any such interests, are wholly inconsistent with her intention, as indicated by the entire scope and meaning of the instrument. As we have said, she alone had the title, and she joined in the deed as a conveying party for the declared purpose of securing the indebtedness. There was no dower or homestead

interest to be released, and if the printed words are to control, there is nothing upon which the deed can operate.

We think his Honor was correct in holding that the true intent and meaning of the deed was that Mrs. Chambers conveyed the property in fee to the trustee.

Affirmed.

Cited: Helms v. Austin, 116 N. C., 753; *Latimer v. Waddell,* 119 N. C., 378; *Wool v. Fleetwood,* 136 N. C., 465; *Schwren v. Falls,* 170 N. C., 251; *Lee v. Oates,* 171 N. C., 722; *Brooks v. Griffin,* 177 N. C., 8.

(527)

A. E. WALKER v. MOULTON MOSES.

Deed—Description—Adverse Possession—Divesting Title of State—Color of Title.

1. A description of land in a deed as "the tract left me by my late grandfather, M. P., adjoining the lands of H. and S. and others, containing 180 acres," suggesting, as it does, the possibility of identifying it by extrinsic proof of the fact that the ancestor had left it, that it adjoined the lands of the persons named, etc., is not void for uncertainty.
2. The State is deemed to have surrendered its right where it permits an adverse occupation of land under colorable title without interruption for twenty-one years, and a title vests in the occupant which can only be divested by a subsequent adverse possession by another till his right in turn ripens in the same way.
3. When title is shown out of the State by adverse possession, one who thereafter acquires title under a sheriff's deed and holds possession thereunder for seven years has good title against one who subsequently obtained a grant from the State.

ACTION for the recovery of land, commenced on 3 August, 1891, and tried at Fall Term, 1893, of BURKE, before *Boykin, J.,* and a jury.

The plaintiff introduced a grant to Nancy A. Walker for the land described in the complaint, dated 5 June, 1884. There was evidence of possession under the grant only until the spring of 1885.

The defendant introduced a deed from Michael Pearson to Hansen P. Satterwhite, dated 4 May, 1841, to which plaintiff objected, on the ground that the description was too indefinite to be made certain by parol testimony, and that the deed could not be relied on as color. The objection was overruled, and plaintiff excepted.

The description was as follows: "A certain tract or parcel of land in the county of Burke and State of North Carolina, on the waters of Silver Creek, adjoining the lands of Andrew Hemphill, H. B.
(528) Satterwhite and others, containing 180 acres, more or less, it being the land left me by my late grandfather Michael Pearson, and bounded as follows: beginning on a . . . together with all the woods, waters, mines," etc.

The defendant also introduced a deed from Alex. Duckworth, sheriff of Burke County, to John H. Pearson, dated 26 January, 1870, reciting a sale of the land on 25 August, 1854, under execution against the heirs of Hansen P. Satterwhite, at which sale John H. Pearson had bought.

It was admitted that defendant, or those under whom he claimed, had a complete chain of title from the sheriff's deed of 1870 down to the beginning of the action, except for the interruption by the issuance of the grant to plaintiff.

It was also admitted that all of the deeds introduced by defendant covered the land in dispute, except the deed of 1841.

There was evidence that the land had been in the uninterrupted possession of Michael Pearson and his ancestors for about thirty years prior to the deed of 1841, and of Satterwhite and his heirs down to the sheriff's sale in 1854, and of the defendant and those under whom he claims from the sale to the trial of the action, excepting as to a part of the land, which was occupied by plaintiff under the grant of 1884 for a few months.

The issues submitted were:

"1. Is the plaintiff the owner of the land described in the complaint?"

"2. Does the defendant unlawfully withhold the possession thereof from the plaintiff?"

His Honor charged the jury, among other things, that the plaintiff had made out a *prima facie* case, and would be entitled to have them answer the issues "Yes," if the jury believed the plaintiff's evidence, unless the defendant had shown title in himself or those under whom he claimed as tenant; that defendant could not rely on the deed of
(529) 1870 and twenty-one years' possession thereunder prior to the bringing of this action to ripen title as against the plaintiff, for the reason that he had not had possession under said deed for twenty-one years prior to the plaintiff's grant, but it being admitted that all of the deeds of defendant or those under whom he claimed covered the land in dispute, except the deed of 1841, and that defendant or those under whom he claimed had a complete chain of title from the deed of 1870 down to defendant; therefore, if the deed of 1841 covered the land in dispute, and the defendant and those under whom he claimed had had actual possession of the land covered by the deed, or of any part thereof, from the

date of the deed to the beginning of the action, under known and visible boundaries, for twenty-one years, there being no other person in the actual possession of any part thereof, such possession, even of a part, would be possession of the whole, and defendant would be entitled to have them answer the first issue "No," and if they so answered, they need not answer the second issue.

The jury answered the first issue "No."

After verdict the plaintiff moved for a new trial, for error in the charge so far as the same related to possession by the defendant and those under whom he claimed under the deed from Michael Pearson to H. P. Satterwhite, and so far as said instruction held said deed to be color of title. Motion refused, and after judgment for defendant, plaintiff appealed.

S. J. Ervin and J. T. Perkins for plaintiff.
Isaac T. Avery for defendant.

AVERY, J. The description of the land conveyed in a deed as the tract "left me by my late grandfather Michael Pearson," and as "adjoining the lands of Andrew Hemphill, H. B. Satterwhite and others, containing 180 acres, more or less," suggests upon its face the possibility of identifying it by extrinsic proof of the fact that the ancestor (530) named had left it, and that it adjoined lands of the persons mentioned, and possibly the additional circumstance that it corresponded in size. *Massey v. Belisle,* 24 N. C., 170; *Blow v. Vaughan,* 105 N. C., 198. The description is not therefore void for uncertainty, and the exception to the ruling that the boundaries could be located by parol proof is not well taken.

The only remaining exception was to the instruction that the deed executed by Michael Pearson to Satterwhite in 1841 was color of title. There being no exception to the sufficiency or competency of testimony offered to fit the description to the *locus in quo,* we must assume that the necessary extrinsic proof was offered to locate the boundaries of that tract, so as to include the land in controversy. The undisputed testimony tended to show that the land covered by that deed (there being no question raised as to its actual identification by the evidence offered, if parol proof was competent for that purpose) had been in the possession of the grantee Satterwhite and his heirs for more than twenty-one years from its execution, in 1841, till John H. Pearson took possession, in 1854, and until title was made to Pearson, in 1870, if that deed did not relate to the sale. If it did relate back, twenty-one years elapsed after Pearson's possession began. There was no error in instructing the jury that such a possession would divest the title of the State and vest it in the

heirs of Satterwhite or of Pearson. *Mobley v. Griffin,* 104 N. C., 112. The State is deemed to have surrendered its right where it permits such an occupation without interruption for twenty-one years, and a title vests in the occupant which can only be divested by a subsequent adverse possession by another till his right in turn ripens in the same way. *Christianbury v. King,* 85 N. C., 229; *Avent v. Arrington,* 105 N. C., 377. The first duty incumbent on one who essays to show title good against the world is to prove that the State has conveyed the land
(531) in controversy to some person, or that, by reason of continuous occupation by such claimant, or those through whom he deraigns title for the stautory period, "the State will not sue" for trespass or prefer any claim to the profits. The Code, sec. 139. If the defendant failed to connect himself with the possession of Satterwhite or his heirs, it was, nevertheless, admitted that he had shown a connected chain of title and continuous possession in himself and those through whom he claimed from 26 January, 1870, the date of the sheriff's deed to John Pearson, to 3 August, 1891. Having shown that the interest of the State had passed to the heirs of Satterwhite, it was then sufficient as against them to prove a subsequent adverse possession for seven years under color of title in those under whom the defendant claims, in order, in turn, to divest the right of said heirs and transfer it to the defendant. Therefore, by the occupation of Pearson and his devisees under the sheriff's deed and his will, an indefeasible title passed to them at the end of seven years from 26 January, 1870, which, it was admitted, was transmitted to the landlord of the defendant. The issuance of a grant by the State in 1884 for any portion of the land covered by the sheriff's deed could not impair the title of those under whom the defendant claims, which had ripened so as to include all of the land within the limits of the deed to Pearson. *McLean v. Smith,* 106 N. C., 172. There was no evidence of an occupation by the plaintiff under his grant, except that by his tenant, Satterwhite, which continued only for a short time after the date of the deed (June, 1884), till the spring of 1885, when it was abandoned, and that was insufficient to impair the title acquired under the sheriff's deed.

The plaintiff had no cause to complain of the instruction that the issuing of the grant was such an interruption as arrested the running of the statute [The Code, sec. 139 (2)] in favor of the defendant by virtue of the possession under the sheriff's deed and subsequent conveyances.

It is needless to discuss the question whether the sheriff's deed
(532) related back from its date in 1870 to the sale in 1854, so as to make the possession of Pearson, the purchaser, which began immediately after the sale, adverse to the claim of the heirs of Satterwhite (the grantee in the former deed), who surrendered the possssion to Pear-

son and would have been estopped from denying his title had he caused the sheriff's deed to be executed immediately after the sale. If Pearson entered under the Satterwhite heirs, his possession from 1854 to 1870 was but a prolongation of theirs, by which they had already acquired title. If he held adversely, he thereby extended the benefit of his own occupation backward, without benefit to himself, since, by holding for seven years under color, after 26 January, 1870, he acquired the title theretofore vested in the Satterwhite heirs, even though he had held under, not adversely to them, till the execution of the sheriff's deed. For the reasons given, the judgment must be

Affirmed.

L. L. JENKINS, CASHIER, ETC., v. L. A. H. WILKINSON ET AL.

Assignment of Mortgage by Delivery—Collateral Security.

1. A note may be transferred by delivery and without indorsement, the transferee becoming the equitable owner thereof.
2. A note being the principal thing and the mortgage securing it the incident or accessory, the transfer of the note carries with it the security without any formal assignment or delivery or mention, even, of the latter.
3. Although an action on a note be barred by the statute, the lien created by the mortgage given to secure it is not impaired by the running of the statute of limitations on the debt.
4. Where a note was made payable to "J., cashier," and collateral security delivered to him, he being a member and cashier of the firm of "C. & J.," the owners of the debt, an action for the foreclosure of the mortgage security was properly brought in the name of the cashier, he being the holder of the collateral as trustee for the firm.

ACTION for the foreclosure of a mortgage given to plaintiff as collateral security by the defendant M. A. Wilkinson, before (533) *Armfield, J.*, at Spring Term, 1893, of LINCOLN.

The record shows that this action was brought on 20 June, 1891.

It was in evidence that on 5 January, 1888, the defendant L. A. H. Wilkinson executed a note to the plaintiff in the sum of $800, bearing interest after maturity, and that M. A. Wilkinson indorsed the said note and became surety therefor.

It was in evidence that at the time the $800 note was executed, and at the time M. A. Wilkinson indorsed it, the defendant M. A. Wilkinson placed in the hands of the plaintiff the $900 note and mortgage set

forth in the pleadings, as collateral security for the payment of the $800 note, and thereupon the plaintiff paid over to the defendant L. A. H. Wilkinson the money.

1. When the plaintiff offered to show that the $900 note and mortgage were placed in his hands as collateral security, and was a part of the same transaction as the execution of the $800 note, the defendants excepted. Exception overruled. Evidence allowed by the court.

2. It was in evidence that the defendant L. A. H. Wilkinson was sued on the $800 note at the Fall Term, 1890, of Gaston Court, and that judgment was obtained for $750 and costs, which said judgment has never been paid.

3. As will appear in the pleadings, the $900 note and mortgage placed by M. A. Wilkinson as collateral in the hands of the plaintiff, was executed by L. A. H. Wilkinson and wife, the principals in the $800 note.

4. It was in evidence that the $800 note belonged to a banking firm by the name of Craig & Jenkins, and that the plaintiff, to whom the note was made payable, was cashier of the firm at that time.

5. It was in evidence that no suit had been brought against
(534) M. A. Wilkinson, except the present, and that no relief has been asked as against him, except the foreclosure of this mortgage, as the $900 note and mortgage in question were executed to M. A. Wilkinson by L. A. H. Wilkinson and wife.

6. It was in evidence that there was no written transfer of the $900 note and mortgage to plaintiff, but at the time it was given him it was stated that it should be held as collateral security for the payment of the $800 note given by L. A. H. Wilkinson, and indorsed by M. A. Wilkinson at the same time.

His Honor submitted the following issues to the jury, to wit:

"1. Did L. A. H. Wilkinson and Nannie Wilkinson make and deliver to M. A. Wilkinson the $900 note and mortgage described in complaint? Answer: 'Yes.'

"2. Did M. A. Wilkinson deliver the $900 note and mortgage to the plaintiff to hold as collateral security for the payment of the $800 note on which judgment was obtained? Answer: 'Yes.'

"3. Is plaintiff's action barred by statute of limitations? Answer: 'No.'"

The defendants tendered the following issues, which were not submitted to the jury by the court, to which defendants except:

"1. To whom was the money loaned?

"2. Is this action barred by the statute of limitations as to the indorsement on the note given by L. A. H. Wilkinson?

"3. Was there any writing passed between M. A. Wilkinson at the time of this loan as to the note and mortgage?"

Defendants contend that, inasmuch as there was no written assignment of the note and mortgage to plaintiff nor any stipulation in said mortgage that it was made to secure the note to plaintiff, the plaintiff could not be subrogated to the rights of defendant M. A. Wilkinson; that a mere verbal transfer from the mortgagee to the plaintiff, and no judgment had against the mortgagee, would not uthorize the (535) plaintiff to subrogate the plaintiff to the rights of the mortgagee; that inasmuch as the note indorsed by the defendant M. A. Wilkinson is barred by the statute of limitations, and the plaintiff has no claim against the mortgagee M. A. Wilkinson, he has no right to be subrogated to the rights of the mortgagee aforesaid. The defendants further contend that the plaintiff could not maintain this suit, because the note given by L. A. H. Wilkinson and indorsed by M. A. Wilkinson belonged to the firm of Craig & Jenkins and not to the plaintiff.

Judgment for plaintiff. Motion for new trial by defendants. Motion overruled. Defendants appealed.

Jones & Tillett for plaintiff.
M. L. McCorkle and L. L. Witherspoon for defendants.

MACRAE, J. The first exception is to evidence offered by plaintiff to prove that the $900 note and mortgage were delivered to plaintiff as collateral security for the other note. We suppose that the ground of the objection by defendants was a contention on their part that the note and mortgage could not be transferred by delivery and without writing.

A note may be transferred by delivery and without indorsement. The Code, sec. 177. Such transfer does not pass the legal title according to the law merchant, but the transferee is the equitable assignee thereof. *Miller v. Tharel,* 75 N. C., 148; *Jackson v. Love,* 82 N. C., 405; *Kiff v. Weaver,* 94 N. C., 274; *Carpenter v. Tucker,* 98 N. C., 316.

The debt is the principal thing. The mortgage to secure it is the incident or accessory. "Equity puts the principal and accessory upon a footing of equality, and gives to the assignee of the evidence of the debt the same rights in regard to both."

1. The transfer of the note carries with it the security without any formal assignment or delivery, or even mention of the latter. (536) *Carpenter v. Lorgan,* 16 Wall., 271. See also Colebrook Collateral Security, sec. 144, where a multitude of authorities are cited.

2. The issues submitted by his Honor seem to cover all the real contentions in the case. As to the first issue tendered by defendant, it made no difference to whom the money was loaned, if any money was loaned. The action was brought to foreclose a mortgage made to secure the payment of a note under seal, and transferred to the plaintiff, who, as we

shall see, was the proper party to bring the action. The question of the statute of limitations could be fairly presented in all its aspects under the third issue; and it seems that the note itself was barred. Indeed, although an action upon the note was barred by the statute, the lien created by the mortgage is not impaired in consequence of the running of the statute of limitations on the debt. Wood Limitations, sec. 222. Clark's Code, sec. 152 (3), and cases cited, p. 45.

3. The defendants contend that the plantiff could not maintain this suit, because the note given by L. A. H. Wilkinson and indorsed by M. A. Wilkinson belonged to the firm of Craig & Jenkins, and not to the plaintiff. It appears to have been made to the plaintiff L. L. Jenkins, Cashier. It is found that plaintiff was cashier of the banking firm for whose benefit the note was given and the collateral transferred. He was the holder of the collateral as trustee for the firm, and the action was properly brought in his name. The Code, sec. 179.

No error.

Cited: Taylor v. Hunt, 118 N. C., 172; *Hedrick v. Byerly,* 119 N. C., 422; *Bresee v. Crumpton,* 121 N. C., 123; *Menzel v. Hinton,* 132 N. C., 663; *Tyson v. Joyner,* 139 N. C., 73; *Martin v. Mask,* 158 N. C., 443.

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(537)

MARY E. FERGUSON v. SAMUEL C. WRIGHT ET AL.

Execution Sale Without Allotting Homestead—Residence—Evidence—Color of Title—Adverse Possession—Ouster—Tenants in Common.

1. A sale of land under execution on a judgment rendered against a resident of this State on a debt contracted since 1868 is void as to the defendant in the execution, unless a homestead was allotted him then, or unless he had a homestead already allotted in other lands.
2. Hearsay testimony as to the residence of a person is inadmissible.
3. Where it is shown that a person was once a resident of this State the presumption is that he continues to be so, and the burden of proving a change of domicile is upon him who relies upon such change.
4. A void deed by a sheriff is not color of title.
5. Where an occupant of land has entered and holds under title derived mediately or immediately through conveyances from a portion of the tenants in common, to whom the land had passed by descent or purchase, although professing to convey the whole interest in the land, a possession for less than twenty years will not raise the presumption that the cotenant who did not join in the deed has been evicted, for one tenant in common cannot thus make the possession adverse to his cotenant.
6. Registration of a deed does not have the effect of an ouster.

FERGUSON *v.* WRIGHT.

ACTION by the plaintiff to be let into possession as owner of one-eighth interest of a certain tract of land in Cherokee County, tried before *Graves, J.*, and a jury, at Spring Term, 1893, of CHEROKEE.

Robert Ferguson died intestate in 185__, leaving surviving him children and heirs-at-law—Samuel C. Ferguson, George Ferguson and others—to whom the land descended. There was evidence tending to show that Samuel C. Ferguson died in August, 1870. There was evidence tending to show that S. C. Ferguson was married, and that plaintiff was his only child. Upon issues submitted to and found by the jury, to which there were no exceptions taken, either to the evidence or the charge of the court, the jury found that Samuel C. Ferguson and Jennie Morgan were married in 1865, and the plaintiff is the only (538) issue of said marriage, and she was born in 1866. There was evidence tending to show that Samuel C. Ferguson and the said Jennie separated in 1866, the said Jennie returning to her parents where she has since resided; and there was evidence tending to show that, after the said Jennie went to her mother's, S. C. Ferguson went there to see her at times.

The defendants offered and read in evidence a deed from the sheriff of Cherokee County, one C. C. Vest, conveying to M. C. King said Samuel C. Ferguson's interest in the land, dated 4 October, 1869, and registered in Cherokee County __ day of December, 1869, and execution issuing from the Superior Court of Cherokee County on a judgment in favor of F. P. Axley against said Samuel C. Ferguson. The judgment was taken on 11 August, 1869, before a justice of the peace, and docketed in the Superior Court on 14 August, 1869, and it appeared from the record that the summons was served personally in Cherokee on Samuel C. Ferguson on that day. There was evidence tending to show that on 25 April, 1870, the said King sold and conveyed the interest of Samuel C. Ferguson, which he acquired by the sheriff's deed, to Thomas M. Ferguson. Said deed was registered in April, 1870. King testified that he bought the land for the benefit of S. C. Ferguson, and conveyed to his brother with that understanding. There was evidence tending to show that Thomas M. Ferguson and the heirs-at-law, other than Samuel C. Ferguson, of Robert Ferguson, on 14 May, 1870, sold and conveyed the entire tract of land to M. L. Brittain, who immediately took sole possession under their deed, which was duly registered on 17 May, 1870, and the said M. L. Brittain and the defendants claiming under him have been in the sole possession of said tract of land continuously up to this time. There was no evidence that (539) plaintiff or his brothers had made any demand to be let in, or that there was any actual denial of plaintiff's right, except such as arose from defendants' claim and occupation. The defendants offered evidence tend-

ing to show that Samuel C. Ferguson was a nonresident of the State at the time of the execution sale, and there was evidence tending to show that he was a resident.

Witnesses for the defendants testified that Samuel C. Ferguson was raised on the lands in controversy, and made it his home until 1866, at which time he went off, and from that time until his death the witnesses did not know, of their own knowledge, the place of his residence, during which year he and his wife separated, the latter returning to the home of her parents and being visited occasionally by her husband; that shortly thereafter Samuel went away, and witnesses had not seen him since, but that it was generally understood in the neighborhood that he died in the State of Georgia.

The defendants proposed to prove by these witnesses that it was generally reported in the neighborhood that said Samuel was not a resident of this State, but was residing in the State of Georgia, and continued to reside there from 1866 to the day of his death. This was objected to by the plaintiff and excluded by the court, and defendants excepted.

The defendants asked the court to charge the jury, among other charges given, that "the sheriff's deed to M. C. King is color of title, and, although M. C. King did not go upon the land, if the sheriff's deed was registered in December, 1869, the registration of said deed was notice of the claim of King, and if King conveyed to T. M. Ferguson on 25 April, 1870, and said T. M. Ferguson conveyed to M. L. Brittain on 4 May, 1870, and Brittain went into possession of the land under said deed, and he and those claiming under him have been in the open, notorious (540) possession of said land for more than seven years before the commencement of this action, claiming the whole estate therein, the plaintiff is not the owner." This was refused by the court, and defendants excepted.

In response to this prayer the court said if the deed is valid it was sufficient to pass and did pass the title to the purchaser, but if it was void it was not color of title.

The defendants asked the court to further charge that if M. L. Brittain entered into the open adverse possession of the land, claiming the same under the deed of the sheriff to King, and from King to T. M. Ferguson, and from T. M. Ferguson to him, the statute began to run at the time of his taking possession, and the death of Samuel C. Ferguson would not stop the statute from running. This was refused by the court, and defendants excepted.

His Honor charged the jury that if Samuel C. Ferguson was a nonresident of the State at the time of the execution sale said Ferguson was not entitled to a homestead, but that the residence was a matter for the jury to determine from the testimony of witnesses, speaking of their own

knowledge, that Samuel C. Ferguson was not a resident of the State, or, speaking of their own knowledge, that he was a resident of another State or place outside of this State; that the jury should take into consideration all the facts and circumstances fixing his place of residence at the time of the execution sale; they cannot take into consideration mere hearsay or common reputation.

That Samuel C. Ferguson's residence was admitted to be in this State in 1866, and the law presumed that his residence continued to be in this State, unless such presumption has been rebutted. His Honor further instructed the jury that, if there was an actual ouster in the lifetime of Samuel C. Ferguson in May, 1870, and said Ferguson died in August, 1870, the statute would begin to run from the time of actual ouster, and the death of said Ferguson would not stop the running of the statute, but in this case there was no evidence of an actual (541) ouster.

That if Samuel C. Ferguson was a son of Robert Ferguson, on his death Samuel became a tenant in common with his brothers and sisters, and if they sold their interest such sale was not an ouster, and the possession of the purchasers would not be an ouster unless held exclusively for twenty years.

If Thomas Ferguson and others joined in the deed conveying their interest to Brittain, Brittain had a good title to that much of the land, and his entering upon the land was rightful and his possession was not necessarily adverse to the plaintiff's rights. Neither the plaintiff nor Samuel Ferguson could have brought an action against him to turn him out of the possession. Possession under color of title, in order to ripen into title must be adverse so as to expose him to an action of the plaintiff's ancestor; until there was an actual ouster, or a presumed ouster, which occurs after twenty years, the statute does not begin to run.

That as the sale was made in 1869, and the statute did not begin to run until January, 1870, and the suit was brought in 1889, there was no presumption of an ouster, and as the sheriff's deed to King was a sale of the interest of one tenant in common, and that interest was conveyed by King to another tenant in common, who, in a joint deed with the remaining tenants in common, conveyed to Brittain, although he and they conveyed the entire estate, Brittain's possession under such deed was not adverse to the plaintiff's ancestor, and Brittain and those claiming under him could not avail themselves of the seven years statute.

His Honor instructed the jury that if Samuel Ferguson and the mother of the plaintiff were married, and the plaintiff was born in lawful wedlock, she would be the owner of a one-eighth interest in the land and entitled to be let into the possession, unless the sheriff's deed conveyed the title of Samuel C. Ferguson. "If Samuel C. Ferguson was

(542) a resident of the State at the time of the sheriff's sale, and no homestead was allotted and set apart to him, the sale was void and the sheriff's deed conveyed no title to King. If Samuel C. Ferguson was not a citizen of the State at the time of the sheriff's sale, although no homestead had been allotted to him, his interest in the land passed, and the plaintiff, being his heir, cannot recover."

1. The defendants assign error in the charge given, in that there was error in confining the jury in their deliberations upon the question of the residence of the said Samuel C. Ferguson to the testimony of the witnesses detailed to be within their own knowledge.

2. That the court erred in instructing the jury that the defendants' possession under the sheriff's deed was not adverse to Samuel C. Ferguson. That the court erred in instructing the jury that the defendants were not entitled to the benefit of the seven years exclusive adverse possession under the sheriff's deed.

3. For refusal to give the special instructions prayed for by defendants.

After a verdict for plaintiff, the defendants moved for a new trial for the errors assigned in the charge, and the refusal to give the instructions prayed for, and for the exclusion of the testimony offered by them, and appealed from the judgment for the plaintiff.

E. B. Norvell and C. M. Busbee for plaintiff.

G. S. Ferguson for defendants.

AVERY, J. If Samuel C. Ferguson was a resident of the State of North Carolina on 4 October, 1869, when his land was sold upon a justice's judgment, rendered on 11 August, 1869, and docketed in the Superior Court on 14 August, 1869, he was entitled to a homestead, and unless he had a homestead already allotted to him in other lands, the (543) sale of his interest in the land in controversy, under such execution, was null and void. It was conceded that no other land had been allotted to him. He resided in North Carolina in 1866, and the summons was served on him in the case wherein judgment was rendered, and execution and sale followed in the summer of 1869. We find positive and direct testimony tending to show these facts and nothing more bearing upon the question of his domicile, though it was stated in general terms that there was additional testimony offered for the defendants.

The court, upon objection, properly excluded the testimony offered that Samuel C. Ferguson was generally reputed in his family, or in the neighborhood in which he lived in 1866, to have removed to and become a resident of the State of Georgia, where he died in August, 1870. Evi-

dence as to the residence of a person falls within the general rule that hearsay testimony is inadmissible, and no sufficient reason can be adduced for making it an exception like testimony as to pedigree. The other evidence upon the same question seems to have been fairly submitted to the jury. It being conceded that Ferguson resided in Cherokee County in 1866, the presumption was that he continued to make this State his home, and the jury were left to determine whether the evidence was sufficient to rebut it, since, in the absence of such proof, the law assumed that his domicile remained unchanged. 5 A. & E. Enc., 971; Lawson Presump. Ev., 172, rule 30.

The defendants offered no testimony tending to show that the judgment was recovered upon a debt created prior to 1868, and as we must assume that the sale was made to satisfy an obligation incurred after the ratification of the Constitution, and without allotting homestead, it was void. *Long v. Walker,* 105 N. C., 90; *Loyd v. Loyd, ante,* 186.

Whether the defendants or those under whom they claim entered upon the land in 1869 or 1870 is not material. If the execution sale of Samuel's one undivided eighth was invalid, the deed to Brittain, (544) under which they claimed, passed only the seven-eighths of the land which had descended on the death of Robert Ferguson to his other children. The defendants had not been in possession twenty years when this action was brought in 1889, and therefore the presumption had not arisen that the plaintiff as a cotenant had been evicted. *Caldwell v. Neely,* 81 N. C., 114; *Ward v. Farmer,* 92 N. C., 93. *McCulloh v. Daniel,* 102 N. C., 529, and *Amis v. Stevens,* 111 N. C., 172, which were relied on by defendants' counsel to sustain his position, were carefully distinguished by the court in both opinions from those already cited in support of the view of the question which we have taken. The distinction was that in the one case the occupant entered and held under title derived mediately or immediately through conveyances from a portion of the tenants in common, to whom the land had passed by descent or purchase, while in the other he had bought at sheriff's sale a claim purporting to be adverse to all of such tenants, and had entered and held adversely for more than seven years.

The deed of Thomas M. Ferguson and others to Brittain, though it purported to convey all of the interest in the land, had only the effect of putting Brittain in the relation to Samuel Ferguson previously occupied by his grantors. Thomas C. Ferguson, after procuring a conveyance from King for such interest as had passed to him by the sheriff's void deed, joined the heirs of Robert Ferguson in conveying to Brittain. As to the individual interest of Samuel Ferguson, Thomas Ferguson and Brittain stood in the same relation to him as had been sustained by King. The occupation and undisturbed enjoyment of the rents and profits by

Brittain or those claiming under him for a less time than twenty years, though under a deed purporting to convey the entire estate, did not bar the action of the heirs of Samuel Ferguson, if the sale by the sheriff was void. *Breden v. McLaurin,* 98 N. C., 307; *Hicks v. Bullock,* (545) 96 N. C., 164. But a case more directly in point is *Page v. Branch,* 97 N. C., 97, where *Justice Davis,* delivering the opinion of the Court, laid down the principle that one tenant in common cannot make the possession adverse to his cotenant by conveying the entire estate, because his bargainee only acquires such estate as the bargainor can convey. We see no reason why the registration of the deeds from the sheriff to King, and from the latter to Thomas Ferguson, should give any additional force or effect to the subsequent conveyance to Brittain. There is no principle which we can invoke that would give to the registration at that date, if now, the effect of an ouster.

For the reasons stated we conclude that there was

No error.

Cited: S. c., 115 N. C., 568; *Neal v. Nelson,* 117 N. C., 405; *Roscoe v. Lumber Co.,* 124 N. C., 48; *Hardee v. Weathington,* 130 N. C., 92; *Allred v. Smith,* 135 N. C., 452; *Lumber Co. v. Cedar Works,* 165 N. C., 86; *S. c.,* 168 N. C., 350.

IN THE MATTER OF THE ADMINISTRATION OF THE ESTATE OF SARAH ELLICK MEYERS.

Administration—Right of Husband to Administer on Wife's Estate—Transfer of Prior Right to Administration—Duty of Clerk.

1. A husband has a right to administer the estate of his deceased wife, whether she die intestate (The Code, sec. 1376) or leave a will without naming an executor (The Code, sec. 2166).
2. A husband having a prior right to administer may transfer that right to another by appointment or may cause another to be associated with him in the administration, and this right, and the power and duty of the clerk to make such appointments, are not affected by the filing and probating in common form of a writing purporting to be the will of the wife, for the duties and responsibilities of the administrators are not changed by the fact that a will has been or may be probated, which will guide them in their administration after the payment of debts, etc.; being subject to the orders of the clerk touching the administration, they must obey, and if guilty of misconduct, they may be removed.
3. Where a husband and chosen associate were appointed administrators of the estate of the deceased wife of the former, they should not have been

ousted by the clerk for the reason that at the time the appointment was made a writing purporting to be a will was on record and an issue *devisavit vel non* was pending.

By consent, upon the appeal of the respondents, Morris Meyers and Charles A. Webb, administrators of Sarah Ellick Meyers, from the clerk of the Superior Court, his Honor *Armfield, J.*, found the facts.

The court, being of opinion, upon this finding of facts and the record, that the action of the clerk of the Superior Court of Bun- (548) combe County in issuing to the respondents the general letters of administration as in cases of intestacy was void for want of jurisdiction, affirmed the order of the clerk revoking such appointment, to which the respondents excepted and appealed.

James H. Merrimon for legatees.
Charles A. Webb for appellants.

BURWELL, J. A husband has a right to administer the estate of his deceased wife, both in the event of her death intestate (The Code, sec. 1376) and also in the event that she leaves a will, but names no one as executor. The Code, sec. 2166.

The script which has been propounded as the will of Mrs. Sarah Ellick Meyers does not appoint any one to execute it. Therefore, if it be found, upon the trial of the issue *devisavit vel non*, that it is the will, that cannot have the effect of depriving her husband of the right to administer the estate. Hence, while it is true that there is a contest pending, there is no controversy in regard to the right of administration. Nor can there be one. The statutory provisions are plain. *Little v. Berry*, 94 N. C., 433.

It has been decided by this Court that one who has the prior right to administration may transfer that right by appointment. *Little v. Berry, supra.*

If the husband could have lawfully transferred his right to administer his wife's estate to another, he may certainly cause another to be associated with him in the administration. If it was proper to appoint the husband, it was proper to appoint the husband and his chosen associate, Webb, to be coadministrator.

From what has been said, it follows that the husband's *right* to letters of administration, and the clerk's power and duty to (549) appoint him and his chosen associate to be coadministrator, were not at all affected by the filing and probating in common form of the script which purported to be the will of Mrs. Meyers, for, as has been noted, that instrument named no one to administer the estate under its

provisions. *Suttle v. Turner,* 53 N. C., 403, is overruled in *Little v. Berry,* 94 N. C., 433. The duties and responsibilities of these administrators are not in any degree changed by the fact that a will has been or may be probated that will guide them in their distribution of the assets that remain after payment of debts and charges of administration. They must take notice of that. The clerk has power to issue orders touching the administration, and they must obey. If they are guilty of misconduct, they may be removed.

But they should not have been ousted by the clerk for the reasons set out in the petition upon which his order of removal was founded.

His Honor should have directed the clerk to revoke his order of removal. It is so ordered.

Error.

Cited: Boynton v. Heartt, 158 N. C., 491; *In re Shufford,* 164 N. C., 135.

THE NEW BERN GAS LIGHT COMPANY v. LEWIS MERCER CONSTRUCTION COMPANY AND THE NEW BERN SEWERAGE COMPANY.

Attachment—Tort.

Where a sewerage construction company, in laying its pipes in a street, punctured and injured the pipes of a gas company embedded in the streets, causing loss to the gas company by the escape of its gas, such an injury to property was done as entitled the gas company to an attachment under section 347 of The Code, that section having been amended by chapter 77, Acts 1893, so as to extend the right of attachment to all cases, whether the injury is to real or personal property.

ACTION brought to the February Term, 1893, of CRAVEN, in (550) which plaintiff obtained a writ of attachment against the property of the defendant construction company, under section 347 of The Code, for injury to plaintiff's pipes, which were laid in the streets of the city of New Bern, and for injury to and destruction of the gas of plaintiff, which escaped through the pipes so broken and injured.

The clerk of the Superior Court vacated the attachment, but on appeal by plaintiff, his Honor *Bryan, J.,* reversed the clerk's order, and defendant appealed.

The defendant contended that the pipes being firmly embedded in the streets constituted realty, and that attachment would not lie under sec-

tion 347, and that although the gas, admitted to be personal property, escaped by the injury to the pipes, and consequential loss accrued to plaintiff, for which an action would lie, no injury was done to the gas itself, for which the ancillary remedy of attachment could be obtained. Mr. Guion, for the defendant, illustrated his contention as follows: "Suppose the subject-matter of the damage to be water, which plaintiff conveyed to its consumers by means of similar pipes, and defendant has injured a pipe, causing the water to leak out, could it be contended that there was any injury done to the water? But on the other hand, if any foreign substance had been introduced *into* the *water* causing it to become polluted, in such event the injury would be to the water, and the damage would spring therefrom. Again, suppose defendant should break open plaintiff's stable, permitting plaintiff's horse to escape therefrom, could it be concluded that any injury was done *to* his *horse?*"

Chapter 77, Acts of 1893, amended section 347 of The Code, extending the right of attachment for injuries to *real estate.*

M. DeW. Stevenson for plaintiff.
O. H. Guion for defendants.

PER CURIAM: Upon careful investigation we are of the opin- (551) ion that under the peculiar circumstances of this case, the ruling of his Honor refusing to dismiss the attachment should be sustained.

In view of the recent amendment to section 347 of The Code, extending the right of attachment to cases where the injury is to real as well as personal property, we do not think an elaborate discussion of the law as it previously existed can serve any useful purpose.

Affirmed.

Cited: Judd v. Mining Co., 120 N. C., 399.

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(552)

W. D. SPRAGUE v. LOUISA N. BOND ET AL.

Practice—Appeal from Interlocutory Order When not Premature—Reference to Take Account—Evidence—Issues.

1. Where on the trial of pleas in bar there was a verdict for plaintiff, and an order for an account, an appeal is not premature, for, if the pleas should be established, plaintiff would not be entitled to an account, and the action would be at an end.

2. When a party to an action is allowed to be a witness as to a transaction, and is impeached, he may be corroborated by showing that soon after the matter occurred he made similar statements or declarations in regard to it; but this is only permissible as *corroborative* and not as *substantive* evidence, and it is the duty of the trial judge, without special instructions to that effect, to see that the jury fully understand the use they are permitted to make of it.

3. In an action for an account, plaintiff alleged that he had conveyed, by absolute deed, to the defendant B, certain lands in consideration of her agreement that when the land should be sold plaintiff should have one-half of the proceeds, and that the land had been sold and defendant refused to account, etc. A was allowed to become a party defendant, and in her answer alleged that she was the equitable owner of the land, as against the plaintiff, by reason of a deed or contract to convey the same, dated but not registered before the deed to defendant B, which allegations plaintiff in his reply denied: *Held*, (1) that A was properly allowed to become a party; (2) that the truth of the allegations made by A, and controverted by the plaintiff, should be inquired into, and it was error to refuse to admit issues framed to cover all the controverted transactions between the plaintiff and each of the defendants in relation to the land, so that if plaintiff is correct in his allegations an account may be ordered, and if the facts alleged by A are found to be true, the court may adjudge the rights of the respective claimants and frame the order of reference accordingly.

4. Where the pleadings do not distinctly and unequivocally raise an issue it should not be submitted.

5. It is competent for a party to testify in regard to transactions that took place between himself and an agent of the defendant, within the scope of his agency, and also to the declarations of the agent as a part of those transactions, and this is so notwithstanding the agent be dead.

AVERY and CLARK, JJ., did not sit.

ACTION, commenced 10 February, 1890, and tried at Spring Term, 1893, of CALDWELL, before *McIver, J.*, and a jury.

In his complaint plaintiff alleges that he is entitled to one-half of the net proceeds arising from the sale of certain lands lying in Caldwell County, as the consideration for the execution of a deed to the defendant, Louisa N. Bond, for said lands, under an express contract made contemporaneously with the deed with H. F. Bond, the agent of L. N. Bond, his daughter.

In her answer the defendant, L. N. Bond, expressly alleges that the lands were entered by the plaintiff for her *sole benefit*, and with her own funds, which she supplied to plaintiff through her agent, H. F. Bond.

At Spring Term, 1891, upon being heard on the pleadings before *Hoke, J.*, the plaintiff suffered a nonsuit and appealed. The appeal was heard at February Term, 1891, of this Court, and was reported in 108 N. C., 382. The nonsuit having been set aside, the case resumed its

place upon the docket of the lower court. Subsequently Rebecca Bond Adams and her husband, L. A. Adams, were allowed to become parties defendant, and alleged in their petition and answer that the said R. B. Adams has title to the lands paramount to either that of (553) plaintiff or defendant, Louisa N. Bond, by reason of a deed or contract to convey the lands, made by the plaintiff prior, but not registered before his deed to L. N. Bond, and that she is entitled to the proceeds of the sale therefor. Plaintiff's demurrer to the answer being overruled, he appealed; the cause was heard at September Term, 1892, of this Court. (See 111 N. C., 425.)

At the trial at Spring Term, 1893, one issue only was submitted, though several others tendered by defendants, and covering matters alleged and controverted in the pleadings, were refused:

"Did the plaintiff convey the land described in the complaint by deed to defendant, Louisa N. Bond, upon the understanding and agreement made at and before the execution of the said deed with defendant's agent, H. F. Bond, that when sold, after the payment to the plaintiff and defendant of the advancements made or the expenses incurred by them respectively, that the balance of the proceeds of such sale should be equally divided between them; and was such agreement the inducement and consideration to the execution of said deed?"

To which the jury answered "Yes."

His Honor being of opinion that on the issue as found by the jury, the plaintiff was entitled to an account, made an order referring the cause to Harvey Bingham, Esq., to take and state an account, and defendants appealed.

The other facts are sufficiently adverted to in the opinion of *Associate Justice Burwell.*

M. Silver and Avery & Ervin for plaintiff.
S. J. Ervin for defendants.

BURWELL, J. The motion to dismiss the appeal must be denied. *Clements v. Rogers,* 95 N. C., 248, is decisive of the point. In that action, as in this, there was a verdict for the plaintiff on the trial (554) of the pleas in bar, and an order for an account. An appeal from that order was not considered premature, because, if the pleas in bar were established, the plaintiff would not be entitled to an account, and the action would be at an end. The reason of the rule applies with full force here.

Upon the trial certain evidence was offered on plaintiff's part to corroborate his own testimony in regard to the matter in controversy. This evidence was not competent for any other purpose, consisting, as it did,

of declarations made by him soon after the transaction corresponding with the statements made by him on the witness stand. When this evidence was offered it was conceded that it was only competent for this purpose, and for that purpose alone did his Honor admit it. Among the instructions asked for by defendants was the following:

"The evidence of the declarations of the plaintiff in regard to the matters in controversy are not substantive evidence of the truth of said matters, and are only competent in evidence for the purpose of corroborating the witness Sprague, and can only be considered by you for this purpose, and you can give it such weight as you think it is entitled to."

The case states that this instruction was refused. In this there was error that entitled the defendants to a new trial. It is settled by *Bullinger v. Marshall,* 70 N. C., 520, that it must follow from a party's being allowed to be a witness that, if his testimony be impeached he may be corroborated by showing that he had, soon after the matter occurred, made the same statement in regard to it. The rule was there established as a necessary corollary of the statute which allowed a party to be a witness in his own behalf. The learned *Justice* who delivered the opinion of the Court in that case was evidently loath to yield to this innovation, as he considered it, foreseeing, as he no doubt did, that it would be most difficult to restrain the effect of such evidence and prevent it
(555) from operating on the minds of the jury as substantive proof of the facts in dispute. Because there is this danger of its exercising an improper influence upon the jury, it is incumbent on the judge presiding at the trial where such corroborative evidence is introduced to see to it, even without any request for special instructions, that the jury fully understand the use they are permitted to make of it, and we must hold that the failure to caution them in this particular when such a request is made, as was done by the defendants here, entitled them to a new trial.

As this cause, for the reason above stated, must be tried again, we deem it proper to say that, upon the allegations made by Mrs. Rebecca B. Adams in her pleadings filed, we think she is a proper party to this action, and that the truth of the allegations made by her and controverted by plaintiff in his reply should be inquired into. Issues should be framed to cover all the controverted transactions between the plaintiff and each of the defendants, L. N. Bond and R. B. Adams, in relation to the land, the proceeds of sale of which are here in dispute, to the end that if the facts alleged by the plaintiff are found to be true, an account may be ordered; and if the facts alleged by Mrs. R. B. Adams are found to be true, the court may be in position to adjudge the rights of the respective claimants and to mould the order of reference accordingly. If, at the time of the alleged contract between the plaintiff and

the defendant L. N. Bond, through her agent, H. F. Bond, by the terms of which the plaintiff conveyed the land to said defendant in consideration of her agreement, made for her by her said agent, that when she sold the land she would pay to the plaintiff one-half or other part of the proceeds, after deducting certain expenses pertaining to the business, the defendant Rebecca B. Adams had an equitable interest in said land, or a right to call for a deed therefor, which she had acquired from the plaintiff, and which she then held and now holds by titles or contracts good against him, but not valid against her codefendant, (556) Louisa N. Bond, or her vendees, because of want of registration or other notice, it would surely be unjust to allow him to take the proceeds of the sale and appropriate them to his own use. It seems to us that if Mrs. Adams' allegations are true, the plaintiff, at the time of the alleged contract with H. F. Bond, agent, held whatever interest or estate he had in the land in trust for Rebecca B. Adams. As between the latter and him, if her allegations are true, he had no right to make this sale and contract. It was valid between him and L. F. Bond, because she had no legal notice. But Rebecca B. Adams may ratify that transfer, contract and subsequent sale, and contest, as she does here, the plaintiff's right to the fund, claiming that, in equity, it is hers.

It is proper for us to say further, that as the pleadings now stand, we do not think that the defendants are entitled to have the first issue tendered by them on the late trial, submitted to the jury. The third paragraph of their answer, upon the allegations of which this issue is founded, does not set out as a fact that the alleged contract, if made as stated by plaintiffs, with H. F. Bond, *agent,* was made to defraud creditors of plaintiff, he being insolvent. Its phraseology seems rather to indicate a purpose to assert the high character of Mr. Bond as proof that the contract was not made as plaintiff alleges, because, under the circumstances, it might have been a fraud on plaintiff's creditors, than to plead the fact that plaintiff, if he made the alleged contract, was thereby intending and contriving to defraud his creditors. If the defendants intended to raise such an issue, their allegations should be distinct and unequivocal. If they state on the trial that such was their purpose, they will no doubt be allowed to amend this paragraph so as to entitle them to this issue.

If it is admitted or proved that H. F. Bond was the agent of the defendant L. N. Bond in the negotiations and transactions that resulted in her acquisition of the title to lands which she sets up (557) in her answer, then it would be competent for the plaintiff to testify in regard to transactions that took place between himself and that agent within the scope of his agency, and also to the declarations of the agent as to a part of those transactions. This right of the plain-

tiff so to testify is not destroyed or restricted by the death of the agent. *Howerton v. Lattimer,* 68 N. C., 370. With like restrictions, he may testify to transactions with and declarations of H. F. Bond, that concern Mrs. R. B. Adams, if the latter's agency for her is proved or admitted. Nor can this right so to testify be affected by the deed from plaintiff to H. F. Bond, dated in 1873 and registered in 1891, for an undivided half of the land, the proceeds of the sale of which are herein controverted. The defendants, in their answer, set up no claim to the land as heirs of H. F. Bond, but, on the contrary, assert title adverse to him. They decline, as it seems to us, to contest with the plaintiff, in their capacity as heirs of H. F. Bond, but insist that they can stop his mouth by producing a deed from plaintiff to said Bond, which can have no relation to this controversy, except perhaps to throw light for the jury upon the subsequent transactions between plaintiff and defendants through their agent.. Because, for the reasons heretofore stated, there must be a new trial, we do not deem it best to discuss, with more particularity, the question presented about the admission or exclusion of evidence.

New trial.

Cited: Wallace v. Grizzard, 114 N. C., 493; *Sprague v. Bond,* 115 N. C., 530; *Burnett v. R. R.,* 120 N. C, 518; *Watkins v. Mfg. Co.,* 131 N. C., 540; *Gwaltney v. Assurance Soc.,* 132 N. C., 929; *S. v. Parker,* 134 N. C., 211; *Dickens v. Perkins, ib.,* 223; *Westfeldt v. Adams,* 135 N. C., 600; *Hall v. Holloman,* 136 N. C., 36; *Brown v. R. R.,* 147 N. C., 218; *Henderson v. R. R.,* 171 N. C., 398; *Bank v. Wysong Co.,* 177 N. C., 292.

(558)

ANDREW SYME, ADMINISTRATOR OF THOMAS ROBERSON, DECEASED, v. RICHMOND AND DANVILLE RAILROAD COMPANY.

Person Walking on Railroad Track—Negligence—Duty of Engineer.

1. Where a person is injured while walking on a railroad track, by an engine that he might have seen by looking, the law, as a rule, imputes the injury to his own negligence.
2. Where an engineer has no reason to think a person walking on a railroad track in front of a locomotive is other than one possessed of all the usual powers of mind and body, he is warranted in assuming that he will step off the track and avoid a collision.
3. In the trial of an action against a railroad company for the negligent killing of plaintiff's intestate it appeared that the track of defendant ran

parallel with and in a few feet from that of another company, and that the deceased was walking on defendant's track, commonly used by the public as a walkway, forty or fifty yards in front of an engine and tender backing in the same direction which deceased was going; that an engine drawing a long freight train on the neighboring track was "exhausting heavily" as it passed the deceased; that the accident did not occur in a populous part of the city or at a time when such a number of persons were using the track as to prevent an individual from readily seeing a moving train, and that deceased could have put himself out of danger by stepping to the ditch outside the track: *Held*, (1) that negligence cannot be imputed to the defendant by assuming that its engineer must have seen the long freight train and have known the fact that the engine drawing it was exhausting heavily so as to render deceased as insensible to the approach of defendant's train as if he had been deaf; (2) that, in such case, it was the duty of the deceased to look as well as listen, and he was negligent if he failed to use his eyes as well as his ears, and the defendant's engineer was justified in assuming that deceased had looked, had notice of the approach of the engine and tender, and would clear the track in time and save himself from harm; (3) that negligence will not be presumed in all cases, even where a railroad violates an ordinance or statute by running at a given rate of speed in a town or city, and especially when there is no evidence of such ordinance or statute, or where it is not shown that the accident occurred in a populous part of the city or at a time when, or usually, so many persons were walking on the track as to prevent one from readily seeing a moving train, or that all who used it as a footway could not secure their safety by stepping off the track.

ACTION, prosecuted in forma pauperis by the plaintiff to re- (559) cover damages for the wrongful act and default of defendant in causing the death of his intestate, tried in WAKE, at February Term, 1893, before *Brown, J.*, and a jury.

The answer admitted the killing, but denied the charges of negligence and liability for damages, and set up the defense (1) that deceased negligently walked on defendant's track, and though defendant used every precaution and gave every necessary signal to alarm deceased and cause him to leave the track, he paid no attention to the same, and was unavoidably run over and killed by defendant's engine; (2) that deceased contributed to his own death by his own negligence by getting on the track near to the engine while the engine was in rapid motion, and without attempting to observe its approach, or looking, or listening, and negligently remaining upon the track until the engine ran over him, and that he lost his life by his own want of ordinary care and prudence.

On the trial, T. A. Bowen, a witness for plaintiff, testified: "Live in the country; work in Raleigh; I came in town by railroad track; defendant's track is generally used as a walkway; I have been living where I now live six years; great deal of walking done by the public on defendant's track leading out of Raleigh to the west. The North Caro-

lina Railroad track and the Raleigh and Augusta Air Line track are eight or ten feet apart; ties project about eighteen inches further; there is a ditch on side of track and embankment runs up; same on both sides; no pathway on either side of the tracks. The tracks of both roads are on one bed; Boylan's bridge spans both roads—the North Carolina and the Raleigh and Augusta; the two tracks diverge going east after passing under the bridge. The deceased was killed forty or fifty yards west of the bridge; I saw the deceased when he was killed; the defendant's engine was coming from the North Carolina Railroad depot, going west—the tender was ahead and engine backing; Roberson, the (560) deceased, was going west; he had a bucket on his left arm. When Roberson was struck there was a freight train on the Raleigh and Augusta track passing along by the side of the deceased; I was fifty yards west of the deceased; I was coming to Raleigh, going east; deceased was going west. The engine of the Raleigh and Augusta freight train was off against me going west when deceased was struck; Raleigh and Augusta train had fourteen or fifteen cars, don't know exactly how many. I saw Roberson's face; it was towards me; he was walking briskly up the road towards me; the Raleigh and Augusta freight train was making considerable noise; when the engine and tender of defendant struck deceased it passed over him and came nearly to a stop about thirty yards from deceased. You can't see the Raleigh and Augusta train from up the road until it comes under the bridge; when I first saw defendant's engine and tender it was east of the bridge; from where engine and tender was when I first saw it a man could see to where I was; the deceased was between me and the said engine. Don't think a person can see all the way to North Carolina Railroad depot from bridge; distance from bridge to depot 300 to 400 yards. A person on an engine on North Carolina road, situated half-way between depot and said bridge, can see to and under said bridge. It is possible to see a freight train from the Richmond and Danville depot from Hargett Street station to bridge. When I first saw Richmond and Danville engine and tender it was thirty-five or forty yards from deceased and had just got to bridge; from this point to where deceased was is open and straight, and Roberson could have been seen perfectly plain. The Raleigh and Augusta train was passing by deceased when Richmond and Danville engine struck deceased; the Raleigh and Augusta train had, about half of it, passed deceased; the freight train and engine and tender were running neck and neck. I waved my hand once or twice to deceased; he did not pay any attention to it. I don't know whether de- (561) ceased stepped over from Raleigh and Augusta track or not; I heard the whistle of Richmond and Danville engine very plainly, and deceased was between me and engine; I motioned several times to

deceased to get out of way and he did not do so. There was plenty of room on the outside of Richmond and Danville or of North Carolina track for deceased to have stepped off; there was room on side of embankment and in the ditch, which was two feet deep; I stepped in ditch and was not hurt; engine passed me before it stopped; I was on same track as Roberson. If deceased had been on Raleigh and Augusta track there was room on outside of that track for deceased to have stepped off and saved himself. I heard whistle of engine of defendant blow twice, plainly; engine had been slowed down before it struck deceased, because it stopped about thirty yards after it passed him and after it passed me. Buck Howell was on same track between me and Roberson; when engine blew Howell also got off track and so did I; deceased did not; both of us were farther from Richmond and Danville or North Carolina engine than deceased. At the time Richmond and Danville engine blew, the Raleigh and Augusta engine was just about up in front of me; the train was passing Howell and also deceased."

George Davis: "Live in fourth ward of Raleigh; Roberson was killed about 6:30 a.m. on 9 October, 1891; I was ahead of him going west on North Carolina track; I saw freight train on Raleigh and Augusta track; was about 170 feet ahead of Roberson; did not see deceased when he got on track or when he was killed; I was going on up the road west; the Raleigh and Augusta train was going west. I heard engine on North Carolina track blow three times; it was then going west, I looked back and saw nothing between me and the engine; I thought it was blowing for me to get off; I was right smart distance ahead of North Carolina engine. I am certain I saw no one between me and that engine; I stepped off on outside in ditch and engine passed me; I got (562) on track again and looked back and saw something on track; it was Thomas Roberson, dead; his whole body was between the rails; there was a hole in his head and his foot cut off; his head was towards the east. The engine on the North Carolina Railroad did not stop; as it passed me it was running fast—thirty to thirty-five miles an hour; the shifting engine on the North Carolina track was going faster than Raleigh and Augusta freight train. When I started on the track Thomas Roberson got on the track behind me and I started in same direction that he did. From Boylan's bridge and one hundred yards east of it a person could see straight ahead to Cox Avenue, nearly three-fourths of a mile. There was room on outside of North Carolina track to get off in ditch, just as I did. When I heard engine blow on North Carolina track the train on Raleigh and Augusta track was passing me, and the engine of that train had got beyond me going west.

Cross-examination.—The freight was running pretty fast—can't exactly say how fast it was running—about fifteen miles an hour; I met

two men coming towards city walking in ditch, one behind the other; they were thirty yards from bridge west; the engine on the Raleigh and Augusta track was pulling fourteen cars and was coming under bridge when I first saw it; it was exhausting very heavily; did not see Richmond and Danville engine when I first saw Air-Line train; I looked back to see if Raleigh and Augusta train was on track I was on; I saw a man on the track behind me; I had got only a few steps before Raleigh and Augusta engine passed me; it was good daylight; could see very plainly; the engine on North Carolina road was not far from the bridge when I heard it blow; it had just passed under bridge going west and then blew not far from the bridge."

The defendants introduced the following evidence:

A. F. Fowler: "I am a shifting engineer on the Richmond and
(563) Danville Railroad. On 9 October, 1891, when the man Roberson was killed, I had started out from depot for lantern lights on switch-targets; I did not stop until I passed over deceased; at Boylan's bridge I first saw deceased; he was not on our track, he was coming from Raleigh and Augusta track and got on ours; he was going west and got on under bridge. As soon as I saw him get on track I told the fireman to ring the bell, he did so; I blew whistle, short, sharp blows—the danger signal; as soon as I saw he did not notice signal I reversed engine at once t the risk of bursting out cylinder; I threw steam on the reverse to stop the quicker, and applied the brakes. When he first got on the track I did not stop engine because I supposed he would obey signal and get off as I blew and rang bell; as soon as I saw he did not notice signal I used every appliance to stop. The engine came nearly to a stop just after passing over body after running about the length of the engine. After I saw I had passed over body I went on and got switch-lights and came back for body; I was going twelve miles per hour when I reversed; I got to body and laid it one side and sent for coroner.

Cross-examination.—I am still employed by the Richmond and Danville Railroad; I was looking the way I was going (witness showed how he was sitting, with face towards the side, and leaning back out of window, in which position he could readily see in the direction the engine was going), and was sitting on my seat; my body was facing towards engine and I looked out window with head out looking west, the direction I was going, and my hand on throttle. I don't know whether seat is higher than tender or not; I was about thirty yards from bridge when the engine of the Raleigh and Augusta train went under bridge. The deceased had just then stepped upon our track, and I then blew, and fireman rang bell. Our freight train from Greensboro was due at 6:45 or 6:47 a.m. I suppose I was thirty yards from deceased when I
(564) commenced blowing whistle; when I first saw deceased, he was

about fifty yards off, coming from Raleigh and Augusta track where it comes away from our track; the deceased could have seen my engine and which way it was going before he got on our track; he must have been about twenty yards from our track. It requires about twenty-five or thirty yards to stop my engine; I blew whistle as soon as he got on our track, and continued to blow; I had fifteen minutes to go and get switch-lights and get back before our freight was due; this was plenty of time. Raleigh and Augusta train went on; I never did pass it. The body was about twenty-five yards from bridge when struck, I think; it was about thirty yards from bridge when we got hold of body; it was about twenty-five yards from bridge east when I first saw deceased, and blew, and rang bell; I did not stop at first, but blew and rang bell. As soon as I saw that deceased did not notice this, I had got nearer him, about twenty yards or so from him, can't tell exactly; then I reversed engine and applied brakes; the engine passed nearly over the body before coming to a stop; I saw the man had been struck before I could stop. I started up to get lights, as ordered, before freight could get there, and I came back at once, and removed the body. If deceased had stopped under the bridge, between the two tracks, there was plenty of room, and he would not have been hurt."

Upon the conclusion of the evidence his Honor intimated that he would charge the jury that, upon the whole evidence, there was no view of it in which plaintiff would be entitled to recover. Upon which intimation the plaintiff submitted to a nonsuit, and appealed.

W. N. Jones and Battle & Mordecai for plaintiff.
Busbee & Busbee for defendant.

AVERY, J. Counsel for plaintiff did not contend that the intestate was deficient in any of his senses, or wanting in physical (565) power or mental faculties, and if they had there would have been no evidence to support the contention. *A priori,* the engineer had no reason to think him other than a man possessed of all of the usual powers of mind and body, and was warranted in assuming that he would step off the track and avoid a collision, until it was too late to save him. *McAdoo v. R. R.,* 105 N. C., 145; *High v. R. R.,* 112 N. C., 385. When a person is injured while walking on a railroad track by an engine that he might have seen by looking, the law, as a rule, imputes the injury to his own negligence. *Meredith v. R. R.,* 108 N. C., 616; *Norwood v. R. R.,* 111 N. C., 236. There being no testimony tending to bring this case within any exception to the general rule, we are of the opinion that there was no evidence of want of ordinary care on the part of the defendant, while, in any aspect of the case, the plaintiff's intestate was

negligent in getting upon the track in front of the engine without looking, and exposing his person to injury, when he might have seen that it was approaching and have avoided the collision by stepping off the track.

We cannot yield to the ingenious suggestion of the able counsel for the plaintiff that the engineer must have seen the long freight train and known the fact that the engine was "exhausting heavily," so as to render intestate so insensible to the approach of the other train as if he had been deaf, and that therefore the defendant's engineer was negligent in not attempting earlier to stop the engine. But it was the duty of intestate to look, as well as listen, under the circumstances, and he was negligent if he failed to use his eyes as well as his ears. *McAdoo's case, supra.* On the other hand, the engineer was justified in assuming that intestate had looked, had notice of his approach, and would clear the track in ample time to save himself from harm. Even when a
(566) railroad company violates a statute or an ordinance by running at a given rate of speed in a town or city, negligence will not be presumed in all cases. 2 Wood R. R., 1097, and note. But in our case there was no evidence of the existence of a town ordinance, nor was any statute forbidding such running cited by counsel. And, no matter what the speed of the engine may have been, it did not appear that the accident occurred in a populous part of the city, or where there was at the time, or usually, such a number of persons using the track that an individual walking upon it would not be able readily to see a moving train, or that all who used it as a footway could not secure their safety by stepping off of the track. On the contrary, the undisputed evidence is that the plaintiff's intestate had but to step to the ditch to place himself beyond the pale of danger, whether he was walking on the Raleigh and Augusta Railroad track or that of the North Carolina Railroad.

We think that the judgment should be

Affirmed.

Cited: Neal v. R. R., 126 N. C., 638, 645; *Bessent v. R. R.,* 132 N. C., 941; *Pharr v. R. R.,* 133 N. C., 614; *Crenshaw v. R. R.,* 144 N. C., 322, 323; *Beach v. R. R.,* 148 N. C., 165, 166; *Exum v. R. R.,* 154 N. C., 411; *Patterson v. Power Co.,* 160 N. C., 580; *Talley v. R. R.,* 163 N. C., 577; *Abernathy v. R. R.,* 164 N. C., 95; *Ward v. R. R.,* 167 N. C., 151, 154; *Davis v. R. R.,* 170 N. C., 586; *Horne v. R. R., ib.,* 656; *McMullan v. R. R.,* 172 N. C., 855.

E. W. WARD v. WILMINGTON AND WELDON RAILROAD COMPANY.

Damages—Negligence—Railroad Company—Killing Stock—Obstructions on Right of Way.

It is the duty of a railroad company to remove such growth, whether of shrubs, trees or grain, as is calculated to obstruct the view of its engineers, to the outer bank of the side ditches of its roadbed; and when, by reason of such growth between the track and the side drain, a horse was concealed from the view of the engineer, and got upon the track in front of the moving train and was killed, the railroad company was negligent and liable, although, after seeing the horse on track, the engineer did all he could to avoid the collision.

ACTION to recover the value of a certain horse alleged to have been negligently killed on defendant's road, tried by *Winston, J.*, (567) and a jury, at Spring Term, of PENDER.

The following issues were submitted to the jury:

"1. Did the defendant, by its negligence in moving its cars and engine, kill the horse of the plaintiff?"

To which the jury responded, "Yes."

"2. If 'Yes,' what damage has the plaintiff sustained thereby?"

To which the jury responded, "$75."

The defendant requested the court to charge the jury:

"1. If the jury believe that the engineer, as soon as he could by looking out and being on the watch, discovered the horse, and then used all the efforts at his command to stop the train, and could not do so in time to keep from striking the horse, then the defendant was not guilty of negligence, and the plaintiff could not recover."

"2. If the jury believe that the engineer was prevented from seeing the horse, had he been on the careful lookout, by the weeds and bushes growing upon the right of way not in the actual use of the company, and on the side of the road on which the horse was killed, and the horse suddenly emerged therefrom, and got upon the track in front of the approaching train, and the engineer did all he could to prevent the collision, and the horse was killed, then the *prima facie* case in favor of the plaintiff would be rebutted, and the jury should find the first issue in favor of the defendant."

The court gave the second instruction as asked for by the defendant, but modified the instruction asked for by the defendant, and numbered above "1," by adding to said first instruction the following:

"But if the jury should find from the testimony that the defendant carelessly and negligently suffered and permitted bushes and weeds to grow on its right of way, between the railroad track and the rail-

(568) road ditch to drain the roadbed, which ditch in this case is testified to be in about three or four feet of said track; and if the jury shall further find that said weeds and bushes were tall enough to hide the horse from the engineer, and did hide the same until it was too late to stop the train and prevent the destruction; and if the jury shall in addition believe that the horse was killed because he was concealed by the bushes and weeds as aforesaid, and but for the same would not have been killed, then the defendant is negligent. The defendant is not required to clear the right of way outside of the said drain or ditch, and if the horse was killed because of being concealed in bushes or weeds growing beyond said limits, the defendant is not negligent."

There was no exception by defendant that there was no evidence to which the modification of the instruction made by the court to the first instruction asked by the defendant was applicable.

Ward, the plaintiff, testified "that in July, 1888, or June, his horse was killed by the defendant railroad; heard Shoo-Fly train blow like something on track; horse had broken loose and was at large; began to blow one-half mile from where horse was killed; killed at 11 o'clock in day; saw track of plow-line that horse dragged along the railroad; Shoo-Fly backed back to horse after killing him; horse lying on embankment in two and a half feet of cross-ties; tracked the horse by actual steppings half-mile on the railroad; on east side of railroad, and on the right of way, were bushes; west side, none now. You can see a horse 1,600 or 1,700 yards plainly where horse killed. Tracks made by a horse walking."

Knight, the engineer: "Remember killing the horse; had an engine and two coaches; can stop a long train of coaches easier than short train; forty or fifty yards from horse when I first saw him; was (569) on the lookout, and could not see him sooner; bushes four or five feet high grow there in four or five feet of track; curved track there; hit horse on rump before he got on track; I blew whistle, applied air-brakes, reversed engine; we had good machinery, all right; blew whistle at crossing, and also two or three times before hitting the horse; had no time to blow more; running at schedule rate, twenty-five to thirty-five miles an hour, and on schedule time; did all in power to stop train, and could not; could not stop under 200 yards; ran 150 yards beyond horse; bushes hid the horse from my sight; bushes growed on edge of railroad drain and on inside of it next to track; could not see horse for those bushes; ditch two and a half to three feet deep, four or five feet wide, and in three or four feet of railroad track; rope around horse's neck cut by my car-wheels."

There was other evidence tending to corroborate the plaintiff and the engineer, not deemed necessary to be sent up.

There being no objection to the sufficiency of evidence, all of it is not sent.

The defendant excepted to the additions and qualifications made by the court to his first prayer for instructions.

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

Haywood & Haywood for defendant.

No counsel contra.

AVERY, J. The defendant's engineer testified that the bushes which hid the horse from his view grew "on the inside" of the "railroad drain" and "next to the track." It was held on the former appeal in this case to be the duty of railroad companies to remove such growth, whether of shrubs, trees or grain, as was calculated to obstruct the view of their engineers, to the outer bank of the side ditches, or from all of the ground of which they assumed actual dominion for corporate (570) purposes. *Ward v. R. R.*, 109 N. C., 358; *Hinkle v. R. R.*, 109 N. C., 472.

In making the addition and qualification of the instruction asked, to which defendant excepted, the judge below stated the law applicable to the testimony of the defendant's witness, Knight, and substantially as announced by this court in the opinion referred to. There was, therefore,

No error.

Cited: Tate v. Greensboro, 114 N. C., 411; *Black v. R. R.*, 115 N. C., 673; *Blue v. R. R.*, 117 N. C., 649; *Shields v. R. R.*, 129 N. C., 4; *Simpson v. Lumber Co.*, 131 N. C., 521.

A. BORDEN ET AL. v. RICHMOND AND DANVILLE RAILROAD COMPANY.

Contract—Unilateral Error—Evidence.

1. Where there has been no misrepresentation, and where there is no ambiguity in the terms of the contract, a party to it cannot be allowed to evade the performance of it by the simple statement that he has made a mistake. If, however, a proposal by one evidently contains a mistake the other cannot, by snapping at it, be permitted to take advantage of the error.

2. Where a local freight agent of defendant railroad company made a written offer to ship cotton between two points at 69½ cents per hundred for plaintiff, who at once, and in writing, accepted the offer, and it was conceded that the said local agent was authorized to make such proposal on the part of the defendant, and the agent plainly and unequivocally expressed what he understood to be the price to be charged for carrying cotton, and there was no misunderstanding between the plaintiff and the agent as to any of the terms of the alleged contract; and it appeared that, by an error in the transmission of a telegram from the general freight agent to the local agent, "89½" was changed to "69½": *Held*, (1) that the contract was binding on defendant company, notwithstanding the mistake; (2) that in an action by the shipper (who had paid the larger rate under protest) to recover the difference between the two rates, all evidence in regard to plaintiffs' purchase of cotton was irrelevant, and plaintiff was entitled to recover.

ACTION, tried before *Brown, J.*, and a jury, at April Term, (571) 1893, of WAYNE.

The plaintiffs complained for damages for the nonfulfillment of a contract of affreightment between Goldsboro and Liverpool, alleging that the defendant agreed to transport five hundred bales of cotton for plaintiffs between those points at a rate of sixty-nine and a half cents per one hundred pounds and afterwards declined to do so, but charged eighty-nine and a half cents, which latter amount plaintiffs paid under protest, and brought suit to recover the difference between eighty-nine and a half cents and sixty-nine and a half cents.

Defendant admitted that its agent at Goldsboro quoted a rate of sixty-nine and a half cents on 20 October, 1891, and that plaintiffs accepted it, but allege that this rate was quoted by a mistake of a telegraph operator, as appears in the evidence.

The plaintiffs introduced the following paper, the genuineness of which was admitted:

"GOLDSBORO, N. C., 20 October, 1891.

"*Mr. Borden:* Good until Saturday; can place five hundred bales Goldsboro to Liverpool at sixty-nine and a half cents per one hundred pounds. November sailing.

"69½ accepted. C. M. LEVISTER.

"A. B."

It was proved that C. M. Levister was the local agent of the defendant at Goldsboro and was the usual person through whom freight rates were communicated to cotton dealers and others in Goldsboro.

Defendant introduced S. G. Freer, the operator in the office of J. H. Drake, general freight agent at Richmond, Va., and proved that by direction of said J. H. Drake, on 19 October, 1891, he sent from Richmond, Va., to the relay station, Keysville, Va., the following telegram:

"RICHMOND, VA., 19 October, 1891. (572)

"C. M. Levister, Goldsboro, N. C.

"Good until Saturday night; can place five hundred bales Goldsboro to Liverpool eighty-nine and a half cents.

" J. H. DRAKE."

This was sent to J. A. Thompson, operator at Keysville. The telegraph line was operated by Richmond and Danville Railroad Company. Mr. Thompson testified that he was the operator at Keysville and that he received this dispatch, but by some mistake, which he could not account for, the message was received by him and sent to Goldsboro in the following form:

"RICHMOND.

"C. M. Levister: Good until next Saturday night; can place five hundred bales Goldsboro to Liverpool sixty-nine and a half cents.

"J. H. DRAKE."

Mr. J. H. Drake testified that he was the general freight agent of the Richmond and Danville Railroad Company in October, 1891, and alone authorized to make rates for ocean shipments, etc. That on 19 October, 1891, he authorized the transmission of the rate of eighty-nine and a half cents, Goldsboro to Liverpool.

Local agents are not authorized to give rates for transportation to foreign ports. They must apply to me. Upon cross-examination the witness testified that he sent the rates through the local agents; that such is the custom, unless merchant applies to him direct.

C. M. Levister testifies that "he was in October, 1891, agent at Goldsboro; that he received telegram No. 3, quoting rate sixty-nine and a half cents, on 19 October, and on 20 October made the offer, Exhibit No. 1, which was accepted by Arnold Borden at that time. Borden delivered the first lot of cotton 26 October, 1891, and then on to 31 October. I issued him a bill of lading at eighty-nine and a half cents. I notified him before any cotton was delivered that we (573) could not take cotton at sixty-nine and a half cents per one hundred pounds, and that there was an error in the rate as first quoted.

"On 20 October I sent following telegram to J. H. Drake:

" 'GOLDSBORO, 20 October, 1891.

" '*J. H. Drake, Richmond:*

" 'Arnold Borden accepts room and rate, 69½ cents, for five hundred bales cotton, Goldsboro, N. C., to Liverpool, England. Advises engagement number, etc. Also wire quick if we can offer room for five hundred more bales at same rate.

" 'C. M. LEVISTER.

" '9:30 A.M. F. C. & M. P.

'10:50 P.M.'

"And on 21 or 22 October I received this reply:

" '*C. M. Levister:*

" 'Your wire of the 20th: We have no record whatever of having quoted 69½-cent rate on cotton from Goldsboro to Liverpool. Give me full information. Answer.

'J. H. DRAKE.'

"On the next day I received this telegram:

" '23 October, 1891.

" '*C. M. Levister, Goldsboro, N. C.:*

" 'Telegram of the 19th quoted rate of 89½ cents per hundred pounds to Liverpool on cotton, and not 69½. We cannot contract for cotton at less than 89½ cents.

" 'J. H. DRAKE.'

"This telegram of 22d is first positive information I had that the 69½ cent rate was a mistake.

"I don't remember telling plaintiff anything on the 21st. As
(574) soon as I received this telegram (No. 6), I called Borden's attention to it. It is dated 22 October. I showed it as soon as I received it. I might not have received it until late on 22d, and showed it next morning. When I received this message of 22d, and showed it to Borden, I notified him for the first time that the 69½ rate was a mistake, and I would not receive it at less than 89½."

The defendant asked his Honor to charge that there was never a contract or a coming together of the minds of plaintiffs and defendant to ship cotton at 69½ cents per one hundred pounds, to Liverpool, but that as the error was that of defendant's agent, the defendant was obliged to indemnify plaintiffs against actual loss. That as plaintiffs had not shown the price at which the cotton was sold, and had not shown or attempted to show any loss, they were entitled to recover nominal damages only. That defendant was not obliged to pay plaintiffs any profit plaintiffs would have made on the reduced price for freight on cotton.

His Honor refused the instructions, and charged the jury that the plaintiffs were entitled to recover the difference as claimed in the complaint between 89½ cents per one hundred pounds and the rate quoted by Levister of 69½ cents per one hundred pounds on five hundred bales, the amount being admitted to be $_____.

The defendant excepted from the refusal to charge and to the charge as given.

The issues and responses were as follows:

"1. Did the defendant contract with plaintiffs on 20 October, 1891, to receive and ship five hundred bales of cotton to Liverpool at 69½ cents per one hundred pounds, as alleged by plaintiffs?"

"Yes."

"2. Was this contract made by defendant's agent at Goldsboro at the rate of 69½ cents in consequence of a mistake made by defendant's operator at Keysville in transmitting a telegram, as alleged (575) by defendant?"

"Yes."

"3. Did defendant refuse to receive and ship said cotton at 69½ cents?"

"Yes."

"4. What damage are plaintiffs entitled to recover?"

"$483.39."

There were no exceptions to issues.

Allen & Dortch and Aycock & Daniels for plaintiffs.
Busbee & Busbee for defendant.

BURWELL, J. It is conceded that the local agent of the defendant at Goldsboro made a written offer to ship for the plaintiff five hundred bales of cotton to Liverpool in November, 1891, and that the said agent was authorized to make such a proposal on the part of the defendant, and that plaintiff at once accepted this offer, his acceptance being also in writing. Furthermore, it seems to be conceded that the said agent plainly and unequivocally expressed what he understood to be the price to be charged by the defendant company for the transportation of the cotton, and there was no misunderstanding between the plaintiff and the agent as to any of the terms of the alleged contract.

Now it is evident that, if the agent is considered, not as the mere mouthpiece of the defendant corporation, through whom the intention of its higher officers in this matter was to be simply communicated to the plaintiff, but as its authorized contracting agent—its *alter ego* in this affair—there was no error or mistake at all, much less one that would prevent the written proposal and its written acceptance from constituting

a valid contract, by the plain terms of which each party would be bound. In this view of the matter there was no variance between the intention of the defendant and the expression of that intention. The con-
(576) tracting agent expressed in unequivocal language exactly what he intended to express. The plaintiff accepted the offer thus made to him. The defendant cannot escape liability on this contract by asserting that its agent would not have so conducted himself if he had known at that time what he was afterwards informed of. And it might well be insisted on the part of the plaintiff that, in the absence of notice to the contrary, he had a right to assume that that agent had power to act for his principal in this matter, and that defendant should not be allowed to dispute that authority.

Passing by that question and assuming, for the sake of argument, that the local agent at Goldsboro was the mere mouthpiece or spokesman of the defendant in this matter, and that plaintiff knew this fact, then we have here a variance between the intention of the proposer (the defendant) and the expression of that intention. There was an error in the expression of the defendant's intention, but that error was unknown to the plaintiff. He had no good reason to suspect that the writing submitted to him did not correctly express the intention of the defendant. He did not "snap up" an offer which he knew or suspected was erroneously expressed. He merely accepted a plainly expressed proposition. In the view of the matter we are now taking, the question, then, is: If, in the expression of the intention of one of the parties to an alleged contract, there is error, and that error is unknown to and unsuspected by the other party, is that which was so expressed by the one party and agreed to by the other a valid and binding contract, which the party not in error may enforce? The law is well settled, says *Mr. Lawson* in his work on Contracts, sec. 206, that a man is bound by an agreement to which he has expressed his assent in unequivocal terms, uninfluenced by falsehood, violence or oppression, and it judges of an agreement between two persons exclusively from those expressions of their intention which are communicated between them. And Wharton, in his
(577) work on the same subject, sec. 196, quotes from *Tamplin v. James*, L. R., 15 Ch. Div., 215, this general rule, as he denominates it: "Where there has been no misrepresentation, and where there is no ambiguity in the terms of the contract, the defendant cannot be allowed to evade the performance of it by the simple statement that he has made a mistake. But," he adds, "where a proposal evidently contains a mistake, an acceptor, by snapping at it, will not be permitted to take advantage of the mistake." In section 202*a* he announces the rule thus: "A unilateral mistake of expression of one party cannot be set up by him as a ground for rescinding a contract or for resisting its enforcement,

when his language was accepted by the other party in its natural sense. But when the blunder made by the proposer is obvious, an acceptor will not be allowed, by catching it up, to take an unfair advantage." An essential bilateral error as to the nature of a contract avoids it, if based upon such error, but a unilateral error will not have that effect. Bishop Contracts, secs. 701 and 702. "It would open the door to fraud if such a defense was to be allowed. It is said that it is hard to hold a man to a bargain entered into under a mistake, but we must consider the hardship on the other side." *Tamplin v. James, supra.* We must consider also that "one of the remarkable tendencies of the English Common Law upon all subjects of a general nature is to aim at practical good rather than theoretical perfection, and to seek less to administer justice in all possible cases than to furnish rules which shall secure it in the common course of human business." 1 Story E. Jur., sec. 111.

We think, therefore, that all evidence in regard to plaintiff's purchase of the cotton was irrelevant. He had a valid contract for its shipment at 69½ cents. His rights thereunder could not be affected by a notice that the defendant's agent had been misinformed, as we have seen.

Hence, we need not consider the exception taken by the defendant to the admission of exclusion of evidence relating to that (578) part of the controversy. Under the law as we hold it to be, it being admitted that the plaintiff had been required to pay more than the contract price for the shipment of his cotton, he was entitled, as his Honor held, to recover the difference between the sum so paid and the contract price.

Affirmed.

CLARK, J., (dissenting). The evidence is not controverted that the local agent at Goldsboro did not have authority to quote rates of freight from that point to Liverpool (passing, as the freight must, over so many lines besides that for which he was agent); that the general agent at Richmond, in reply to an inquiry from local agent, quoted a rate of 89½ cents, and that by some error in transmission by telegraph this was received at Goldsboro as 69½ cents, and so quoted to the plaintiffs.

The mistake having been made by an agent or an employee of the railroad company, it is bound, but only to the extent that the plaintiffs had been misled and damaged by having acted upon it before the mistake was corrected, which was done promptly—as soon as the general agent had notice of the mistake which had been made in the transmission of the message.

If, by reason of the supposed reduction of the rate from 89½ cents to 69½ cents, the plaintiffs had, before correction of the mistake, sold cotton in Liverpool at less than the market price, which is very im-

probable, or had bought cotton somewhat above the market rate in Goldsboro, which is possible, to whatever extent they had been thus damaged by relying upon the correctness of the dispatch they are entitled to compensation. There was no offer on the part of the railroad company through its general agent, who alone was authorized to speak for it, to carry at 69½ cents. The local agent did not even hold him-
(579) self out as having authority. He merely reported the query of defendant to the general agent and communicated his reply to the plaintiffs. There was no offer by the defendant, by accepting which a contract was made between the parties. There was simply an erroneous message delivered to the plaintiffs by an agency used by the defendant. The plaintiffs' right to recover is not based upon a breach of contract on the part of defendant, for it made none at 89½ cents, nor offered to make it. The right to recover is based upon the mistake made by the agent in delivering a message, which the plaintiffs had a right to rely upon till corrected, and to the extent that they were so misled and damaged by reliance upon the supposed message they are entitled to recover, but no further. This damage was not necessarily and not even probably the difference between 89½ cents and 69½ cents, but only the lower price at which the plaintiffs sold, or at the higher price at which they bought by reason of supposing they had gotten 20 cents per hundred pounds off of the usual rate of freight, and this not on the 500 bales, but on only so much thereof as they had bought or sold before the correction of the error was made known to them. This is the measure of plaintiff's loss, and not the value of the good bargain they thought they had made. There was no contract at 69½ cents. The mind of the defendant never entered into such. There was a mistake of the agent used in transmitting the message, and the loss caused thereby should be borne, not by the party who in good faith relied on it, but by the party who employed such agency.

The principle is only bound by the acts of its agents within the scope of their agency. The scope of Drake's agency at Richmond was to contract for rates. He made no offer at 69½ cents. He made no mistake. He has done nothing that fixes any contractual liability upon the defendant. Yet, he is the only one who could have done so. The scope of the agency of the telegraph operator at Chase City, who, it
(580) seems, made the mistake, was not to make contracts, but to transmit messages. The defendant is only bound by his acts within the scope of its agency. Whatever damage the plaintiffs sustained by the mistake in relaying the message, the principal, the defendant company, is liable for, but not for a breach of a contract, since that agent could not make a contract, if he had offered to do so, and certainly could not by making a mistake. In relaying the message he inadvertently

took or erroneously transmitted six dots (. . . . . .), the telegraphic mark for six, instead of a dash and four dots (—. . . .), the sign for eight. This mistake of a dash for two dots, was, so to speak, a *lapsus pennæ* on his part. It was no mistake on the part of the contracting agent. The learning about unilateral mistakes has, therefore, no bearing, for there was no mistake on either side to the contract. The two sides simply never agreed. The defendant offered 89½ cents, the plaintiffs thought they were accepting 69½ cents.

Take a homely example. A landowner has an overseer, who is authorized to employ hands. The overseer sends a message by one of his employees to some one that he will give him employment for a year at $10 per month. By reason of carelessness, drunkenness or stupidity, the messenger says the overseer will give $30 per month. Could it be contended that the landowner must pay for a year three times the usual price for an ordinary farm hand? Not at all. He is bound by the act of his overseer, who is authorized to hire hands, in the absence of collusion and the like. But as to the messenger, the principal is bound by his mistake only to the extent of the damages actually suffered by the other party, by relying upon the message before it is corrected. In the present case it does not appear whether the telegraph line was operated by the defendant's agents and employees, or by an independent company. Nor does it make any difference to the plaintiffs, as the telegraph agency acted for the defendant, who is liable for damages caused by its mistake. If the telegraph line was op- (581) erated by a telegraph company, the defendant could recover of it what damages it has to pay plaintiffs by reason of its mistake in transmission. But that does not affect this question, which is as to the measure of damages the defendant must pay by reason of the mistake. The court should have instructed the jury, as prayed by the defendant, "that there was never a contract or coming together of the minds of plaintiffs and defendant to ship cotton at 69½ cents per 100 pounds to Liverpool, but that as the error was that of defendant's agent the defendant was obliged to indemnify the plaintiffs against actual loss," and that "the defendant was not obliged to pay plaintiffs any profit plaintiffs would have made on the reduced price for freight on cotton."

Cited: Norton v. R. R., 122 N. C., 934; *Efird v. Tel. Co.*, 132 N. C., 270; *Waters v. Annuity Co.*, 144 N. C., 669.

(582)

NATT ATKINSON v. THE ASHEVILLE STREET RAILWAY COMPANY.

Corporation—Franchise—Collateral Attack—Appeal—Practice.

1. Where a license to lay down a railway track on certain streets mentioned was granted by a city to "F. and his associates, to be known as the A. Company," who could act as a corporation only upon duly taking out letters of incorporation or obtaining a legislative charter, the question whether such incorporation has been duly obtained or whether those parties have attempted to exercise corporate functions without it cannot be raised in an action by one who, claiming to be the owner of the franchise, seeks to have an assignment of the same to defendant company set aside and to enjoin the company from operating under it.
2. City authorities are empowered to issue license for the laying down a street railway track upon the streets of the city, and for the operation of the railway.
3. Where a complaint alleged that the plaintiff, being the owner of a license to build and operate a street railway, assigned it *in escrow* to M., who, in breach of the trust reposed in him, assigned it to defendant corporation, who is endeavoring to act under it, and plaintiff seeks to have the assignment set aside and the defendant enjoined from operating the road: *Held*, that it was error to dismiss the action on the ground that the complaint did not set out a cause of action.
4. Where the case on appeal, adopted by the trial judge, states that notice of appeal was waived, the statement cannot be denied for the first time on the argument in this Court.
5. The record need not show that an appeal was duly entered when it affirmatively appears in the case on appeal, which bears date within the time prescribed for taking an appeal, that the appeal was taken and notice thereof waived.

ACTION, by Natt Atkinson against the Asheville Street Railway Company, to set aside a certain assignment of a franchise and to restrain defendant company from operating under such franchise, heard before *Bynum, J.*, at August Term, 1892, of BUNCOMBE.

From a judgment dismissing the action on the ground that the complaint did not state facts sufficient to constitute a cause of action, the defendant appealed.

The complaint was as follows:

"1. That the city of Asheville is a body politic and corporate, duly chartered and organized under and by virtue of an act of the General Assembly of North Carolina, entitled 'An Act to amend the charter of the town of Asheville,' ratified 8 March, A. D., 1883, and the acts of which that act is amendatory and the acts amending the same.

"2. That on 4 March, A. D., 1888, the plaintiff was the owner of a certain license privilege and franchise to operate a street railway in the city

of Asheville, commonly known as the Farrinholt Charter, the same being a license privilege and franchise granted by the said The City of Asheville, by an ordinance duly enacted, passed and ratified by the Board of Aldermen of the said The City of Asheville to one (583) L. A. Farrinholt and his associates, and by the said L. A. Farrinholt and his associates assigned to plaintiff, for value. A copy of said ordinance is hereto attached, marked 'Exhibit A,' and is hereby made a part of this complaint.

"3. That on said 4 March, A. D. 1888, the plaintiff was and ever since has been the owner of valuable real estate in and near the said city of Asheville, some lots of which lie near Chestnut Street and Merrimon Avenue in said city, and some lots of which lie near Depot Street in said city, and all of which would have been greatly enhanced in value by the building and operating of a street railway on said streets and said avenue, and the greatest, if not the only object the plaintiff had, outside of the general welfare of said city, in purchasing the said Farrinholt charter, was to insure the building and operating of a street railway along said Chestnut and Depot streets and Merrimon Avenue, and the plaintiff in order to prevent the building of other lines of street railroad on only a part of the streets named in the said Farrinholt charter, the building of which would have rendered the building and operating of the street railway on all the streets therein named as aforesaid unprofitable, and in this way would have made it impossible to raise the necessary capital to build a street railroad on the streets therein named as aforesaid, deposited with said city of Asheville the sum of $1,000 as a guarantee that the plaintiff would build or cause to be built a railroad on all of said streets so named as aforesaid (all of which will more fully appear upon reference to said city's receipt for said money, a copy of which is hereto attached and hereby made a part of this complaint), and thereby induced the said city to refuse permission to the parties desiring it to build a railway on only a part of said streets, leaving the said Chestnut and Depot streets and Merrimon Avenue without railroad facilities (the said city being about to grant such permission on the ground that plaintiff, as the said city and said parties alleged, could not (584) command the means to build any road, and that a road on part of said street was better than no road at all).

"4. That in order to accomplish the desire of plaintiff that street railroads should run on all of the streets named in the said Farrinholt charter, and especially that such railroads should be built and operated on said Chestnut and Depot streets and Merrimon Avenue, the plaintiff entered into an agreement and contract with one E. D. Davidson, who, as plaintiff is informed and believes, is insolvent, whereby the said E. D. Davidson, in consideration of the assignment to him of the said Farrin-

holt charter, agreed and bound himself to build and operate a street railroad on all the streets named in the said Farrinholt charter, and, in order to insure the faithful performance of said contract on the part of the said E. D. Davidson, the assignment of the said Farrinholt charter was not delivered to him, but was, by agreement with the said E. D. Davidson, delivered to J. G. Martin, to be held by him *in escrow*, and by him delivered to the said E. D. Davidson only after the said E. D. Davidson had fully complied with his contract in reference to the building and operating of said railroad on said streets named in said Farrinholt charter, and in other respects; and that the said J. G. Martin accepted the trust thus reposed in him, and received the said assignment *in escrow* for the purposes aforesaid; all of which will more fully appear by reference to a certain writing, a copy of which is hereto attached and hereby made a part of this complaint, and marked 'Exhibit C.'

"5. That, notwithstanding the solemn agreement on the part of the said J. G. Martin that he would hold the said assignment for the purposes set forth in said 'Exhibit C,' he has long since delivered said assignment to said E. D. Davidson, although as the said J. G. Martin well knew, the said E. D. Davidson had not then, nor has he yet, built or begun to build any street railroad or other railroad on the said Chestnut and Depot streets and Merrimon Avenue, or either of
(585) them; and, although no street or other railroad has ever been built or begun by any person or persons, or by any corporation or corporations, on said last named streets or said last named avenue, and the time within which the said E. D. Davidson agreed to build or begin to operate a street railroad on all of the streets named in the said Farrinholt charter having long since expired, the plaintiff has no reason to hope that the said railroad will ever be built on either of said last named streets or on said last named avenue, and, by the breach of trust on the part of the said J. G. Martin hereinbefore set forth, the plaintiff has been greatly damaged.

"6. That the defendant, which is a corporation chartered and organized by and under the laws of North Carolina, purchased the said license, privilege and franchise known as the Farrinholt charter, as aforesaid, from the said E. D. Davidson, with full knowledge of all the facts hereinbefore alleged.

"Plaintiff therefore prays judgment that the delivery of the assignment, referred to in the foregoing complaint, by J. G. Martin to E. D. Davidson, be and ever shall be void, and that the plaintiff is the owner of the license privilege and franchise described in the foregoing complaint, and that the defendant be perpetually enjoined from ever using, exercising or operating under the said license privilege and franchise,

and for such other further relief as the facts set forth in the foregoing complaint will warrant."

The case on appeal made out by plaintiff states:

"When the case was called for trial the defendant moved to dismiss the action, on the ground that the complaint did not state facts sufficient to constitute a cause of action. The motion was resisted by plaintiff, and after full argument the court sustained the motion and dismissed the action, holding that the complaint did not state facts sufficient to constitute a cause of action, and the plaintiff excepted and appealed to the Supreme Court.

"Notice of appeal waived. Appeal bond fixed at $25. 10 September, 1892." (586)

His Honor made the following order and statement:

"The case of the appellant Natt Atkinson having been tendered to the defendant, and the exceptions being considered and reviewed, and the case returned to the defendant for a counter statement, and no counter statement being filed, the case as made out and tendered by the appellant is adopted as the case for the Supreme Court.

"JNO. GRAY BYNUM,
"Judge Presiding."

"In the above case my recollection is that the plaintiff asked an appeal, and I intended to tell the clerk to make the entries. If the failure to make the entries was my inadvertence, I cannot allow the plaintiff to be prejudiced by it, especially as no injury can ensue to the defendant. Therefore, the exceptions of the defendant are overruled, and as the defendant asks in his exceptions leave to file counter statement, he has leave to do so. JNO. GRAY BYNUM,

"WEBSTER, 29 September, 1892. *Judge Presiding."*

Chas. A. Moore for plaintiff.
F. A. Sondley for defendant.

CLARK, J. The so-called "Farrinholt" charter is simply a license by the city to lay down a railway track on certain streets mentioned, granted to individuals named, who, of course, could act as a corporation only upon duly taking out letters of incorporation before the clerk or obtaining a charter from the General Assembly. The question whether such incorporation has been duly obtained, or whether those parties have attempted to exercise corporate functions without it, is not raised in this action, and could not be in this collateral way.

(587) The city authorities were empowered to issue the license. Elliot R. & S., 329, 334; *Burlington v. R. R.*, 31 Am. Dec., 145; *R. R. v. Richmond,* 96 U. S., 521. The complaint avers that it was assigned by the plaintiff, then owner of the license, *in escrow* to Martin who, in breach of the trust reposed in him, has conveyed it to the defendant, who is endeavoring to operate under it It was error to hold that a cause of action is not set out.

The case on appeal recites "plaintiff excepted and appealed. Notice of appeal waived." The judge in a memorandum, appearing in the transcript on appeal, says that "his recollection is that the plaintiff asked an appeal, and if the failure to make the entries was his inadvertence, he cannot allow plaintiff to be prejudiced," and grants defendant "leave to file counter statement, as it had asked to do." This, it seems, the defendant did not do, and the judge adopted the case on appeal prepared by appellant. The waiver is neither controverted nor is there a denial that an appeal was, in fact, taken, though opportunity was given defendant by leave to file a countercase. There is nothing beyond the bare suggestion in defendant's printed argument or brief that notice of appeal was not served, and that *entry* of appeal was not made. But this neither denies taking the appeal nor waiver of notice, nor if it did, does it do so in a legal mode. If notice was waived, why should it be served, and if appeal was actually taken, whether it was entered or not becomes less material. If there had been a denial in a legal way and at the proper time of a waiver, the court could not recognize the waiver, unless in writing. *Sondley v. Asheville,* 112 N. C., 694, in which case there were contradictory affidavits, and the court disregarded the alleged verbal agreement, under Rule 39, and repeated rulings of this Court. Besides, the denial of a waiver should have been made below, and not for the first time by a suggestion in the argument in this Court, and in contradiction of the case on appeal adopted by the judge.

(588) *Walker v. Scott,* 102 N. C., 487, cited in *S. v. Price,* 110 N. C., 599. Strictly and properly the record should show that the appeal was duly entered, but that is not imperative if it appears, as here, affirmatively that the appeal, in fact, was taken and notice was waived. *Fore v. R. R.,* 101 N. C., 526. Here the case on appeal recites that the defendant excepted and appealed, and that notice of appeal was waived. This not being controverted by the appellee, even if it had not been adopted by the judge, is evidence of those facts. Besides, in addition, the case itself bears date 10 September, 1892, within the time within which the appeal could be taken. This distinguishes this case from *Moore v. Vanderburg,* 90 N. C., 10; *Wilson v. Seagle,* 84 N. C., 112,

and *Spence v. Tapscott,* 92 N. C., 576, relied on by appellee. The motion to dismiss appeal is denied. In dismissing the action below there was

Error.

Cited: Simmons v. Allison, 119 N. C., 563; *Delozier v. Bird,* 123 N. C., 692; *Barden v. Stickney,* 130 N. C., 63.

JOHN SELBY v. WILMINGTON AND WELDON RAILROAD COMPANY.

Common Carriers—Railroads—Special Contract—Shippers—Damage to Stock—Duty of Carrier as to Providing Cars.

1. When a shipper of freight waives his privilege to demand of a common carrier the transportation of his freight under the strict rule and requirements of the common law, and for a valuable consideration (the payment of less than the usual tariff charges) allows the transportation company to assume the relation of a carrier under special contract, such contract, in the absence of an allegation of fraud or imposition, must be interpreted according to the ordinary rules of construction and its provisions enforced, unless they are unreasonable and unjust.
2. Where, in consideration of the reduced rates granted him, the shipper of livestock agreed as a condition precedent to his right to recover any damages for loss or injury to said stock, that he would give notice in writing of his claim thereof to some officer of said company or its nearest station agent before said stock should be removed from the place of destination or mingled with other stock: *Held,* that such stipulation contravened no sound public policy and was not unreasonable and void.
3. While it may be the duty of a carrier of livestock to provide cars strong enough to safely transport animals that are ordinarily unruly, the law does not require it to detect that some of them are vicious, and act accordingly. The vehicle must be suitable for the safe conveyance of ordinary animals of the class, and it is not required that it shall be strong enough to withstand the struggles of some of that class that may be not only unruly but vicious. Therefore, on a trial of an action for damages to stock while being transported on defendant's cars, the trial judge erred in instructing the jury that "the car must be sufficiently strong to resist the struggles of the stock, and the company is liable for any loss occasioned by its neglect in this regard, in spite of the fact that the animals are vicious and unruly, upon the principle that it is within its power to provide those which are actually and absolutely sufficient."

ACTION for injuries to livestock while being transported on defendant company's cars, tried before *Shuford, J.,* and a jury, at February Term, 1893 of WILSON.

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

S. A. Woodard for plaintiff.
C. B. Aycock for defendant.

BURWELL, J. The relation between the parties to this action is not that of a common carrier towards a shipper of freight who had chosen to pay the usual tariff charges, and stand upon his rights, and hold the carrier to the performance of its duty under all the strict requirements of the common law. It was his privilege to demand of the carrier the shipment of his stock under those somewhat stringent but not unjust conditions. He has chosen not to avail himself of this privilege, and thus put his animals under the safeguard established by the law for
(594) the protection of those whose property comes to the possession of a common carrier for transportation, but rather, for a valuable consideration, to waive this right of privilege and allow the defendant to assume simply the relation of a carrier of stock under a special contract which, no fraud or imposition being alleged, must be interpreted according to the ordinary rules of construction, and its provisions enforced, unless they are unreasonable and unjust—"if they are not in conflict with sound legal policy." *Express Co. v. Caldwell,* 21 Wall., 264.

Among other stipulations contained in the contract was one by which the plaintiff agreed, in consideration of the reduced rates granted "as a condition precedent to his right to recover any damages for loss or injury to said stock," that he would "give notice in writing of his claim thereof to some officer of said company or its nearest station agent before said stock is removed from the place of destination above mentioned, or from the place of the delivery of the same to said party of the second part, and before such stock is mingled with other stock." It seems to us that this condition, imposed upon the plaintiff by a contract of his own making, founded upon a valuable consideration moving to him, contravenes no sound legal policy, and is not unreasonable. It is not in any sense a stipulation that the defendant carrier shall be exempted from the effects of its negligence or the negligence of its servants in the performance of those duties towards the plaintiff assumed in the contract; nor is it a requirement that any injury that has been done to plaintiff's stock while in defendant's care under the terms of the bill of lading shall be *adjusted* in the presence of an officer of the defendant company before the property is removed from the station, and hence the case of *Capehart v. R. R.,* 81 N. C., 438, has no application here. We have no stipulation at all as to the fixing of the amount of damage done to plaintiff's property, but simply an agreement that he will, when about to take his

animals from the cars or yard of the defendant, notify the company in writing if, upon a reasonable examination, he is able (595) to detect any damage done them. Owing to the nature of the property intrusted to the carrier, the difficulty of identifying each animal, and the terms of the contract as regards such damage as might be inflicted by the animals on one another, or might come to them without any fault on the part of the defendant, it seems to us indeed very reasonable that the defendant's agents should have an opportunity then and there to examine the stock and ascertain if they can the cause and the extent of the damage. We have been cited to no authority which, upon examination, seems to hold that such requirement, under the circumstances, is unreasonable. *Rice v. R. R.*, 63 Mo., 314; *Goggin v. R. R.*, 12 Kan., 416, and other cases, seem fully to sustain the view we take of the matter, and to show that there was error in the charge that the stipulation was not reasonable and was void.

It is stated in the case that his Honor gave the jury the following instruction, which was excepted to: "It is the duty of the defendant company to provide suitable cars for transporting livestock. The car must be sufficiently strong to resist the struggles of the stock, and the company is liable for loss occasioned by its neglect in this regard, in spite of the fact that the animals are vicious and unruly, upon the principle that it is within its power to provide those which are actually and absolutely sufficient."

There was error here also, we think, for while it may be the duty of a carrier that undertakes to ship livestock to provide cars strong enough to safely transport animals that are ordinarily unruly, the law does not impose upon it so hard a task as to detect that some of them are vicious, and act accordingly. The vehicle must be suitable for the safe conveyance of ordinary animals of the class. It is not required that it shall be strong enough to withstand the struggles of some of that class that may be not only unruly, but vicious. (596)

As there must be a new trial for the error mentioned, we omit consideration of the other exceptions taken by defendant.

New trial.

Cited: Wood v. R. R., 118 N. C., 1063; *Mitchell v. R. R.*, 124 N. C., 249, 251; *Jones v. R. R.*, 148 N. C., 385; *Austin v. R. R.*, 151 N. C., 138; *Stringfield v. R. R.*, 152 N. C., 138; *Kime v. R. R.*, 156 N. C., 453; *Harden v. R. R.*, 157 N. C., 243, 250; *Southerland v. R. R.*, 158 N. C., 329; *Kime v. R. R.*, 160 N. C., 464; *Mule Co. v. R. R., ib.*, 247; *Duvall v. R. R.*, 167 N. C., 25; *Culbreth v. R. R.*, 169 N. C., 725; *Baldwin v. R. R.*, 170 N. C., 13; *Mewborn v. R. R., ib.*, 210; *Horse Exchange v. R. R.*, 171 N. C., 73; *Schloss v. R. R.*, 171 N. C., 352.

NORA DARGAN ET AL. v. THE CAROLINA CENTRAL RAILROAD COMPANY.

Right of Way—Eminent Domain—Statute of Limitations.

1. The right of the State to take private property under the power of eminent domain rests upon the ground that there is a public necessity for such taking, and can only be exercised when the law provides the means of giving adequate compensation to the owner.
2. The statutory provision allowing private property to be taken under the right of eminent domain must be strictly pursued, and the right of the owner to obtain compensation depends on whether the corporation has obtained a vested right.
3. An interest in the entire right of way does not vest in the corporation unless it takes actual possession in the exercise of the privilege granted it; but *it seems* that where the corporation enters, its constructive possession extends to the boundary of the right of way given in the charter.
4. Where the charter of a railroad provided that, in the absence of any contract with the owner, it should be presumed that the land over which the road runs, with a space of 100 feet on each side, has been granted to the corporation, and the corporation took a deed for less than 100 feet within two years after its completion, this prevented the limitation in the charter from applying, and the corporation got no title to land lying outside of the deed, but within 100 feet of the track, by the lapse of the two years.

ACTION, tried on issues joined before the clerk, before *McIver, J.*, and a jury, at August Term, 1893, of UNION.

The facts were as follows:

1. That C. N. Simpson owned the whole of lot No. 42 when
(597) the defendant railroad company entered upon and completed its road across the same.

2. That the defendant railroad company entered upon and completed its road across said lot in November, 1874, its track and actual possession being upon and confined to that portion of said lot conveyed to the defendant company in the deed above set forth.

3. That all the land embraced in the said deed of C. N. Simpson, which is the southwestern half of said lot No. 42, is within 100 feet of the center of the track of the defendant railroad company, as laid down by it when it entered and completed its road across the northeastern half of said lot No. 42, in November, 1874.

4. The several acts of the Legislature chartering the defendant company, and the companies to whose rights it succeeded, were considered in evidence, and they are hereby referred to as a part of this case.

C. N. Simpson, a witness for the plaintiff, testified as follows: "Neither myself nor the railroad company instituted proceedings for con-

demnation. Colonel Fremont was superintendent at the time the railroad entered and completed its road across lot No. 42."

Exception 1.—Question: "State whether the deed of 7 July, 1875, made to the C. C. Railroad Company for the northeastern half of lot No. 42, was the consummation of a contract with the said company, by which you consented for said company to build its road across your land?"

The defendant, waiving objection to the leading character of the question, objected because the same was incompetent, and it did not state that the contract was in writing. Witness then stated that there was no written contract.

(Objection sustained. Exception by plaintiffs.)

Question: "Why did you not convey the whole of Lot No. 42 to the railroad company?"

After objection by defendant witness stated that it was because Mr. Frye said the company did not need any more. "Mr. (598) Frye was civil engineer, but I think he was acting as road-master at the time. He surveyed that part of the lot I conveyed to the company, and it was to him I delivered the deed."

Exception 2.—Upon the foregoing evidence and admissions the court stated that it would charge the jury that more than two years having elapsed after the completion of the railroad through the land, and before the commencement of this suit, it would instruct the jury that the plaintiff's claim for compensation was barred by the statute of limitations and the plaintiffs could not recover. (Plaintiffs excepted.)

The court so instructed the jury, whereupon the jury responded to the issues as follows:

"1. Is the *feme* plaintiff the owner of the land described in the complaint? Answer: 'No.'

"2. Is her right to recover compensation barred by the statute of limitations? Answer: 'Yes.'"

Plaintiffs excepted, and appealed from the judgment for defendants.

D. A. Covington, F. I. Osborne and Haywood & Haywood for the plaintiffs.

John D. Shaw and Batchelor & Devereux for defendant.

AVERY, J. The right of the State to take private property rests upon the ground that there is public necessity for such appropriation, and can be exercised only where the law provides the means of giving adequate compensation to the owner. Where the power to appropriate has been given by statute, without sufficient provision for the payment of damages, it has been held to be the intent of the Legislature that

(599) the right of eminent domain should be exercised only after first obtaining the consent of those affected. *R. R. v. R. R.*, 2 Gray, 1; *Matter of Flat Bush Avenue*, 1 Barb., 286; *Matter of Hamilton Avenue*, 14 Barb., 414; 1 Potter Corp., sec. 168.

Text-writers and courts classify the methods of obtaining the right of way for railroads as of three or four kinds, the difference between two of the modes being only that which arises from entering into an executory contract for purchase in one instance, and taking an executed conveyance for the same interest in the other. 1 Harris on Dom. Ry. Corp., 35; *Beattie v. R. R.*, 108 N. C., 436. The charter of the defendant company (Laws 1854-55, ch. 55 secs. 26 and 28) followed substantially the usual formula adopted in framing nearly all of the earlier acts of incorporation in this country, when it provided that "in the absence of any contract or contracts in relation to land, through which said road or any of its branches may pass, signed by the owner thereof, . . . it shall be presumed that the land over which said road or any of its branches may be constructed, together with a space of one hundred feet on each side of the center of said road, has been granted to said company by the owner or owners thereof," etc. Where no such contract was shown, the undisturbed use by the company of such right of way over a tract of land for two years after the road should be finished and running over it, by the terms of the act, raised the presumption of a grant of the easement by the owner. *Hendricks v. R. R.*, 101 N. C., 623; *Beattie v. R. R., supra.* Though the provision in reference to a previous attempt to make some agreement with the owner, by which the necessity for instituting condemnation proceedings might be obviated, was in different charters couched in terms somewhat variant, many of the ablest courts in this country construed them as imposing the duty upon corporations as a condition precedent to the exercise of the right of condemnation, of alleging and proving that an effort had been made to purchase
(600) the privilege of passing over the land sought to be condemned directly from the owners, or that such proprietors were not *sui juris.* Lewis Em. Domain, sec. 301, with note 2, page 394, and notes 6 and 7, page 395; 1 Wood R. R. Law, page 711. While it is not necessary to give our approval to this doctrine, which has no direct application to our case, it illustrates the rule that statutory provisions for taking property in the exercise of eminent domain must be always construed strictly. 1 Wood's R. L., page 643 and note 2.

The right of the owner to recover damages for the taking by a railway company depends in any case upon the answer to the test question, whether the corporation has already acquired a vested interest in the land, and whether the owner has a still subsisting right to recover damages for the assertion of dominion over it. *Westbrook v. North*, 2 Me.,

179; *Hampton v. Coffin,* 4 N. H., 517; *R. R. v. Nesbit,* 10 Howard (U. S.), 395. An interest in the entire right of way of one hundred feet on each side would not vest in the company, unless it took possession in the exercise of the privilege of appropriating private property conferred by the charter (sections 26 to 28), and the correlative right to sue for the damages would not accrue till the title to the interest vested in the company by such unequivocal entry. It was only "in the absence of such a contract as would enable the company to construct and operate its road over the land on which its line was located that its occupation and use of the land for corporate purposes for two years after its line was finished over it could be justly held to have started the statute to running so as to raise a presumption of a grant to the right of way for one hundred feet on each side of the center of the track." This is not only a fair construction of the language of the charter, but it establishes a rule that is in accord with a familiar principle of the common law in reference to adverse possession.

In order to ripen title in the occupant, "possession (said (601) *Pearson, C. J.,* in *Osborne v. Johnston,* 65 N. C., 26) must be adverse, uninterrupted, open and unequivocal, so as to expose the party to an action. This is the *teste.*" *McLean v. Smith,* 106 N. C., 172. The general rule is that when one enters upon land under a deed and occupies some portion of it, his constructive possession extends to the boundary line of his deed, unless, by reason of the lappage of a better title on some part of it, the possession on such interference is deemed in law to be in the claimant under such title. *McLean v. Smith, supra.* The company constructed its track in November, 1874, across the Simpson lot, but entirely upon the half of said lot which was afterwards, on 7 July, 1875, conveyed to it by Simpson and wife in fee simple. The company did not attempt to enter upon the other half, though it was situate within 100 feet of the center of the track, until within two years before this proceeding was instituted, on 16 March, 1893. The plaintiff alleges that there was no attempt to take actual possession of the half of the lot which was conveyed by Simpson and wife to the plaintiff on 23 June, 1883, until within such period, and the answer, by evading a direct admission or denial, is deemed to have conceded the truth of the allegation. If the plaintiff had commenced this condemnation proceeding prior to any assertion of dominion by the defendant, the company or its predecessors might well have answered that they had accepted the conveyance from Simpson in lieu of condemnation, and that the plaintiff could not demand compensation for land outside of that covered by its boundaries, certainly until the company should have entered upon and used it for corporate purposes, if at all. We are not called upon to determine whether the plaintiff could have maintained an action for

possession and damages for the wrongful withholding of the possession of the land conveyed to her by Simpson. 6 A. & E., 603, note 3, and p. 606, note 1. It lies, however, within 100 feet of the
(602) center of defendant's track, and if she could have maintained such civil action for the trespass, we think she might, nevertheless, waive the tortious character of the entry, when actually made in the assertion of a claim by the defendant under its charter, and demand compensation in damages for the easement claimed. 6 A. & E., 595, and note 6. The defendant cannot take advantage of its equivocal conduct in confining its occupation for fifteen years to the limits of its deed from Simpson, so that it was not subjected to any liability for trespass beyond its bounds, and then claim the advantage of holding under the privilege granted in the charter up to the margin of the usual right of way, instead of to the outer lines of the deed. Even though it may not have been incumbent on the defendant, as a condition precedent to setting up a claim that he acquired an easement in the land from the State in the exercise of the right of eminent domain, to show that he had made an effort previously to purchase the privilege by private agreement, and had failed, yet, if the plaintiff, taking the laboring oar upon himself, proposed to prove that another agreement was made in lieu of instituting condemnation proceedings in 1875, by which the defendant's predecessor accepted (probably for a smaller price) a more restricted territory in fee simple, instead of the easement in a larger boundary, we can conceive of no sufficient ground for objecting to the competency of the testimony. It was only in the absence of such agreement as to the right of way that the statute, upon the completion of the line over the land of an owner, was put in motion so as to raise a presumption of a grant of the easement within two years thereafter. The company, like an individual, can acquire a right as an incident to occupation only where the possession is unequivocal. It was clearly competent to show that the agent of the company accepted said deed, because, as he said, the company did not need as much as 100 feet on either side of
(603) the center of the track. We think that the presumption is in all cases where a deed from a landowner to an area more limited than that allowed by its charter for the location of its line has been accepted by the company, that the conveyance was, within the contemplation of the charter, a contract entered into in lieu of the resort to condemnation proceedings. In this particular instance the defendant has no cause to complain, if the land is really needed for corporate purposes on account of the growth and development of its business, that the plaintiff has waived objection and conceded, instead of contesting, its right of condemnation. 6 A. & E., p. 595, and note 6. The rights of the defendant are not impaired and its liabilities are not affected,

as a rule, by reason of the successive sales of the franchise. *Hendricks v. R. R.*, and *Beattie v. R. R., supra.*

For the reasons given, we think that the court below erred in instructing the jury that the plaintiff's claim was barred by the lapse of time, and a new trial must therefore be awarded.

New trial.

Cited: Jones v. Comrs., 130 N. C., 453; *Dargan v. R. R.*, 131 N. C., 629; *Thomson v. R. R.*, 142 N. C., 322; *R. R. v. Power Co.*, 171 N. C., 322; *Cobb v. R. R.*, 172 N. C., 60.

(604)

W. L. BAIRD v. RICHMOND AND DANVILLE RAILROAD COMPANY.

Removal of Causes—Federal Jurisdiction—Duty of State Court—Practice.

1. The Circuit Court of the United States, when satisfied by affidavit and petition for removal of a cause from a State court, on the ground of adverse local influence and prejudice, that it has jurisdiction of the parties and of the subject-matter of the suit, and that the prejudice, etc., exists, has the right to order the removal of the suit from the State to the Federal court.
2. A State court, while not bound to surrender its jurisdiction on a petition for a removal until a case has been made, which on its face shows that the petitioner has the right to transfer, yet when it does so appear, it is error "to decline to permit" the removal upon an affidavit offered; therefore,
3. In such case the usual and proper practice is to enter a formal order that the State court will not proceed further, to the end that parties and witnesses may understand that they will not be required to attend, unless upon notice that the cause has been remanded.
4. Where the Circuit court has the power to remove a cause pending in the State court, and exercises it by an order, it may issue a *certiorari* to the State court, or the parties may, upon filing a certified copy of the affidavit, petition and order, demand a certified copy of the record.
5. It is not error in the State court to refuse to order a record to be certified to the Federal court, since it is the duty of the clerk to certify it to the Federal court in obedience to a writ of *certiorari*, without any motion or order made in his own court, but after the record has been certified, showing sufficient ground for removal, it is error in the State court to resist the order of removal.
6. Where a removal of a cause from a State to the Federal court is asked for upon the ground of prejudice, etc., the order may be granted upon a proper showing as to other matters at any time before trial.

The complaint alleged that the plaintiff's intestate was a brakeman on defendant's freight train, and injured by the negligence of defendant in consequence of the defective condition of a locomotive, of which condition the intestate had no notice. The defendant denied the charge of negligence, and averred that intestate knew of the existence of the causes which are alleged to have produced the injury complained of.

The case was heard at August Term, 1893, of BUNCOMBE, before *Armfield, J.*, upon a motion of defendant to remove the cause to the Circuit Court of the United States. The motion was refused, and defendant appealed.

The defendant offered the order issued by *Judge Dick,* United States Judge. And to sustain this order the defendant offered in evidence the petition, affidavit and bond of the defendant, filed in the Circuit Court of the United States, as shown by a transcript from said court

(605) In the order of *Judge Dick,* after a finding that the prejudice and local adverse influence did actually exist, as set out in the petition and affidavit of defendant, it was "further ordered and adjudged that the said cause, suit or action be removed to the Circuit Court of the United States for the Western District of North Carolina, and that the clerk of the said court at Asheville, within said district, certify this order to said State court, to the end that the transcript of the record in said cause, suit or action be made and transmitted to this court, that the same may be tried in the Circuit Court for the Western District of North Carolina."

The defendant asked the court to sign an order as follows:

"It appearing that the 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, affidavit 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 case."

His Honor declined to permit the removal and to sign the order, and defendant appealed.

J. D. Murphy for plaintiff.
Busbee & Busbee for defendant.

AVERY, J. Where it appears by affidavit and petition, as prescribed by the act of Congress, that the Circuit Court of the United States has jurisdiction of the parties to and subject-matter of a suit pending in the State court, and that on account of prejudice and local influence the pe-

titioner will not be able to obtain justice in the court in which the action has been brought, or in any other State court to which (606) it may be removed under the laws of the State, the Federal Court, if satisfied as to the sufficiency of the proof of prejudice and local influence adverse to the petitioner, may grant the order of removal. In reference to the practice in such cases, *Foster,* after calling attention to the fact that it is not clearly settled by the adjudications of the courts how much of the Revised Statutes relating to removal had been repealed by implication by the Act of 1888, makes the following suggestion: "The prudent practitioner, when seeking to remove a cause for prejudice or local influence, will comply with the provisions of the Revised Statutes, and also with the practice in ordinary removals. It seems that the petition should be presented to the Federal Court and a certified copy of the same, with the proceedings thereon, filed in the State court." Foster's Federal Practice, sec. 386. It would seem that the defendant has acted upon the foregoing suggestion in filing a certified copy of the petition and affidavit in the State court, but has gone further in procuring a writ of *certiorari* and moving for a formal order for the transfer, founded upon the record so filed. The judge below, after reciting the order offered for his signature, declined "to permit the removal of the cause to the Circuit Court of the United States, and to sign the order presented by the defendant." The material part of the order which the court was asked to make, was as follows: "It is considered and adjudged that the court will proceed no further in this cause, and that the clerk of the court certify to said Circuit Court before the next term thereof a copy of the record in this case." The plaintiff is a resident and citizen of the district in which the action was brought, while one of the defendants is a nonresident corporation. The Circuit Court, in the exercise of its discretion, has found *prima facie,* upon the defendant's affidavit and petition, that on account of prejudice and local influence the foreign corporation cannot obtain a fair trial in the court where the action was brought, or in any other State court to which it (607) might by law be transferred and has ordered the removal to the Federal tribunal. There is no ground for questioning the power of the Circuit Court to make and enforce such an order, since it had jurisdiction of the parties and subject-matter, upon its unreviewable finding that the necessary conditions existed for its exercise, to wit, prejudice and local adverse influence. The only points presented for adjudication by this appeal are:

1. Whether the court below was authorized to declare that it declined *"to permit* the removal."

2. Whether the proper practice was to recognize the fact by a formal order, the cause having already been transferred to the Federal tribunal,

that the court would not proceed further, and thereby give notice to parties and witnesses that they would not again be called.

3. Whether, conceding that the Circuit Court had already acquired jurisdiction, the defendants could insist upon an order from the State court to certify the record.

We do not understand why the learned counsel for the defendants should have pressed the point that there was any conflict between the decision of this Court in *Lawson v. R. R.*, 112 N. C., 396, and an opinion of one of the Circuit Judges of the United States, since no such conflict appears to exist, and if it had been shown, we claim the right, nevertheless, to hold to our own construction until the Supreme Court of the United States shall have interpreted the meaning of the statute otherwise. If, in the case at bar, it had appeared from the petition that the plaintiff was a citizen of a State other than North Carolina, then the Circuit Court would have had no jurisdiction of the case, and we would have adhered to our rulings in the *Bostian Bridge cases,* and unhesitatingly have sustained the judge below in declining to desist from further proceedings and to have the record of the cause certified
(608) to a tribunal which, upon the face of the record transmitted from it, appeared to have no authority to take cognizance of the controversy. In order to confer jurisdiction upon the Circuit Court by the terms of the law as amended, all of the plaintiffs must be citizens of the State where the suit is brought, and at least one of the defendants must be a nonresident. 20 A. & E., 999; *Thomas v. R. R.,* 38 Fed., 673; *Niblack v. Alexander,* 44 Fed., 306; *Pike v. Floyd,* 42 Fed., 247; *Jefferson v. Beaver,* 117 U. S., 272; *Yancey v. Parker,* 132 U. S., 267.

On the other hand, it is only where the petition and affidavits show that the cause is one which the Federal tribunal is empowered to remove and to try that the jurisdiction of the State court is ousted, *ipso facto,* upon the making of the order by the other court. Whether the petition for removal be based upon the allegation of local prejudice, diverse citizenship or other grounds recognized as sufficient by statute, if it appear from the application itself that the Circuit Court cannot lawfully take cognizance, it is both the right and the duty of the State court to ignore an order of removal and proceed as though it had had no notice of it. *Stevens v. Nichols,* 130 U. S., 230; *R. R. v. Swain,* 111 U. S., 379; *Wilson v. Bruce,* 108 U. S., 531.

"A State court," said *Chief Justice Waite,* in delivering the opinion in *Stowe v. South Carolina,* 117 U. S., 430, "is not bound to surrender its jurisdiction on a petition for removal until a case has been made which, on its face, shows that the petitioner has the right to the transfer. . . . The mere filing of a petition for the removal of a suit which is not re-

movable does not make a transfer." *Steamship Co. v. Ferguson,* 106 U. S., 122; 2 Foster Fed. Prac., sec. 385*a*. The Constitution of the United States, and the statutes enacted and treaties made in pursuance of its provisions, are the supreme law of the land, and when one of its courts, in the exercise of its rightful jurisdiction, issues an order to one of the judicial tribunals of a State, it is at least a breach of judicial courtesy in the State court to refuse compliance. 2 Foster, *supra,* sec. 385*a*; *S. v. Hoskins,* 77 N. C., 530. (609)

It was error to "decline to permit" the removal upon the affidavit offered therefor, and we think that it is the usual practice, and is proper, to enter a formal order that the State court will not proceed further, to the end that parties and witnesses may understand that they will not be required to attend unless upon notice that the cause has been remanded. *S. v. Hoskins, supra.* In all cases where the Circuit Court has the power to remove, and exercises it by making an order, it may issue a *certiorari* to the State court, or, without asking for such writ, the parties may, upon filing a certified copy of the affidavit, petition and order of the Federal tribunal in the State court, demand a certified copy of the record. Foster, *supra,* sec. 390. It has been generally held that, upon the filing of the certified copy of the record of the State court, the Federal Court may proceed to hear and dispose of a civil cause. *Ibid.* Where a criminal action is removed, it is the practice to issue a writ of *habeas corpus cum causa. S. v. Sullivan,* 110 N. C., 513; *S. v. Hoskins, supra.* It is not error in the State court to refuse to order the record to be certified, because the clerk was required, on request, to furnish a certified copy, and it was his duty to certify it to the Federal Court, in obedience to the writ of *certiorari,* without any motion or order made in his own court, though comity might dictate to the Federal tribunal a different course, but it was clearly error in the court below to resist the order after the record had been certified, showing sufficient ground for removal. We think, also, that when the jurisdiction of the Federal tribunal attached, the order that the court would not proceed further should have been made, on motion of the defendants, for the reason already stated. *S. v. Hoskins, supra.*

If the application had been made to the State court, and founded upon an affidavit or complaint alleging only diverse citizenship as a ground of removal, as in the case of *Douglas v. R. R.,* 106 (610) N. C., 65, it would have been properly refused on the ground that the controversy was not wholly between citizens of different states, and was not a separable controversy. 20 A. & E., 995 to 998. But as we have already shown, where the petition is filed in the Federal Court, and founded upon prejudice and local influence, if the plaintiff

is a resident of the district, it is sufficient under the amended act if either of the defendants be a nonresident. 20 A. & E., 999 and note 5; *Fisk v. Hanani,* 32 Fed., 417.

Where a removal is asked upon the ground of prejudice or local influence the order may be granted upon a proper showing as to other matters at any time before the cause has been effectively tried, unless a trial be in progress when the motion is submitted, "and undetermined." *Fisk v. Hanani,* 142 U. S., 469. So that the order was made by the proper tribunal and in apt time, and the defendant took the precaution to procure a writ of *certiorari* and file a copy of the record in the State court (2 Foster, *supra,* page 832), and afterwards submit its motion, thus conforming to the construction of law, which was most exacting in its requirements. The order declining to permit the transfer of the cause was erroneous.

Error.

Cited: Howard v. R. R., 122 N. C., 953; *Higson v. Ins. Co.,* 153 N. C., 42.

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(611)

MALVINA T. WHITE v. NORTHWESTERN NORTH CAROLINA RAILROAD COMPANY.

Streets—Ownership of Streets—License by City to use Streets for Steam Railroad—Abutting Owner—Additional Servitude—Action for Damages.

1. In the absence of evidence as to the ownership of the fee in a street of a city, the presumption is that the city has an easement only, and that the fee remains in the abutting owner.
2. Where the ownership of the fee in a street is in the abutting landowner, he is entitled to every right and advantage therein not required by the public, and the easement of the public is the right to use and improve the street for the purposes of a highway only.
3. Although the abutting proprietor may not own the fee in the street, he has, nevertheless, a proprietary interest in the same by way of an equitable easement to the extent that its uses shall not be perverted to other than public purposes as a street.
4. If a city perverts a street to illegitimate purposes it is an interference with the rights of the abutting proprietor, and he is entitled to recover any damages suffered therefrom.
5. The use of a street for an ordinary steam railroad is not a legitimate use of the street for public purposes, and neither the Legislature nor city can authorize such a railroad to be constructed and operated thereon against the abutting proprietor's will without compensation.

6. Where a railroad company entered upon and constructed its road upon a street, thereby reducing the width of the latter, and it does not appear that it entered under any statutory authority but only by the license of the city, the abutting property owner who is endamaged thereby may maintain a common-law action for damages, to be assessed up to the time of the trial, or may sue for permanent damages inflicted by the location and construction of the road, and by so doing confer upon the defendant an easement to occupy the street, as far as such abutter is concerned.

Semble, that where the entry is made under statutory authority the remedy by statute is exclusive.

ACTION for damages to plaintiff's property resulting from the construction of a railroad on a street in front thereof, tried before *Boykin, J.*, and a jury, at August Term of *Forsyth*.

There was judgment for defendant, and plaintiff appealed.

E. B. Jones for plaintiff.
Glenn & Manly for defendant.

SHEPHERD, C. J. The plaintiff is the owner of a lot abutting upon one of the streets of the city of Winston, and brings this action to recover damages for various injuries to her said property, inflicted by the defendant by reason of its having entered upon and constructed its railroad through the said street.

It appears from the complaint that, prior to the plaintiff's (612) purchase of the property in 1879, the street had been "located and opened for the use and benefit of plaintiff and others, and the public generally, who owned property north of Liberty Street, which was almost inaccessible by or over any other street." It also appears that in the construction of its road the defendant made an excavation in front of said property 223 feet in length, and thirty-five or forty feet in depth and width, and thereby reduced the width of the street from thirty to eighteen feet. It is further alleged that by "reason of the nature of the soil and the proximity of the cuts, travel along the said street is rendered dangerous, and that, in order to sustain the width of the same fifteen to eighteen feet, the defendant has put in pillars or posts to hold and retain the earth composing the street in position, which plaintiff alleges is insecure and unsafe and liable to destroy and render useless the said street." It is furthermore alleged that by reason of such excavation and occupation by the defendant, the street, at certain points along the line of plaintiff's property, is almost entirely destroyed, and that plaintiff is greatly endamaged. These allegations extracted from the complaint, must, for the purposes of the appeal, be taken as true, as no evidence seems to have been introduced on the trial, and his Honor rejected the issue as to the alleged damages sustained by the plaintiff, on

the ground that the defendant "had a license from the city to construct its road and use the street, if necessary."

The questions presented, therefore, are whether, as against the abutting owner, the city can authorize the use of its streets for the purposes of an ordinary steam railroad, and whether such abutting owner has any proprietary rights for the violation of which she can maintain an action.

It does not appear how the city acquired its title to the street in question, nor do we learn from the record whether it owns the fee in the soil, or simply an easement therein. In the absence of evidence, (613) however, the presumption is that the city has an easement only, and that the fee remains in the abutting proprietor. Elliott Kent. Com., 432. In such a case "the abutting owner is entitled to every right and advantage in that part of the street of which he owns the fee, not required by the public. The easement of the public is the right to use and improve the street for the purposes of a highway only." Lewis Eminent Domain, 113. It must follow, therefore, that if the city perverts the streets to illegitimate purposes it is an interference with the proprietary rights of the abutter, and that he is entitled to relief at the hands of the courts.

This introduces us to the very important question, never before passed upon by this tribunal, whether or not the use of a steam railroad is a perversion of the street from its original and proper public purposes. There has been much discussion and not a little conflict of judicial decision upon this subject, but it is believed that the weight of authority greatly preponderates in favor of the affirmative view of the proposition. *Judge Dillon,* after a careful investigation, states his conclusion as follows: "The weight of judicial authority undoubtedly is that where the public have only an easement in the streets, and the fee is retained by the adjacent owner, the Legislature cannot, under the constitutional guarantee of private property, authorize an ordinary steam railroad to be constructed thereon, against the will of the adjoining owner, without compensation to him. In other words, such a railway as usually constructed and operated is an additional servitude." 2 Dillon Mun. Corp., 725. In Mills Eminent Domain (section 204) the same doctrine is laid down, and it is said: "The Legislature may authorize the use of a street by the railroad, so as to make the entry lawful, but the use is an additional burden, and the right will not become fixed in the company until compensation is made. If no remedy is provided, there is (614) remaining the remedy at common law."

In Lewis Eminent Domain (section 111) the able and discriminating author remarks: "To us it seems so clear that a railroad is foreign to the legitimate uses of a highway that we never have been able

to understand how a court could reach a contrary conclusion." After stating that highways have from time immemorial been devoted to the common use of every citizen, and that no one had a private right or any exclusive privilege therein, the author proceeds: "The railroad does not fall within the scope of such uses. It requires a permanent structure in the street, the use of which is private and exclusive. It gives to an individual or corporation a franchise and easement in the street inconsistent with the public right. To hold that a railroad is one of the proper and legitimate uses of a street leads to the absurd consequence that a street might be filled with parallel tracks, which would practically exclude all ordinary travel and still be devoted to the ordinary uses of a highway. The law ought not to tolerate such a consequence."

In Elliott Roads and Streets (528) the author cites many authorities and concludes by saying that the weight of authority is that such an appropriation of a street is "a new and additional burden, for which the abutter is entitled to compensation."

In support of his proposition he quotes the following language of *Judge Cooley*: "Neither can the use of the highway for the ordinary railway be in furtherance of the purpose for which the highway is established, and a relief to the local business and travel upon it. The two uses, on the other hand, come seriously in conflict. The railroad constitutes a perpetual embarrassment to the ordinary use, which is greater or less in proportion to the business that is done upon it and the frequency of trains. When, therefore, the country highway or the city street is taken for the purposes of a railroad company en- (615) gaged in the business of transporting persons and property between distant points, the owner of the soil in the highway is entitled to compensation, because a new burden has been imposed upon his estate, which affects him differently from the original easement, and may be specially injurious." Constitutional Lim., 3 Ed., 683.

In Hare's Ann. Const. Law, 361, the foregoing doctrine is fully approved, and it is said: "It is immaterial as regards the principle whether the land is given voluntarily or taken under the right of eminent domain. If the owner dedicates the land, it is for the continuing uses of a street. If it is condemned, such also is the end in view. To convert a common highway over a man's land into a railroad is therefore to impose an additional burden upon the land, which greatly impairs its value, considered as a whole, and if the owner is not compensated his consent must be proved. It cannot be said with truth that, in assenting to the laying out of the highway upon his land, he consented to the building of a railroad upon it, because they are essentially different. The one benefits his land, renders access to it easy, and enhances the

price, while the other makes access to it difficult and dangerous, and renders it comparatively valueless. Nor can it be justly contended that a railway is merely an improved highway. . . . Were the transaction between individuals, every one would see the injustice of such a conclusion. The doubt arises from the supposition that the public interest is involved, and it was to guard against the bias arising from this source that the Constitution interfered to protect the citizen. It follows that the dedication of land as a street does not preclude the owner from bringing trespass or ejectment or obtaining an injunction against a railway company which is about to enter upon and occupy the way, and that the company cannot (in the absence of the exercise of the right of eminent domain) rely upon a grant from the Legislature and the license or consent of the municipality as a justification."

(616) Booth, in his work on Street Railways, sec. 78, after stating that, in the early history of commercial railroads, the current of authority was contrary to the views above stated, remarks: "But, according to the weight of judicial opinion, as expressed during the last thirty years, where the fee of the street remains in the adjoining owner, such use is inconsistent with the purposes of the original acquisition, and, without compensation, can only be acquired by the exercise of the power of eminent domain."

In the discussion of the question, we have preferred to reproduce the conclusions of eminent text-writers rather than attempt a review of the numerous decisions upon which they are founded. These decisions, and others we could cite, fully establish, upon principle and by weight of authority, the proposition that, where the public have only an easement in the street, and the fee of the soil of the street is retained in the abutting owner, a steam railroad cannot, under the constitutional guaranty of private property, be lawfully constructed and operated thereon against his will and without compensation. *R. R. v. Heisel,* 47 Mich., 393; *R. R. v. Reed,* 41 Cal., 256; *Imlay v. R. R.,* 26 Conn., 249; *R. R. v. Steiner,* 44 Ga., 546; *Daly v. R. R.,* 80 Ga., 793; *Cox v. R. R.,* 48 Ind., 178; *Kercheman v. R. R.,* 46 Iowa, 366; *R. R. v. Hartly,* 67 Ill., 439; *Phipps v. R. R.,* 66 Md., 319; *Springfield v. R. R.,* 4 Cush., 63; *Harrington v. R. R.,* 17 Minn., 215; *R. R. v. Ingalls,* 15 Neb., 123; *Chamberlain v. Cordage Co.,* 41 N. J. Eq., 43; *R. R. v. Williams,* 35 Ohio State, 168; *Ford v. R. R.,* 14 Wis., 609; *Carl v. R. R.,* 46 Wis., 625; *Buckner v. R. R.,* 60 Wis., 264; *R. R. v. McAhren,* 12 Ind., 552; *Theobold v. R. R.,* 66 Miss., 279; *Barney v. Keokuk,* 94 U. S., 324; *Adams v. R. R.,* 39 Minn., 286.

(617) The principle, then, being established that the use of a street for steam railroads is not a legitimate use of the street for public purposes, it must of course follow that the city had no right, in the ex-

ercise of its usual and ordinary powers relating to its highways, to authorize the entry and occupation of the same by the defendant, and that the bare license of the city can afford no justification for the infringement of the rights of the plaintiff. The plaintiff, therefore, taking her allegations to be true as to the damage inflicted upon her property, very plainly has a cause of action against the defendant.

If, however, we are wrong in the assumption that the plaintiff is the owner of the fee in the said street, and if it should appear upon another trial that the city has acquired it, either by dedication, grant or condemnation, it will be necessary to determine whether the plaintiff has an easement in said street to the extent that it shall be used only for street purposes, and whether her rights are "property rights" which cannot be impaired or destroyed except under the exercise of the right of eminent domain.

Distinctions based upon the legal ownership of the fee in respect to the rights of the abutting proprietor, have produced much confusion, resulting in many conflicting decisions, but the true principle which has been slowly, but surely, evolved from protracted discussion and experience, is that, in respect to the use of the soil for the purpose of a street (and apart from those reversionary or other rights peculiar to legal ownership), it is wholly immaterial where the legal title resides. The very power to take private property for public use, as well as the capacity of a municipal corporation to acquire it in any way, necessarily implies that it is to be held in trust for public purposes, and in the case of land acquired for the purposes of a street, there is something in the nature of a contract, under which two coexistent and inviolable rights are created, one belonging to the public to use and improve the street for the ordinary purposes of a street, the other, to the abut- (618) ting owner to have access to and from his property, and to enjoy such use of the street as is customary and reasonable. If the owner voluntarily dedicates or grants a strip of land to a city for a street, it must be presumed that he does so in consideration of the contemplated benefits accruing to his adjoining property by reason of the strip being used for the legitimate purposes of a street only. If the grant be made upon a pecuniary consideration, it is also fair to assume that, in estimating the amount to be paid, the value of the benefits above mentioned were likewise considered. In such cases, says Mr. Lewis, sec. 114: "To make the right a part consideration of the grant, and then allow the public to invade or destroy it at pleasure, would be a fraud which the law will neither impute or allow. Therefore, in the case of such a grant there arises by operation of law a private right to the use of the street in connection with the lot of the proprietor, which is as inviolable as any other right of property." So if the city acquired the land by condemnation,

such advantages or benefits to the adjoining land are usually assessed at a fixed value and deducted from the estimated damages, and it would, says the above author, be "the grossest iniquity to compel a man to pay for advantages, whether in the form of deductions from the price to be paid or of an assessment of benefits, unless those advantages are secured to him by a clear title. . . . The existence of these private rights and easements is strictly independent of the mode in which the highway is established, or of the estate or interest which the public acquires in the soil of the street."

The true principles applicable to this question have been declared by the Court of Appeals of New York, in *Story v. R. R.*, 90 N. Y., 122, and *Lahr v. R. R.*, 104 N. Y., 268. These cases have been followed by subsequent decisions of other States, and their doctrine has been approved by the most prominent writers upon the subject. The opinions
(619) are very elaborate, and we cannot do better than to adopt *Judge Dillon's* summary of some of the principles enunciated:

"These judgments, and those that follow them, rest upon the foundation principle that whether the fee in the street is in the abutter, subject to the rights of the public, that is, to the paramount rights of the public for street uses proper, or whether the fee is in the public for street uses proper, in either case, and generally in both cases, the abutter is entitled to the benefit of the street for all uses except street uses proper, subject, of course, to legislative and municipal regulations, and that such rights are property or property rights in the abutter, which can only be taken away by the Legislature on the condition of making compensation. And the abutting owner's rights in the street are not affected by the source from which he derives his title. . . . If the abutter owns the fee of the street, his rights may be said to be legal in their nature. If he does not own the fee, those rights are in the nature of equitable easements in fee, the soil of the street being the servient, the abutting owner's lot being the dominant tenement. Among the most important of such rights or easements is the abutter's right to access, to light and to air. The court accordingly held that, so far as the elevated railway structures interfered with such rights or easements, while the Legislature might authorize their erection and use, yet this could only be done as respects the abutter by the exercise of the right of eminent domain, viz., on condition of making compensation to the abutting owner for the damage which his property actually sustained."

"The result of the author's reflections upon this subject is that the views of the court of appeals are sound and just; sound, because they recognize the paramount nature of the public right to put the street to this new and necessary form of public use; just, because they recognize and declare that the abutter has special proprietary rights or

easements in their nature, he is not called upon unequally to sacri- (620)
fice without compensation for the public use. In effect, the
court says the true doctrine is 'take but pay.'" 1 Hare, *supra,* 370, 375; Lewis on Eminent Domain, secs. 114, 115; Booth on Street Railways, sec. 81; *Barney v. Keokuk, supra; R. R. v. Schurmer,* 7 Wall., 372; 1 Rorer Railroads, 524; *Story v. R. R., supra; Hanes v. Thomas,* 7 Ind., 38; *R. R. v. Steiner,* 44 Ga., 546; *Theobold v. R. R., supra.*

The contrary view, laid down in 2 Wood's Railway Law, 727, seems to be based upon the restricted interpretation of the word "taken," it being applied by some of the courts only to property actually taken and occupied, and all incidental damages to adjoining proprietors are regarded as "consequential" in their character and *damnum absque injuria.* The learned author admits that such would not be the case if the words used were "taken or damaged," but by a reference to the opinion in *Staton v. R. R.,* 111 N. C., 278, it will appear from the cases cited that this restricted meaning of the word "taken" is not in accord with the more recent and better authorities, and is being rapidly submerged by the steady and increasing current of judicial decision. Lewis, *supra,* 58; *Pumpelly v. Greenbay,* 13 Wall., 166; *Eaton v. R. R.,* 51 N. H., 504.

The result of the numerous authorities is that in either view of the case, that is, whether the fee is in the plaintiff or in the city, the plaintiff has certain proprietary rights, of which she cannot be deprived, even under the authority of the Legislature, without compensation. If her property is in any way injured by the use of the street for legitimate purposes, she cannot complain. But if the enjoyment of her private rights in the street is interrupted by a perversion of the street to uses for which it was not intended, and which the public right does not justify, and her property is thereby injured and its value impaired,
she may maintain an action and recover such damages as she may (621)
have sustained. These proprietary rights in the use of the street
for proper public purposes are practically, as we have seen, the same irrespective of the ownership of the soil, and are not confined to the mere right of access, since this may not be disturbed, although the street may be reduced in width to ten or fifteen feet. This view is well sustained in the leading case of *Adams v. R. R.* (Minn.), 1 L. R. A., 493, in which the court said: "Take a case in one of the States where the fee of the street is in the State or municipality, and of a street sixty feet wide. The abutting lot owners have paid for the advantages of the street on the basis of that width, either in the enhanced price paid for their lots, or, if the street was established by condemnation, in the taxes they paid for the land taken. In such a case, if the State or municipality should

attempt to cut the street down to the width of ten or fifteen feet, would it be an answer to objection by lot owners that the diminished width would be sufficient for mere purposes of access to their lots? It would seem as though the question suggests the answer." The interest of the abutting owner in the entire width of the street, subject to the proper uses of the public, upon the authority of the above decision, has been declared by this Court in *Moose v. Carson,* 104 N. C., 431, and cannot be regarded as an open question. See also *Hanes v. Thomas, supra.* If then the value of the property is lessened by reducing the width of the street, or if such damage is caused by excavations rendering it unsafe and dangerous, as stated in the complaint, the plaintiff is entitled to recover.

It will be observed that the defendant did not introduce its charter or show that it had condemned any part of the street or the rights or easement of the abutting proprietor. It justifies its conduct solely upon the mere license of the city of Winston, and in this view of the case its occupation, in so far as it affects the plaintiff, must be regarded
(622) as unlawful. If this be so, the plaintiff may maintain a common law action for damages, to be assessed up to the time of the trial, or it seems she may sue for the permanent damage, if any, which has been inflicted upon her property by reason of the location and construction of the defendant's road, and by so doing confer upon the defendant (so far as she is concerned) an easement to occupy the street. Had the defendant entered under some statutory authority, it would be important to consider whether the plaintiff would not be confined to the statutory remedy, but as it does not appear to have entered under any other authority *than the bare unauthorized license* of the city, and as the ruling of the Court is based expressly upon the validity of such license, we must conclude that the plaintiff has a right to maintain the present action, and that the issue as to the damages actually sustained should have been submitted to the jury.

As the facts were not fully developed on the trial, we do not deem it proper to further pursue the discussion.

New trial.

Cited: Liverman v. R. R., 114 N. C., 697; *Ridley v. R. R.,* 118 N. C., 1004; *Merrick v. R. R., ib.,* 1082; *S. v. Higgs,* 126 N. C., 1022, 1028; *Jones v. Comrs.,* 130 N. C., 469; *Phillips v. Telegraph Co., ib.,* 525; *Hodges v. Telegraph Co.,* 133 N. C., 232; *R. R. v. Telegraph Co.,* 137 N. C., 334; *Hester v. Traction Co.,* 138 N. C., 293; *Brown v. Electric Co., ib.,* 538; *Staton v. R.R.,* 147 N. C., 435, 437; *Elizabeth City v. Banks,* 150 N. C., 413; *Butler v. Tobacco Co.,* 152 N. C., 419; *Guano Co. v. Lumber Co.,* 168 N. C., 340; *Lloyd v. Venable, ib.,* 535; *Bennett v. R. R.,*

170 N. C., 393; *Kirkpatrick v. Traction Co., ib.*, 478; *Caveness v. R. R.*, 172 N. C., 310; *Powell v. R. R.*, 178 N, C., 246; *Query v. Tel. Co.*, 178 N. C., 641.

STATE v. WILLIAM LEWIS.

Indictment for Escape—Jailer—Negligence of Assistant.

1. In the trial of an indictment against a jailer for the escape of a prisoner in his custody it is not necessary to prove negligence on his part since that is implied, and the burden is upon the defendant in such case to show that the escape was not with his consent or through his negligence.
2. Where in the trial of a jailer indicted for the escape of a prisoner it appeared that he had intrusted some of the keys to an assistant who, according to the testimony, connived at the escape, the trial judge properly instructed the jury that the only question was whether the defendant had exercised due care in the employment of his assistant.

INDICTMENT tried by *Shuford, J.*, and a jury, at May Term, 1893, of VANCE. (623)

the opinion of *Associate Justice Burwell.*

county for negligently permitting the escape of a prisoner from the county jail. It appeared from the evidence that the defendant was sick and intrusted the keys, or some of the keys, of the jail to one Jim Green, a man whom he had hired to assist him in attending to the jail—cleaning it, heating it, and in carrying the prisoners food and water; that, before he hired him, he had made inquiry as to the character of the said Green, and was informed that he was all right and a reliable man, except that he was a big liar.

There was conflicting evidence as to whether the defendant intrusted Green with all of the keys of the jail, or only some of them, and there was evidence tending to prove that some of the inner keys were furnished by some one else—a former jailer—they being duplicates which had never come into the hands of defendant—and that said Green permitted the escape.

His Honor held, and recalled the jury twice to tell them, that it made no difference whether the jailer intrusted the keys of the cells to James Green or not, but the question for them was whether he had used due care in employing a trustworthy assistant. He had instructed them that the jailer had a right to employ an assistant and to intrust him with all the keys, but that he must be careful to employ one who was trustworthy, and if he did not use such care he would be guilty; that defend-

ant admitted being informed that said Green was a big liar, and that they had seen Green on the witness stand and heard him admit that he had made contradictory statements about the escape.

The Attorney-General for the State.
A. A. Hicks, A. J. Harris and T. T. Hicks for defendant.

MACRAE, J., (after stating the facts). Section 1022 of The (624) Code, in relation to the offense above referred to, provides that "in all such cases it shall be sufficient, in support of the indictment against such sheriff or other officer, to prove that such person so charged or sentenced was committed to his custody, and it shall lie upon the defendant to show that such escape was not by his consent or negligence, but that he had used all legal means to prevent the same, and acted with proper care and diligence."

The defendant undertook the burden of showing that the escape was not by his consent or negligence. The rule is laid down in *S. v. Johnson,* 94 N. C., 924. "It is not necessary to prove negligence in one who has the lawful custody of the prisoner, for it is implied, and is excusable only when occasioned by the act of God or irresistible adverse force."

The defendant set up his sickness, which, if believed by the jury, was a sufficient excuse for his personal failure to prevent the escape, and the only question, as stated by his Honor, was whether he had exercised due care in the employment of his assistant. It was properly left to the jury, accompanied with the repeated instructions of his Honor. There is

No error.

Cited: S. v. Blackley, 131 N. C., 733.

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(625)

STATE v. WILL DRAKE.

Confessions by Prisoner—Inducements Held out by Officer—Evidence.

1. No confession by a prisoner is admissible which is made in consequence of any inducement of a temporal nature, having reference to the charge against him.
2. If promises or threats have been used to induce a confession by a prisoner it must be made to appear that their influence has been entirely done away with before subsequent confessions can be deemed voluntary and, therefore, admissible; therefore,

3. Where, after arresting a person charged with burglary and conveying him to the preliminary trial, the officer said to prisoner: "If you are guilty, I would advise you to make an honest confession. It might be easier for you. It is plain against you;" and the prisoner said, "I am not guilty;" and after the preliminary investigation, and while being conducted to jail by the same officer (who had not withdrawn the inducement to confess which he had held out to the prisoner while on the way to the magistrate's office), the prisoner made a confession: *Held*, that such confession was inadmissible as evidence on the trial, since it may have proceeded from the inducement held out to him by the officer when on the way to the magistrate's office, and if so, there is no guaranty of its truth, and it ought to be rejected.

INDICTMENT for burglary, tried at June Term, 1893, of WILSON, before *Shuford, J.*, and a jury.

There was a verdict of guilty, and from the judgment thereon defendant appealed.

The facts necessary to an understanding of the decision are stated in the opinion of *Associate Justice Burwell.*

The Attorney-General for the State.
Aycock & Daniels for defendant.

BURWELL, J. "This much is certain that no confession by the prisoner is admissible which is made in consequence of any inducement of a temporal nature, having reference to the charge against the prisoner, held out by a person in authority." 1 Roscoe Cr. Ev., p. 42. A witness for the State testified that while he was conveying the prisoner from the place where he and others had arrested him to Elm City, where he was taken before a justice, he said to the prisoner, then in his charge, "If you are guilty, I would advise you to make an honest confession. It might be easier for you. It is plain against you."

It seems to be conceded that this remark of the acting officer to his prisoner held out to him such an inducement to confess, that, if a confession had then been made to the officer immediately in response to the suggestion, such confession would have been clearly inad- (626) missible. There was in what was then said to the prisoner a hope held out to him that a confession would make his punishment the lighter, and confessions thus induced by hope "are, of all kinds of evidence, the least to be relied on, and are therefore to be entirely rejected." *S. v. Roberts,* 12 N. C., 259.

But no confession came from the lips of the prisoner in answer to this advice tendered to him by his keeper, but in its stead an assertion of his innocence; "he said, 'I am not guilty,'" are the words of the witness.

Omitting now any recital of what occurred during the day of this occurrence, except that the prisoner was carried before the magistrate and was committed to jail upon evidence adduced at the examination, we find it stated in the case that his Honor, over the defendant's objection, allowed this same witness to testify to a confession made to him by the prisoner while he was conveying him from the justice's office to the jail. There was no evidence of any withdrawal by the acting officer of the inducement to confess that he had held out to the prisoner while on the way to the magistrate's office, and we now consider the admissibility of this confession as if no other inducement had been used.

Viewing the matter in this way, we think there was error in admitting this confession, for the law, always most careful to ascertain if hope or fear in any degree influenced the prisoner, will attribute the making of the confession to the inducement held out to him by his keeper. And the fact that the inducement seemed at the time to have no effect, and only elicited the reply, "I am not guilty," makes no difference in the rule. If the inducement had been held out to him by one person, and the confession had been made to another, nothing else appearing, the confession might have been admissible, for in that case there might have appeared no connection between the two. But, here, we have a confession made to him who had held out the hope, and while
(627) he was in fact exercising the same authority over the prisoner. The assertion of his innocence, in reply to the proposition that he should confess and thus make it easier for him, does not at all prove that the offer of benefit from the officer who had him in charge did not find a lodgment in his mind. If so, what could be more reasonable than that when he found himself on the way to prison in charge of the author of this hope that a confession would alleviate his condition, he should be tempted to act then upon a suggestion that he had rejected when the prospect did not seem to him so dark, and make a confession. It *may* have proceeded from this cause, from this hope so held out to him. If it *may* have proceeded from that cause, there is no guaranty of its truth, and it must be rejected. *S. v. Lawhorne,* 66 N. C., 638; *S. v. George,* 50 N. C., 233.

But there appears in this case, we think, another and perhaps a more cogent reason for the exclusion of this confession. It seems that "quite a crowd had come to the place where the investigation of the matter was had, and after the hearing of the evidence and the decision of the magistrate to commmit the prisoner to jail, he was told by the magistrate (Bailey) that 'if he was going to tell anything, to tell the truth, that there was evidence enough against him to jail him any way' "; and the record proceeds as follows: "He looked as if he was going to tell something, and we took him upstairs in the store to get clear of the crowd.

This was after the decision of the justice committing to jail. The same four who arrested him were upstairs, and also Mr. Bailey. (The defendant objected to what was said upstairs; objection sustained.) In about an hour we started to Wilson with him." And, no inducement being held out to him, while on the way to the jail, nor any caution being given him, he made the confession which was admitted in evidence.

Now if it be conceded that we are wrong in our conclusion, stated above, that the inducement held out by the officer to the prisoner which elicited the reply, "I am not guilty," was sufficient to exclude (628) the subsequent confession, as heretofore stated, still it seems very clear that that inducement, coupled with what the committing magistrate said to him after he had directed that he should be sent to jail, fully warranted his Honor in excluding the confession said to have been made "upstairs." There was certainly enough said to the prisoner by the officer who arrested him, and by the justice just after he committed him to jail, if considered together, to justify the conclusion that the confession then made was brought about by an influence that rendered it unfit for the consideration of the jury. His Honor, therefore, was right in excluding it.

It is a well-settled rule that if promises or threats have been used, it must be made to appear that their influence has been entirely done away with before subsequent confessions can be deemed voluntary, and therefore admissible. And hence, it having been found that an improper influence was used to obtain the confession that was excluded, and it not having been made to appear that that influence had been in any way removed, the confession made on the journey to the jail to one of the crowd should also have been excluded. *S. v. Drake,* 82 N. C., 592. The defendant is entitled to a

New trial.

STATE v. H. L. FINLAYSON.

Indictment—Special Verdict, Wherein Defective.

In the trial of an indictment against a person for refusing and neglecting to take out a license tax imposed by the ordinances of a city, a special verdict by the jury, which fails to specify the trade or occupation carried on by the defendant and set forth the specific provisions of the ordinance alleged to have been violated, is fatally defective, and a new trial will be granted on an appeal from the judgment thereon.

INDICTMENT for failure to pay a license tax imposed by an (629) ordinance of the city of Goldsboro, tried before *Brown, J.*, at April Term, 1893, of WAYNE.

The jury found a special verdict as follows:

"1. That the city of Goldsboro, under its charter, by its regularly constituted authorities, on 1 June, 1892, adopted the following ordinance:

ORDINANCE 12.

"'*Be it ordained by the Aldermen of the city of Goldsboro:*

"'SECTION 1. That the following taxes shall be levied and collected, and are hereby levied on real and personal property and polls, and on the business, trades and occupations carried on within the city of Goldsboro.

"'SEC. 2. That all monthly license taxes levied by this ordinance shall be collected on the first day of each month in advance.

"'SEC. 7. That any person refusing or neglecting to pay the license tax assessed against them for the space of ten days shall be liable to a fine of $5.'

"2. That by another ordinance of said city it is made a misdemeanor to fail to take out the license above provided for.

"3. That defendant is the agent of the Baltimore United Oil Company, a branch of the Standard Oil Company, having charge of the business of the said United Oil Company in Eastern North Carolina, embracing the city of Goldsboro.

"4. That the Baltimore United Oil Company keeps oil stored in the city of Goldsboro, and sells oil to merchants in said city through a regular broker, who charges a brokerage for selling. Said broker is a general broker, and sells for many other parties besides the United Oil Company, and pays the brokerage tax as required by the ordinances of said city. That said oil is shipped to Goldsboro from outside the State, and is stored for convenience of delivery and of purchasers. It (630) is shipped in barrels. Is sold without breaking packages.

"5. In making sales of oil said broker keeps a ticket or memorandum of the sales, which he forwards to the Norfolk office of the United Oil Company, and the bills are there made out against the purchasers for the price of said oil; in rare cases the purchaser proffers cash for the oil, and when he does so the broker takes the cash and charges the cash to himself on his brokerage account—there having been paid in cash at no time up to the present more than was due the broker for brokerage. When a broker buys oil he is at once supplied out of the stock oil, and said broker will receive the cash for any amount of oil on hand proposed to be bought.

"6. That the Norfolk, Virginia, office has charge of the territory of Eastern North Carolina.

"7. That the Standard Oil Company is a corporation organized under the laws of one of the States other than North Carolina, as is also the United Oil Company, and the principle place of business of the said Standard Oil Company is Jersey City, in the State of New Jersey, and the principal place of business of the United Oil Company is in Baltimore, in the State of Maryland, and the said company and the said companies are producers, refiners and dealers in oils, selling the same throughout the United States.

"8. That it was the duty of the defendant to take out license for said business in the city of Goldsboro, if it was the duty of any person so to do. The defendant is an actual resident of the city of Goldsboro, N. C.

"9. That the defendant refuses to take out the license required by said ordinance.

"If, upon these facts, the court shall be of opinion that the defendant is guilty, we find him guilty; but if, upon the facts, the court shall be of opinion that the defendant is not guilty, we find him not guilty."

The court being of opinion that the defendant was guilty, upon the facts found, directed a verdict of guilty and fined defendant (631) $5, whereupon defendant appealed.

The Attorney-General for the State.
Aycock & Daniels for defendant.

SHEPHERD, C. J. The defendant is prosecuted for refusing and neglecting to pay the license tax, as required by chapter 12, section 7, of the ordinances of the city of Goldsboro. The special verdict is fatally defective, in that it fails to clearly allege the trade or occupation carried on by the defendant, and to set forth the specific provisions of the ordinance which it is alleged was violated by the defendant. Evidently a very important question concerning interstate commerce was intended to be presented, but we cannot consider it upon this verdict. According to the ruling in *S. v. Corporation,* 111 N. C., 661, there must be a New trial.

Cited: S. v. Hanner, 143 N. C., 635.

STATE v. DAVE KING.

Indictment—Betting at "Ten-pins."

The game known as "ten-pins," like its kindred English game of "bowls," is not a game of chance for betting at which the participants are indictable under chapter 29, Laws 1891. (*S. v. Gupton*, 30 N. C., 271, followed.)

INDICTMENT under chapter 29, Laws 1891, tried at August Term, 1893, of PERSON, before *Brown, J.*

The jury rendered the following special verdict:

"The defendant and one Dave Clayton, who is indicted in this bill but not on trial, at the date mentioned, and in this county, were playing at a game called ten-pins, at which money was bet by the defend-
(632) ants, to wit, $1 with each other. The said game is played on an alley about sixty feet long and four feet wide. Ten wooden pins are set up at one end, and the players roll balls and knock them down, and the player knocking down the largest number wins the game. The game played for money by these defendants was identical with the game commonly known by the name of ten-pins."

Upon the special verdict as above, his Honor directed a verdict of "not guilty" and discharged the defendant, from which judgment the solicitor appealed.

The Attorney-General for the State.
Boone & Parker for defendant.

SHEPHERD, C. J. The defendant is indicted for a violation of chapter 29, Laws 1891, which provides: "That it shall be unlawful for any person to play at a game of chance at which money, property or other thing of value is bet, whether the same be in stake or not, and those who play and bet therein shall be guilty of a misdemeanor." The defendant both played and bet at a game known as "ten-pins," and the manner in which such game is played is particularly described in the special verdict. The only question to be decided is whether such a game is a game of chance, and that it is not we have direct authority in the case of *S. v. Gupton*, 30 N. C., 271. After an interesting discussion as to what constitutes a game of chance, *Ruffin, C. J.*, concludes that "we take this game to be one species of the game known in England and spoken of in her statutes under the general term of *bowls*, and, if it be, there is legal authority for holding it not to be a game of chance." The Attorney-General, with his usual and commendable candor, yields the case under the above decision.

Affirmed.

(633)

STATE v. YANCEY ALBERTSON.

Indictment—Affray—Plea of Autrefois Convict.

1. An affray being a mutual fighting, and an indictment therefor being against each person, one may be convicted and the other acquitted, or one may be convicted of an assault with a deadly weapon and the other of a simple assault.
2. A plea of former conviction or acquittal before a justice of the peace for a simple assault is a complete defense on a trial for the same offense in the Superior Court, unless it should appear in the latter that the defendant making the plea had, in fact, used a deadly weapon or inflicted serious injury, in which case, the justice not having jurisdiction, the proceedings before him would be a nullity.

AVERY, J., dissents.

INDICTMENT for an affray with a deadly weapon and serious injury, tried before *Bryan, J.*, and a jury, at August Term, 1893, of DUPLIN.

The facts are sufficiently stated in the opinion of *Mr. Justice Clark.*

From the judgment on a verdict of "guilty" the defendant Albertson appealed.

The Attorney-General for the State.
A. D. Ward for defendant.

CLARK, J. The indictment charges an affray, in that the defendant and one Maready did beat and wound each other with deadly weapons. The defendant Albertson pleaded former conviction. It was admitted that he had been tried before a justice of the peace and punished for a simple assault. The evidence, on the trial before the Superior Court, as before the justice, showed that he had used no deadly weapon and inflicted no serious injury, though Maready, whom the jury acquitted, had. Upon this evidence the plea of former conviction should have been sustained.

In *S. v. Coppersmith,* 88 N. C., 614, the indictment charged (634) that each of the parties indicted for an affray had used a deadly weapon. The evidence showed that Coppersmith was guilty only of a simple assault. The court below thereupon held that it had no jurisdiction as to him. This was overruled on appeal. The reason for this more fully appears in *S. v. Ray,* 89 N. C., 587 (and subsequent cases affirming it), which is, that the *charge* of using a deadly weapon confers jurisdiction, and that the court, being a court of general jurisdiction, will not dismiss the action upon it appearing that only a simple assault had been committed. The court, in such cases, will proceed to judg-

ment, though, of course, it cannot impose a sentence beyond the limit for a simple assault when tried before a justice of the peace. *S. v. Johnson,* 94 N. C., 863; *S. v. Nash,* 109 N. C., 824.

Here an assault with a deadly weapon is charged. The proof as to Albertson is of a simple assault. The conviction could only be for a simple assault. It is admitted that Albertson had been tried and punished for that. He cannot be punished again. It was error to overrule the plea of former conviction. *S. v. Price,* 111 N. C., 703.

An affray is a mutual fighting, and an indictment therefor is a charge against each person. One may be acquitted and the other convicted of an assault, or one may be found guilty of an assault with a deadly weapon and the other of a simple assault. If convicted of the latter, a former conviction or acquittal therefor before a justice of the peace is a complete defense, though, of course, a judgment before a magistrate would not be a defense when, in the subsequent trial in the Superior Court, it appears that the defendant pleading former conviction (or acquittal) had, in fact, used a deadly weapon or inflicted serious injury. *S. v. Huntley,* 91 N. C., 617; *S. v. Shelby,* 98 N. C., 673. In such case, the justice not having jurisdiction, the proceedings before him would be a nullity.

Error.

Cited: S. v. Hight, 124 N. C., 846; *S. v. Fagg,* 125 N. C., 611; *S. v. Battle,* 130 N. C., 656; *S. v. Lucas,* 139 N. C., 573; *S. v. Lancaster,* 169 N. C., 285; *S. v. Dockery,* 171 N. C., 829.

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(635)

STATE v. E. W. STAFFORD.

Assault and Battery—Schoolteacher—Pupil.

1. A discretionary power in the infliction of punishment upon pupils is confided to schoolmasters and teachers, and they will not be held criminally liable unless the punishment results in permanent injury, or be inflicted merely to gratify their own evil passions.
2. A warrant which charges that the defendant "did unmercifully whip" a child, "inflicting serious bruises on her person," sets out a battery, though the *quo animo* is not charged. Should the defense be set up that it was inflicted by a teacher on his pupil, it can be invalidated by proof of malice or anger or excessiveness.
3. The words in the warrant, "inflicting bruises on her person," is not a sufficient allegation of serious injury to deprive the justice of jurisdiction.

4. The trial in the Superior Court on appeal from a conviction in a justice's court being *de novo*, it is competent for the judge, in his discretion, to impose a heavier or lighter penalty than the sentence of the justice, provided the punishment does not exceed the limit which the justice might have imposed.

ASSAULT AND BATTERY, tried before *Whitaker, J.*, and a jury, at March Term, 1893, of MOORE.

The action was commenced in a justice's court, and the defendant was convicted, and appealed. The evidence disclosed the fact that defendant was a schoolteacher and Anna B. Black was one of his pupils, and that the defendant whipped the said Anna B. Black.

The evidence on the part of the State tended to show that the punishment was immoderate and was inflicted to gratify defendant's malice, and out of anger. The evidence on the part of the defendant tended to show that the punishment was moderate and was not inflicted out of malice or anger on the part of defendant.

At conclusion of State's evidence, defendant's counsel moved to dismiss the action, because the court had no jurisdiction. Motion was overruled by the court, and defendant excepted. (636)

At the conclusion of defendant's evidence, counsel for defendant moved to dismiss the action for want of jurisdiction, and this motion was overruled, and defendant excepted.

His Honor left the case to the jury, with appropriate instructions as to the law and the evidence in the case. There were no exceptions to the instructions to the jury. There was a verdict of guilty. Judgment of the court as appears in the record. Defendant appealed to the Supreme Court.

The Attorney-General for the State.
No counsel contra.

CLARK, J. The defendant, a schoolteacher, was convicted before a magistrate for whipping one of his scholars, and fined $40. On appeal to the Superior Court he was again convicted, and was fined by the judge $50. There were no exceptions to evidence, nor to the charge. The only exception taken was to the refusal of a motion to dismiss, made upon the ground of want of jurisdiction.

We were not favored with an argument on behalf of defendant. It may be that the motion to dismiss was based on the ground that the courts have no jurisdiction in cases of chastisement inflicted by teachers upon their pupils. In *S. v. Pendergrass,* 19 N. C., 365, it is held that the law confides to schoolmasters and teachers a discretionary power in the infliction of punishment upon their pupils, and will not hold them criminally responsible, unless the punishment be such as to occasion per-

manent injury to the child, or be inflicted merely to gratify their own evil passions. Here the warrant charges that the defendant "did unmercifully whip" the child, "inflicting bruises on her person." It is not necessary that the *quo animo* should be charged. The warrant sufficiently sets out a battery. When the defense is set up that it was
(637) inflicted by a teacher upon his pupil, this defense can be invalidated by proof of malice or anger or excessiveness.

The case on appeal states that there was evidence "tending to show that the punishment was immoderate, and was inflicted to gratify defendant's malice, and out of anger." There was evidence for defendant tending to show the contrary, but the case states that the court left the conflicting evidence to the jury, with appropriate instruction, to which no exception was taken. The *quo animo* thus passed upon by the jury distinguishes the facts of this case from those in *S. v. Pendergrass, supra.*

If the objection to the jurisdiction proceeded on the ground that the magistrate had no jurisdiction, it is sufficient to say that there is nothing in the warrant, nor in the evidence, to oust his original jurisdiction. The words in the warrant, "inflicting bruises on her person," is not a sufficient allegation of serious injury to deprive the justice of jurisdiction. The evidence, as far as set out, falls far short of the facts in *S. v. Huntley,* 91 N. C., 617.

The trial in the Superior Court being *de novo,* it was competent for the judge, in his discretion, to lay a lighter or heavier penalty than the sentence of the justice, provided, of course, he did not exceed the limit of punishment which the magistrate could have imposed. *S. v. Johnson,* 94 N. C., 863.

No error.

Cited: S. v. Battle, 130 N. C., 657; *S. v. Thornton,* 136 N. C., 617.

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(638)

STATE v. JOHN THOMPSON.

Indictment for Perjury, Sufficiency of.

The averments of an indictment charging that defendant did unlawfully commit perjury on the trial of a certain action in a certain court by falsely asserting on oath, "in substance, as follows (here setting out the alleged false testimony); said defendant knowing the said statement to be false, against the form of the statute," etc., are sufficient and in compliance with the form prescribed by the act of 1889.

STATE *v.* THOMPSON.

INDICTMENT for perjury, tried at March Term, 1893, of the Criminal Court of NEW HANOVER, before *Meares, J.*

The jurors, etc., present that John Thompson, etc., did unlawfully commit perjury upon the trial of an action in the Mayor's Court in the city of Wilmington in said county, wherein the State of North Carolina was plaintiff and John Thompson was defendant, by falsely asserting on oath, "in substance, as follows, to wit: 'About 8 o'clock on 25 February I was between Schulkin and Dennis's stores; a man passed in about six or seven feet of me and made an oath; he had a gun in his hand; he walked to the corner and stood up by a post; in a few minutes a car came up to the end of the switch, and as the man changed the trolley he fired; I am positive the man that fired the gun was Buck Wright; I have known him for some time; I have seen the gun before; Wright left it in my shop to be repaired last Christmas; I put a new spring in it'—the said John Thompson knowing the said statements to be false, against the form of the statute in such cases made and provided, and against the peace and dignity of the State." The jury returned a verdict of guilty, and the defendant moved in arrest of judgment, on the ground that the indictment was not sufficient in its averments to charge the crime of perjury, as it did not specifically charge that the matters, alleged to be sworn to, were wilfully, absolutely and falsely in a matter material to the point in issue. The motion was denied, and the defendant appealed (639) from the judgment pronounced.

The Attorney-General for the State.
No counsel contra.

BURWELL, J. The averments in the indictment are sufficient. It complies in all essential particulars with the form prescribed by the Act of 1889, which has been approved by this Court in *S. v. Gates,* 107 N. C., 832, and in other cases.

Affirmed.

Cited: S. v. Mitchell, 132 N. C., 1036; *S. v. Harris,* 145 N. C., 458; *S. v. Cline,* 146 N. C., 642.

STATE v. THOMAS CARTER.

Case on Appeal—Counts in Indictment—Larceny—Verdict.

1. Where the case on appeal shows no exceptions to the admission or refusal of testimony, nor to the charge, and that no special instructions were asked, the judgment will be affirmed, unless error appears upon the face of the record proper.
2. Where there are two counts in an indictment, each charging a felony, a general verdict is good without specifying upon which count it was rendered.
3. The charge of the theft of "$5 in money of value of $5" is good under The Code, sec. 1190, and is sustained by the proof of the theft of any kind of coin or treasury or bank notes without proof of the particular kind of coin or treasury or bank note.
4. Where an indictment for larceny laid the property in "W. A. C., agent of the Farmers' Exchange," and there was no exception that the evidence failed to show a special property in C.: *Held*, that the words "agent of Farmers' Exchange" are mere surplusage, and the verdict of guilty establishes all the material facts charged in the indictment, including that of the ownership.

INDICTMENT for larceny, tried before *Boykin, J.*, and a jury, at Spring Term, 1893, of DAVIE. Defendant was convicted, and appealed.

(640) *The Attorney-General and T. B. Bailey for the State.*
No counsel contra.

CLARK, J. The case on appeal states that there were no exceptions to the admission or refusal of testimony, nor to the charge, and that no special instructions were asked. The judgment must be affirmed, unless there is error upon the face of the record proper. *S. v. Bell,* 103 N. C., 438, and other cases cited in Clark's Code (2 Ed.), p. 582.

The defendant was indicted for larceny, with a second count for receiving stolen goods, knowing them to have been stolen. There was a general verdict of guilty without specifying upon which counts. The Code, sec. 1191, permits the joining of the two counts, and a general verdict was held good without specifying upon which count it was rendered, in *S. v. Speight,* 69 N. C., 72; *S. v. Baker,* 70 N. C., 530, and *S. v. Jones,* 82 N. C., 685. These cases were decided when the first count (larceny) was a felony, and the second (for receiving) was only a misdemeanor. *A fortiori,* a general verdict is valid, since Laws 1891, ch. 205, which makes both charges felonies. The second count is not defective, though using some unnecessary phraseology. But if it were defective, the court would place the verdict to the good count. *S. v. Toole,* 106 N. C., 736, and cases there cited.

The charge of the theft of $5 in money of the value of $5 is good under The Code, sec. 1190, and was sustained by proof of the theft of any amount of coin or treasury or bank notes without proof of the particular kind of coin or treasury or bank note. *S. v. Freeman,* 89 N. C., 469. The property is laid in "W. A. Clements, agent of the Farmers' Exchange." There is no exception that there was a variance, or that the evidence failed to show a special property in Clements. The verdict establishes all the material facts charged in the indictment, including that of the ownership. The words, "agent of the Farmers' Exchange," are mere surplusage. This differs from *S. v. Jenkins,* 78 N. C., 478, in that, there, exception was taken on the trial that the evi- (641) dence did not show any special property in the railroad agent, in whom the ownership was laid. His possession being merely, on the evidence, the possession of a servant, he had no property therein and the ownership should have been laid in the corporation.

There being no error on the face of the record, the judgment is

Affirmed.

Cited: S. v. Holder, 133 N. C., 711; *S. v. Francis,* 157 N. C., 614; *S. v. Poythress,* 174 N. C., 813.

STATE v. W. R. WINCHESTER.

Criminal Action—Judge Directing Verdict—Practice.

1. In a criminal action the trial judge cannot direct a verdict on the testimony, for the jury must pass upon the credibility of the testimony offered.
2. Regularly, the two pleas of "former conviction" and "not guilty" should be tried separately, since the former implies an admission of the criminal act and is inconsistent with an absolute denial.

ASSAULT AND BATTERY tried, on appeal from a justice of the peace, before *Armfield, J.,* and a jury, at February Term, 1893, of UNION.

The facts are stated in the opinion of *Associate Justice Clark.*

The Attorney-General and Armistead Jones for the State.
R. B. Redwine for defendant.

CLARK, J. The case on appeal states, "At the close of the testimony his Honor instructed the jury that, upon the testimony of justice of the peace Irby, there had been no former conviction, and, upon the testi-

mony of the defendant, he was guilty, and directed a verdict to be rendered accordingly." If the evidence justified it (as to which we need express no opinion), it would have been proper for the court to (642) instruct the jury that if they believed the evidence of Irby, witness for defendant, they should find that there was no former conviction, and, if they believed the defendant's own testimony, he was guilty of the offense charged. *S. v. Vines,* 93 N. C., 493, 498. But in directing a verdict, the judge exceeded his powers in a criminal action. The jury must pass upon the credibility of the testimony offered. The subject has been so recently discussed in *S. v. Riley, post,* 648, that we need not repeat what is there said.

Regularly, the two pleas of former conviction and not guilty should be tried separately, since the plea of former conviction "implies an admission of the criminal act, and is inconsistent with an absolute denial." *S. v. Pollard,* 83 N. C., 597; *S. v. Respass,* 85 N. C., 534. But the practice of trying them together has become not unusual, and is often convenient. There being no exception on that ground, this Court must assume that this course was pursued with the assent of the defendant. But in directing a verdict there was

Error.

Cited: S. v. Ellsworth, 131 N. C., 774; *S. v. Taylor,* 133 N. C., 758; *S. v. White,* 146 N. C., 610.

(643)

STATE v. JOHN RAMSOUR.

Practice—Case on Appeal—Record Proper—Indictment—Carrying Concealed Weapons—Jurisdiction—Ex Post Facto Laws.

1. Where there is repugnancy between the case on appeal and the record proper the record will control.
2. The Laws of 1887 (ch. 68), as amended by the Laws of 1891 (ch. 26), giving exclusive jurisdiction to justices of the peace of the offense of carrying concealed weapons, was in force 25 December, 1892, and where a defendant committed the offense on that date and was indicted therefor in October, 1893, under the Laws of 1893 (ch. 10), which repealed the Laws of 1887 and 1891, and restored the jurisdiction to the Superior Court, the indictment was properly quashed.
3. The Legislature has no more authority to give a retroactive effect to a statute making the punishment for an offense already committed more severe than to subject persons to punishment under a criminal statute passed after the commission of the act for which they are indicted.

STATE *v.* RAMSOUR.

INDICTMENT for carrying concealed weapons, tried at Fall Term, 1893, of LINCOLN, before *McIver, J.*

The facts are stated in the opinion of *Associate Justice Avery.*

The Attorney-General for the State.
D. W. Robinson for defendant.

AVERY, J. There is a conflict between the record proper and the statement of the case on appeal. The judge states that the judgment was suspended after a trial and verdict of guilty, it being admitted that the offense was committed in December, 1892. From the record proper it appeared that no jury was impaneled, but that the defendant was brought to the bar of the court and arraigned upon an indictment (in the usual form for carrying a concealed weapon) which was found on 16 October, 1893, whereupon the following entry was made: "Motion by defendant to quash bill of indictment. Admitted by the State that the offense was committed in the year 1892. The carrying admitted by the defendant. Motion to quash allowed. Defendant discharged. State excepts, and appeals to the Supreme Court."

"Where there is a repugnancy between the record and the case stated, the record will control." *S. v. Keeter,* 80 N. C., 472; *Farmer v. Willard,* 75 N. C., 401. We must, therefore, consider the case as though it had been found on a special verdict on a plea in abatement that the offense was committed on 25 December, 1892, as charged in the indictment. The statute which was in force on 25 December, 1892 (Laws 1887, ch. 68), by limiting the punishment for carrying a concealed weapon, so that it could not exceed a fine of fifty dollars or imprisonment for thirty days, gave courts of justices of the peace exclusive cog- (644) nizance of the offense, and Laws 1891, ch. 26, left the jurisdiction still in the same tribunals. The later statute (Laws 1893, ch. 10), by repealing the Laws of 1887 and the amendatory Act of 1891, restored vitality to section 1005 of The Code, which leaves the punishment for carrying a concealed weapon to the sound discretion of the court, and again makes the offense solely cognizable in the Superior Court. This statute took effect on 2 February, 1893, and is still in force. The Superior Court therefore has no authority to try one who carried a concealed weapon prior to the enactment of the statute now in force and as all laws giving jurisdiction to justices of the peace have been repealed without reservation or saving clause, it would seem that offenders who violated the Act of 1887 as amended by that of 1891 are not now liable to indictment. *S. v. Massey,* 103 N. C., 356.

The Legislature has no more authority to give a retroactive effect to a statute making the punishment for an offense already created more

severe, even though it is so provided in express terms, than to subject persons to punishment under a criminal statute passed after the commission of the act for which they may be indicted. The provision of the Federal Constitution, which forbids the enactment by a State of any *ex post facto* law, could, in either event, be invoked for the protection of the person charged. Ordronaux Cons. Leg., p. 223.

The judgment quashing the indictment is

Affirmed.

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(645)

STATE v. PRESTON BROWN.

Indictment, Sufficiency of—Highway Robbery—Joinder of Counts for Higher and Lower Offense.

1. Since the Laws of 1891 (ch. 205, sec. 2), the joinder in an indictment for an offense of a count for a lesser offense, or for an attempt to commit the same, is mere surplusage.
2. In an indictment for highway robbery the value or description of the article taken, or attempted to be taken, is not material, since the gist of the offense is not the *taking* but a taking by putting in fear or by force.
3. Inasmuch as money is the measure of values, a charge in an indictment of taking "ten dollars in money" is an allegation of taking "the value of ten dollars." (The Code, sec. 1190.)
4. A charge in a bill of indictment for robbery that the defendant "did make an assault" and "put in bodily fear and danger of his life," and "then and there feloniously and violently did seize, take and carry away ten dollars in money from the prosecutor," is an explicit allegation of force. Indeed, the words "feloniously and violently" were of themselves sufficient.

INDICTMENT for highway robbery, tried before *Hoke, J.*, and a jury, at Spring Term, 1893, of EDGECOMBE.

The defendant was convicted, and appealed. The facts appear in the opinion.

The Attorney-General for the State.
No counsel contra.

CLARK, J. Upon inspection of the transcript it appearing that though the "case on appeal" recited that there was a verdict of guilty and judgment, the record proper failed to show that there had been a trial by jury and to set out the sentence of the court below, this Court *ex mero*

motu directed an *instanter certiorari* to supply the defect, which has now been done.

The indictment sets out two counts, one for highway robbery, second for an attempt to commit the same. The verdict found the defendant guilty on the first count. It is therefore unnecessary to consider the exception made to the second count. But had the defendant (646) been convicted of the attempt to commit highway robbery, the first count, if good, would have supported the verdict since Laws 1891, ch. 205, sec. 2, which provides: "Upon the trial of any indictment the prisoner may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime." This statute is a copy of that in force in England and in New York and other States. It extends to all crimes the provision which, to a more limited extent, was already in force in this State, by virtue of chapter 34, Laws 1885, and indeed at common law. Wharton Crim. Pl. and Pr. (9 Ed.), 246, 465. The joinder of a count for a lesser offense or an attempt is now mere surplusage.

The objections to the first count raised by motion to quash and renewed after verdict by a motion in arrest of judgment were:

"1. For that there was no value of the money designated in the bill."

In an indictment for this offense, the value or description of the article taken or attempted to be taken is not material, for the gist of the offense is not the taking, but a taking by putting in fear or by force. *S. v. Burke,* 73 N. C., 83, citing *Rex v. Bingley,* 5 C. & P., 602. But, in fact, the charge of "ten dollars in money" is an allegation of "the value of ten dollars," since money is the measure of values. *McCarty v. S.,* 127 Ind., 223. Indeed, the description would be sufficient under our statute, even in an indictment for larceny, and would be sustained by proof of the theft of coin or bank or treasury notes. *S. v. Freeman,* 89 N. C., 469; The Code, sec. 1190.

"2. That the word steal nor any equivalent word is charged in the bill."

It is not necessary that it should be. The indictment is a copy of the form given in Wharton Pr., 410. Among the many defini- (647) tions given of robbery, probably the best is that by *Lord Mansfield*: "A felonious taking of property from the person of another by force." *Rex v. Donally,* 2 East P. C., 715, 725, or Blackstone's (4 Bl. Com., 242): "The felonious and forcible taking from the person of another of goods or money to any value by violence or putting him in fear." To make it highway robbery it is only necessary further to charge and prove that it was committed "in or near a highway." It is true a defendant acquitted of this offense, because violence or putting in fear

is not proved, may be convicted of larceny. *S. v. Cody,* 60 N. C., 197; *S. v. Halford,* 104 N. C., 874. But the word "steal" is not an indispensable word like "feloniously," either in this or an indictment for larceny. As to either, the words "feloniously did take and carry away" are a sufficient allegation in this respect. The addition of the word "seize," i.e., "feloniously did seize, take and carry away," is a peculiarly appropriate substitute in an indictment for this offense, for the word "steal," which is tautology and a mere repetition of the idea embraced in the words "feloniously take and carry away."

"3. That no force is charged therein."

The charge that the defendant "did make an assault," . . . and "put in bodily fear and danger of his life," and "then and there feloniously and violently did seize, take and carry away" ten dollars in money from the prosecutor, is a very explicit allegation of force. Indeed, the words "feloniously and violently" were of themselves sufficient. *S. v. Cowan,* 29 N. C., 239, 250. But this indictment goes beyond that and beyond the other words above quoted, and even adds, out of abundant caution, the express words, "with force and arms," which have been held unnecessary in an indictment for any offense for three centuries and a half. *S. v. Harris,* 106 N. C., 682, 687.

No error.

Cited: S. v. Savage, 161 N. C., 246.

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(648)

STATE v. W. J. RILEY.

Practice in Criminal Actions—Power of Judge to Direct Verdict—Distinction between Civil and Criminal Actions.

1. The court cannot direct a verdict in a criminal case, even when the evidence for the State is uncontradicted, for the plea of not guilty disputes its credibility, and there is the presumption of innocence which can only be overcome by the verdict of the jury; therefore,
2. Where, on the trial of a prisoner, the evidence of the State being uncontradicted, the court told the jury, if they believed the evidence, to return a verdict of guilty, and after pausing a moment or two, and the jury manifesting no disposition to retire, the court told the clerk to enter the verdict of guilty: *Held,* that while it was not necessary that the jury should retire, yet it was indispensable that they should agree upon and render the verdict. (Distinction between civil and criminal actions in this respect noted and discussed.)

STATE *v.* RILEY.

WARRANT issued by and returnable before a justice of the peace, against the defendant for selling spirituous liquors contrary to the provisions of section 2740 of The Code, and tried, on appeal, before *Bryan, J.*, and a jury, at March Term, 1893, of ORANGE.

After the close of the evidence for the State (the defendant having introduce none), his Honor instructed the jury that if they believed the evidence, the defendant was guilty, and directed the clerk to enter a verdict of guilty, which was done. From the refusal of a new trial upon the ground that the jury were not allowed to pass upon the facts, the defendant appealed.

The Attorney-General for the State.
C. D. Turner for defendant.

CLARK, J. The evidence for the State being uncontradicted, the court told the jury, if they believed the evidence, to return a verdict of guilty. This was correct upon the evidence set out, and if the jury had returned a verdict, there would be no ground for ex- (649) ception. *S. v. Burke,* 82 N. C., 551. But the case further states, "after pausing for a moment or two, and the jury manifesting no disposition to retire, the court told the clerk to enter the verdict of guilty." It was not necessary that the jury should retire, but it was indispensable that the jury should agree upon and render the verdict. The court cannot direct a verdict in a criminal case. *S. v. Dixon,* 75 N. C., 275; *S. v. Shule,* 32 N. C., 153.

In the latter case, *Pearson, J.*, thus draws the distinction in this respect between civil and criminal actions: "When a plaintiff fails to make out a case, the judge may say to the jury that, if all the evidence offered be true, the plaintiff has not made out a case, and direct a verdict to be entered for the defendant, unless the plaintiff chooses to submit to a nonsuit. It is in effect a demurrer to the evidence. The plaintiff has no right to complain, for in reviewing the question of law, he has the benefit of the supposition that the evidence offered by him and the inferences of fact are all true. So when the plaintiff's case is admitted, the whole question turns upon the defense attempted to be set up. If, taking the facts to be as contended for by the defendant, the court is of opinion that he has made out no answer to the action it is proper, and saves time for the court, to direct the verdict to be entered for the plaintiff. The defendant is not prejudiced, because, upon appeal, the question will be presented in the most favorable point of view for him."

"But the present case is not like either of these, for the State had not made out a case, unless the State's witness was believed, and the

credibility of a witness must be passed on exclusively by the jury. It is true, from the case as made out, there could be but little room to doubt that both defendants were guilty, and the wonder is why the jury should have hesitated about convicting both. Still, that was a (650) matter for the jury, and it's being a plain case, although it accounts for, does not legalize, this novel mode in entering a verdict."

The rule is also laid down by *Mr. Circuit Judge McCrary* (*Mr. Justice Miller,* of the United States Supreme Court, concurring), in *United States v. Taylor,* 3 McCrary, 500, 505: "In civil cases, where the facts are undisputed and the case turns upon questions of law, the court may direct a verdict in accordance with its opinion of the law; but the authorities which settle this rule have no application to criminal cases. In a civil case, the court may set aside the verdict, whether it be for the plaintiff or defendant, upon the ground that it is contrary to the law as given by the court; but in a criminal case, if the verdict is one of acquittal, the court has no power to set it aside. It would be a useless form for court to submit a civil case, involving only questions of law, to the consideration of a jury, where the verdict when found, if not in accordance with the court's view of the law, would be set aside. The same result is accomplished by an instruction given, in advance, to find a verdict in accordance with the court's opinion of the law. But not so in criminal cases. A verdict of acquittal cannot be set aside, and, therefore, if the court can direct a verdict of guilty, it can do indirectly that which it has no power to do directly." This is cited in 2 Thompson Trials, sec. 2149.

In short, when the court holds that the evidence, if true, fails to make out a case, it can direct a verdict against the State in criminal actions, as against the plaintiff in a civil action, although usually, if a serious question is involved, a special verdict is rendered in the former, and a nonsuit taken in the latter case, that the action of the court may be reviewed.

In a civil case the court can direct a verdict against the defendant when the plaintiff's cause of action is admitted and the evidence or matter set up in defense, if true, would be no defense. This cannot possibly happen in a criminal action, since to admit the State's (651) cause of action (the indictment) is to plead guilty. In a civil case the court may direct a verdict also when "the facts are undisputed and the case turns upon questions of law solely" (*United States v. Taylor, supra*), but in a criminal case this can only happen upon a special verdict. The plea of not guilty disputes the credibility of the evidence, even when uncontradicted, since there is the presumption of innocence, which can only be overcome by the verdict of the jury. The

furthest the court can go in a criminal action, is to charge the jury that if they believe the evidence the defendant is guilty. Upon the evidence set out in the record, there was a plain case against the defendant, and also against his principal as well (who, for some unknown reason, is not on trial), if the evidence is to be believed, but of that a jury and a jury alone can judge. By reason of his Honor's inadvertence, at the moment, to the above essential distinction between civil and criminal actions, we must direct a

New trial.

Cited: S. v. Winchester, ante, 642; *Riggan v. Sledge,* 116 N. C., 93; *Wool v. Bond,* 118 N. C., 2; *S. v. Woolard,* 119 N. C., 780; *S. v. Coy, ib.,* 904; *S. v. Journigan,* 120 N. C., 569; *S. v. Holmes, ib.,* 576; *S. v. Neal, ib.,* 621; *Burrus v. Ins. Co.,* 121 N. C., 65; *Barbee v. Scoggins, ib.,* 143; *S. v. Mallett,* 125 N. C., 723; *S. v. Hill,* 141 N. C., 771; *S. v. R. R.,* 145 N. C., 578; *Bank v. Fountain,* 148 N. C., 594; *S. v. R. R.,* 149 N. C., 447; *Everett v. Williams,* 152 N. C., 118; *Bank v. Griffin,* 153 N. C., 75; *Westfelt v. Adams,* 159 N. C., 424; *Bank v. Branson,* 165 N. C., 349; *Cauley v. Dunn,* 167 N. C., 33; *Smathers v. Hotel Co.,* 168 N. C., 72; *S. v. Craft, ib.,* 213; *S. v. Horner,* 174 N. C., 793; *S. v. Windley,* 178 N. C., 674.

STATE v. JAMES P. AIKEN.

Defaulting Witness in Mayor's Court—Contempt—Power of Mayor to Fine for Contempt.

1. In addition to the fact that the power to punish for contempt is inherent in all courts and essential to their existence, the authority given in this respect to justices of the peace by section 651 of The Code is extended to mayors by section 3818 of The Code.
2. A fine of $8 imposed by a mayor upon a defaulting witness for contempt in disobeying a subpœna is not excessive.
3. From analogy to cases in which prosecutors are taxed with costs, an appeal from a judgment in a proceeding for contempt against a defaulting witness in a prosecution against R. should be entitled "State v. R.; appeal by A., defaulting witness."

PROCEEDING to enforce a penalty against defaulting witness, (652) begun before the Mayor of Brevard, and heard on appeal at Fall Term, 1893, of TRANSYLVANIA, before *Armfield, J.,* who dismissed the action, on motion of the respondents, on the ground that

the mayor had no authority to impose the fine, either under the general law or under chapter 110, Pr. Laws, 1889, incorporating the town.

The State appealed.

The Attorney-General for the State.
No counsel contra.

CLARK, J. The defendant, or, more properly, the respondent, was a defaulting witness in a criminal proceeding before the Mayor of Brevard against one Dock Rhodes for violation of a town ordinance. A notice issued to show cause why he should not be fined for contempt in disobeying the subpœna of the court. The respondent appeared, but the court adjudged that he had not shown good cause, and fined him eight dollars. Upon appeal to the Superior Court his Honor dismissed the proceeding, upon the ground that the mayor had no authority to impose the fine.

In this there was error. *In re Deaton,* 105 N. C., 59, in which (on page 65) the express point is decided. The power given justices of the peace by The Code, sec. 651, is extended to mayors by The Code, sec. 3818. But, in fact, the power to punish for contempt is inherent in all courts and essential to their existence. The courts of our cities and towns would become nullities if they did not possess the power of procuring the attendance of witnesses under suitable penalties for contempt upon wilful disobedience of the subpœna of the court. The fine imposed ($8) was not excessive, and was probably fixed from analogy to the penalty against a defaulting witness, and in favor of the party at whose instance he is summoned, which is allowed by a court of a (653) justice of the peace in a civil action. The Code, sec. 847. In the present case the fine is simply for contempt, and to be disposed of as other fines and penalties.

It is a matter of no special importance, but, from analogy to cases in which prosecutors are taxed with costs, this proceeding should properly be entitled "State v. Rhodes; appeal by Aiken, defaulting witness."

The judgment dismissing the proceeding is set aside and the cause remanded, that the facts may be found by the judge, for the findings of fact by the mayor are not conclusive. *In re Deaton, supra.* If the facts found justify it, the judge will impose sentence for the contempt.

Error.

Cited: *In re Briggs,* 135 N. C., 129. *In re Parker,* 177 N. C., 467.

STATE v. A. P. EDWARDS.

Indictment—Retailing Without License—Violation of Revenue Act—Jurisdiction—Practice.

1. Section 1076 of The Code is not repealed or suspended by the provisions of section 35, chapter 294, Laws 1893, and the Superior Court (or a criminal court of like jurisdiction) has cognizance of the offense of retailing without license.
2. So, also, such court has jurisdiction of an indictment for violation of the offense created by section 35, chapter 294, unless it appears in evidence that the offense was created within twelve months before finding the bill.
3. Where there are two counts in a bill of indictment, one good and the other defective, and a general verdict of guilty thereon, the presumption is that the conviction was upon the good count, and that the evidence supported the conviction.

INDICTMENT tried before *Carter, J.*, at April Term, 1893 of the Criminal Court of BUNCOMBE.

The facts are stated in the opinion. Defendant appealed. (654)

The Attorney-General for the State.
No counsel contra.

BURWELL, J. The bill of indictment on which the defendant was tried contained two counts, one for unlawfully retailing spirituous liquors, and one for unlawfully selling them in quantities less than a gallon, to wit, by the quart. The jury found a general verdict of guilty. Of the misdemeanor charged in the first count, the court in which the trial took place clearly had jurisdiction. The offense there specified was the violation of The Code, sec. 1076, and not of section 35, of chapter 294, of the Acts of 1893 (Revenue Act). The latter act does not at all repeal or suspend the operation of the former, or in any way interfere with the enforcement of its provisions. *S. v. Newcomb,* 107 N. C., 900. This count being good, it is presumed that the conviction was upon it (*S. v. Toole,* 106 N. C., 736), and that the evidence supported that conviction, there being no exception on that score. Hence, it becomes unimportant to consider the second count; but that also was good, as it would be sustained, unless there was evidence that showed that the offense against the State Revenue Act therein charged was committed within twelve months before the finding of the bill. The Code, sec. 892; Acts 1889, ch. 504; *S. v. Dalton,* 101 N. C., 680. What has been said disposes of the defendant's motion to "dismiss the action for

want of jurisdiction," and also of his motion to quash the bill for the same cause.

The judgment of the court is in strict accordance with the provisions of the act therein referred to.

No error.

Cited: *S. v. Lee,* 114 N. C., 845; *S. v. Robbins,* 123 N. C., 738; *S. v. Holder,* 133 N. C., 711

(655)

STATE v. JAMES M. BURTON.

Bastardy—Imprisonment—House of Correction—Insolvent Debtor.

Where the defendant in a bastardy proceeding was placed in custody of the sheriff until fine, allowance, and costs were paid, and was committed to jail by the sheriff under this order, and remained there for twenty days, and was then discharged under sections 2967 and 2972 of The Code, and at a subsequent term was sentenced to the house of correction under section 38 of The Code: *Held,* (1) that placing the defendant in custody of the sheriff was, by necessary implication, an order to imprison upon failure to pay fine, allowance, and costs; (2) that defendant was properly discharged, and (3) that the sentence to the house of correction was erroneous, without regard to the fact whether there was or was not such a house in the county.

(*Arguendo* by AVERY, J., that the imposition of a fine constitutes bastardy, also a criminal action, from which CLARK, J., differs, contending that bastardy is solely a civil action.)

The defendant James Burton was tried, on appeal from a justice's judgment, at the February Term, 1893, of the Superior Court of VANCE, before *Shuford, J.,* and a jury, on a proceeding in bastardy, and the issue was found against him, and, upon judgment being pronounced against him by his Honor, he was, on motion of the solicitor, placed in the custody of the sheriff, by whom he was, on failure to comply with the order of the court aforesaid, committed to the common jail of Vance County, whence he was regularly discharged by order of the clerk, 13 March, 1893, under the provisions of The Code, secs. 2967, 2972.

At the next term of the said Superior Court (May Term, 1893), the solicitor for the State refusing to move in the matter, W. B. Shaw, Esq., who appeared on the trial of the proceeding at February Term, 1893, with the solicitor, at the instance of the prosecutrix, on the affidavit set out in the record, moved the court for a *capias* against the defendant,

which motion was allowed. The defendant being brought into (656) court, the said W. B. Shaw, assuming to act for the State, moved the court that he be imprisoned under section 38 of The Code.

The defendant, by his counsel, insisted that, the solicitor having refused to act in the matter, the court could not, on motion of another than the solicitor, make any order for his imprisonment under said section 38. Thereupon, his Honor *Judge Shuford* stated that he would act on the matter of his own motion.

The defendant then insisted that, having been committed to prison at the February Term, 1893, in default of payment and compliance with the order and judgment of the court then rendered, he is not subject to be committed to prison in default of paying the same; that it is not competent for the court, of its own motion, or on the motion of another than the solicitor, and without the motion of the solicitor prosecuting on behalf of the State, to arrest or punish this defendant; that, having been once imprisoned and discharged according to law, he cannot now be resentenced or reimprisoned for the same offense; that, there being no house of correction in the county of Vance, the said section 38 is inoperative; that section 38 of The Code applies only before the commitment of defendant in default of complying with the judgment of the court, and not after his discharge from imprisonment under section 2967; and moved for his discharge.

His Honor was of opinion against the defendant on all these questions, and held that the record of the court at February Term, 1893, showing no order for the commitment of the defendant for failing to comply with said judgment, he is subject to be imprisoned under section 38 of The Code, and pronounced the judgment accordingly, sentencing him to imprisonment for six months in the county jail, with leave to the county commissioners to hire him out for reasonable (657) wages.

The defendant excepted to the rulings and judgment of his Honor, and appealed.

The Attorney-General and Pittman & Shaw for the State.
T. T. Hicks for defendant.

AVERY, J. Upon conviction at the February Term, the court had power to "sentence" the defendant either to prison, or if the county authorities had established a house of correction, to hard labor therein, in addition to the judgment pronounced against him, which imposed the payment of the usual fine and allowance. This conclusion is inevitable if we construe the two sections (The Code, secs. 35 and 38) relating to the judgment in bastardy cases together, and give effect to both, as a

familiar rule of construction requires us to do. Instead of imposing the additional judgment of imprisonment in the county jail, however, the judge, on motion of the solicitor, ordered the sheriff to take the defendant into his custody for failure to comply with the first order, and so left him at the end of the term. During that term the sentence could have been modified, as its execution had not begun. 21 A. & E., 1084. But no further steps were taken till the term held in May following.

If there had been a house of correction in Vance County, the defendant would nevertheless have been entitled to his discharge upon filing his petition and taking the insolvent debtor's oath, if he had been ordered into custody till fine and cost should be paid. The Code, secs. 2968 to 2974; *S. v. Williams,* 97 N. C., 414; *S. v. McNeely,* 92 N. C., 829. But in our case the defendant, at the instance of the solicitor, "was placed in custody of the sheriff, by whom he was, on failure to comply with the order of the court, committed to the common jail of Vance County, whence he was regularly discharged by order of the clerk, on 13 (658) March, 1893, under the provisions of The Code, secs. 2967-2972." We think that the order to the sheriff to take the defendant into his custody was, by necessary implication, an order to imprison upon failure to pay the fine and costs. The court was presumed to act within the purview of its power, and had no authority to place the defendant in custody, except for the purpose of compelling such payment. The sheriff so construed the order, and we do not think that in acting upon it he exceeded his authority or made himself amenable for damages for false imprisonment. An order that a defendant be placed in custody of the sheriff is construed, according to the practice prevailing in all the courts, as a commitment till fine and costs are paid, or, with the sanction of the court, secured. When such is the order, the prisoner may be lawfully discharged either upon the payment of fine and costs, or upon taking the prescribed oath. *S. v. Williams* and *S. v. McNeely, supra.* When it is admitted, as in this case, that a verbal order was given to the sheriff to take the defendant into custody, after it had been adjudged that he pay fine and costs, and that the sheriff took and held him till, upon petition, he was discharged in accordance with the provision of the statute (The Code, secs. 2967 to 2972), unquestionably it was the right of the prisoner to demand that a record of the order placing him in custody be entered upon the minutes. *S. v. Harrison,* 104 N. C., 728; *S. v. Farrar,* 104 N. C., 702. The persons entitled to be so released are specifically mentioned, among them is "every putative father of a bastard committed for a failure to give bond or to pay any sum of money ordered to be paid for its maintenance." Section 2767 (1). If there is room to doubt whether the language quoted includes the fine as well as the allowance for the

maintenance of the child, the omission in the first is supplied by the provision of the second subsection, which extends the right of discharge to those committed for the "fine and costs of any criminal proceeding." We must concede that a comparison of the cases cited (659) by counsel does not lead to a very clear understanding of what was meant when a bastardy proceeding was declared a civil action, but partaking somewhat of the nature of a criminal action. It is, however, manifest that the defendant may be committed to prison in default in paying the fine, as well as the allowance, since the statute (The Code, secs. 35 and 38) plainly so provides; and it has been expressly held that the judgment for a fine and costs imposed by a court is not deemed a debt within the meaning of Article I, section 16 of the Constitution. *S. v. Cannady,* 78 N. C., 539. In that case the conclusion of the Court rested upon the position that the Constitution did not prohibit the enactment of a law subjecting a prosecutor to imprisonment on failure to pay a judgment for costs. We think that upon the same principle the Legislature had the power, by express provisions of the statute, to make it the duty of the court to commit the putative father of a bastard on default in satisfying a judgment for fine, allowance, and costs. Speaking for myself only, however, I must say that I think the Act of 1879, by imposing a fine, made the putative father indictable for a criminal misdemeanor, and also liable to imprisonment for nonpayment of the allowance.

The manifest intention of the Legislature, as evinced in the enactment of sections 35 and 38 of The Code, was that the proceedings against the putative father of a bastard should be "prosecuted by the State" like a "public offense," with a view to insuring the payment of fine and costs, and an allowance appropriated to the support of the child, in order to indemnify the county. But while a bastardy proceeding is not prosecuted "for the enforcement or protection of an individual right," or "the redress or prevention of a wrong" (The Code, secs. 126 and 127), it was held by this Court in *S. v. Pate,* 44 N. C., 244, that the statute in force before 1879 did not make it a criminal action, because a person "could not be put to answer any criminal charge but by indictment, presentment or impeachment." Const., Art. I, sec. (660) 12. Though prosecuted in the name of the State, it was declared that the "object of the suit was not to punish the defendant for an act done to the injury of the public, but to indemnify the county against liability for the support of a bastard child." *S. v. Pate, supra.* The statute from 1741 to 1879 contained substantially the same provision, using precisely the same language as to the consequences of a finding against the putative father, viz., that he should "stand charged with the maintenance of the same (the child),

as the county court shall order, and give security," etc. Laws 1741, ch. 30 (1 Potter's Rev., p. 144, sec. 10); Haywood's Man., p. 446; Laws 1814, chs. 870 and 871 (2 Potter's Rev., p. 304); 1 Rev. Stat., ch. 12, sec. 4; Rev. Code, ch. 12, sec. 4; Bat. Rev., ch. 9, sec. 4. It was because of the marked distinction between a statute of that kind and one that imposed fine or imprisonment as a punishment that *Judge Daniel* drew the marked distinction between the proceeding in bastardy and the trial of a criminal action by a justice of the peace. *S. v. Carson,* 19 N. C., 370. "Before we quit the case (said the learned Judge), perhaps it may not be improper to remark that there is some difference of construction by the courts in cases of orders of justices in bastardy, and convictions of justices under penal statutes and for petty offenses. Orders of justices in bastardy cases are police regulations, having for their object solely an indemnity of the county from money liabilities. They do not partake of the nature of criminal offenses. Therefore, every intendment will be made to support an order of justices in bastardy. Convictions before justices are generally for petty offenses which partake of a criminal nature. Generally the offenses are created and the jurisdiction to the justices is given by acts of the Legislature. The court thus created being an inferior one and of a limited jurisdiction, proceeding not according to the course of the common law, it has (661) been invariably the practice, in favor of liberty and law, for the Superior Courts of general superintending jurisdiction to hold these inferior courts to strict rules when they attempt to exercise a jurisdiction in any matter savoring of a criminal nature."

When, however, the Legislature passed the Laws of 1879 (ch. 92, sec. 2—The Code, sec. 35), providing that "when the issue of paternity shall be found against the putative father, or when he admits the paternity, he shall be fined by the justice not exceeding the sum of $10, which shall go to the school fund of the county," like all other fines imposed on convictions in criminal prosecutions, it would seem that the obvious effect of the change of the law was to create a petty criminal misdemeanor, and to so limit the punishment as to make it cognizable before a justice of the peace. The Constitution of 1868 and also the amended Constitution of 1875 conferred this power on the Legislature in plain terms (Art. 1, sec. 13, and Art. 4, sec. 27); while under the Constitution of 1835 there was no exception to the rule that all criminal prosecutions must begin by indictment, presentment or impeachment. *S. v. Pate, supra.* The reasons given by *Judge Pearson* for declaring the old proceeding a civil one seem to have been fully met when we consider the effect of the latter act construed in the light of the new provisions in the organic law. One of the objects of the law is to punish the offender by imposing a fine. The defendant can be lawfully convicted of a petty

misdemeanor when the punishment cannot exceed a fine of $50 or imprisonment for one month without the intervention of a grand jury on the warrant of a justice of the peace in the nature of an indictment.

Unless, therefore, we were to concede that the imposition of a fine to be appropriated to the same purpose as all fines imposed on conviction upon indictments is not a punishment, we are driven to the conclusion that the Legislature in the exercise of its power created another petty misdemeanor by the Laws of 1879, attaching as an additional consequence of conviction the old police regulation for the in- (662) demnity of the county against the cost of supporting the child.

It may be well, therefore, to determine what is the legal effect of imposing a fine. Says *Lord Coke* (1 Coke Lit., 126b): "Here a fine signifieth a pecuniary punishment for an offense or a contempt committed against the King."

"A fine is a pecuniary punishment for an offense or a contempt committed imposed by the judgment of a court." 7 A. & E., 991.

"The ordinary punishment for misdemeanors is fine or imprisonment at the discretion of the court. . . . Where the statute commands an act of a public nature, and is silent as to the punishment, the common law provides fine or imprisonment." 1 Bish. Cr. Law, sec. 940.

The act, therefore, not only brings the warrant for bastardy within the definition given by the court in *Pate's case,* but also within the statutory definition of "an action prosecuted by the State, as a party, against a person charged with a public offense, for the punishment thereof." The Code, sec. 129. The parties to a warrant for bastardy are the State and the putative father, and if a fine of not exceeding ten dollars is a punishment, then the statute creates a criminal offense, which is the subject of a criminal action. The word "criminal" means "punishable by law, human or divine." Century Dictionary. Since other corporal punishments than hanging were forbidden by the Constitution of 1868, the Legislature can impose as a penalty for crime only fine or imprisonment in the common jail or in the State prison, or any two or all three of these punishments. "In criminal law, a fine is a sum of money ordered to be paid by an offender as a punishment for an offense. A fine at common law is one of the punishments for misdemeanors, and it has been made a punishment for many offenses by modern statutes." 1 Rapalje's Law Dict.

There can be no question as to the power of the Legislature to make the begetting of a bastard child a misdemeanor, and to so (663) limit the punishment as to make it cognizable before a justice of the peace, or to create a special court with concurrent jurisdiction of such petty misdemeanors or the exclusive right to try higher offenses. *S. v. Powell,* 97 N. C., 417.

It is true that while the question of the construction to be given to the Laws of 1879 had never been raised until this case was argued on appeal, this Court has, *obiter,* conceded that the proceeding was still civil in its character, without adverting to the fact that the Act of 1741 had imposed a fine. See *S. v. Bryan,* 83 N. C., 611; *S. v. Peebles,* 108 N. C., 768; *S. v. Edwards,* 110 N. C., 511. In none of these cases was the attention of the Court directed to the Laws of 1879 and the alteration in the organic law since the older cases of *S. v. Carson* and *S. v. Pate* were decided. It is true that in *S. v. Crouse,* 86 N. C., 617, an exception was taken on the ground that the proceeding was a criminal one, but we search in vain for an intimation that the attention of the Court was called to the fact that the Laws of 1879 imposed a fine. It is evident that the *Justice (Ashe)* who delivered the opinion was not advertent to that change, since he does not notice it, and says, what is not correct, that the only change made in the old law was "to leave it entirely to the option of the woman, as a general rule, whether she would institute proceedings against the father." Did the Legislature intend to leave the allowance unaffected when the amount was limited to $50 and a fine was substituted instead of the additional sum that might have been previously exacted for the support of the child? I think not. But, however that may be, we think that we cannot classify a warrant charging a defendant with bastardy as a civil action or a special proceeding, since he is subject to a fine imposed as a punishment. It does not follow that the rule of evidence which gives artificial effect to the examination of the woman is altered. The Legislature has the power to
(664) make cases of this nature an exception to the general rule, and to make the examination of the woman presumptive evidence, just as it has made the fact of escape by one lawfully committed and charged with a crime *prima facie* evidence on an indictment against the sheriff or jailer. The Code, Sec. 32; *S. v. Rogers,* 79 N. C., 609; *S. v. Bennett,* 75 N. C., 305.

I have examined very carefully the decisions of other States of the Union upon this subject, and, while most of them have construed statutes of similar import to our Act of 1741 (kept in force till 1879) as police regulations, as distinguished from criminal laws on the one hand, and, on the other hand, as not within the inhibition of the constitutional provision in reference to imprisonment for debt adopted in all of the States and expressed in almost the same words, we have failed to find a single act elsewhere which imposes a fine in addition to the allowance exacted for the support of the bastard and the indemnity bond. See 2 A. & E., 144 and 145. If the sentence to pay a fine and costs was imposed upon conviction of a criminal offense, and the defendant had already taken the prescribed oath, he was not liable to arrest for failure

to pay the fine. So it follows that he is now neither liable to imprisonment on account of the nonpayment of the fine to the State, which was imposed as a punishment, nor for default in the payment of the allowance exacted of him for the indemnity of the county. In either of the double aspects of the case, and in both, whether the proceeding be criminal or civil in its nature, the ruling of the court below was erroneous. The judgment is reversed and the defendant is entitled to be discharged.

Reversed.

CLARK, J. I assent to that part of the opinion which is the opinion of the Court, but dissent from the views of *Mr. Justice Avery* as to the nature of the action.

The getting a bastard child is bad in morals, but I do not think the Legislature ever intended to make it either a crime or an in- (665) dictable offense. The statute is, in substance, such as it has always been, and which has uniformly been held a purely fiscal arrangement, or a police regulation, to prevent the child becoming a charge upon the county. The addition, by the Laws of 1879 (The Code, sec. 35), of a fine of "ten dollars, which shall go to the school fund of the county," is not sufficient to turn the matter into a crime. The imposition of the ten dollars is in furtherance of the main design of a fiscal provision and rather in the nature of a tax to be contributed towards educating the children of the county. This is shown by the fact that it is placed at a definite fixed sum and not "not to exceed" a certain sum, or "in the discretion of the court," as is usual in prescribing a punishment for criminal offenses. Also, by the fact that in numerous cases which have come to this Court since 1879 the Court has never held or intimated that the addition of these words had changed the action, heretofore always held to be a civil proceeding into a criminal one.

Owing to its peculiar nature, the enforcement of a police regulation for fiscal purposes, this action has some anomalous features. These have recently been pointed out and the authorities reviewed in *S. v. Edwards,* 110 N. C., 511. In that case it is expressly noted that a fine is imposed. The Court was not inadvertent to it. But it held, as had uniformly always been held ever since the Act of 1879, that it was a civil proceeding. *S. v. Peebles,* 108 N. C., 768; *S. v. Wilkie,* 85 N. C., 513; *S. v. Bryan,* 83 N. C., 611, all of which were since the Act of 1879.

Indeed, in *S. v. Crouse,* 86 N. C., 617, the point was expressly taken that the Laws of 1879 (now The Code, sec. 35) made the action a criminal one, and hence that no appeal lay. The Court held that it was still a civil proceeding, and that the woman could appeal. *Ashe, J.,* says that "the only alteration of the law with regard to bastardy ef-

(666) fected by the Act of 1879, and all that we think was intended to be effected," was that it was to become optional with the woman to institute proceedings, except where the child was likely to become a charge upon the county.

In *S. v. Giles,* 103 N. C., 396, *Smith, C. J.,* passes upon this very contention that the fine makes this a criminal proceeding and holds that it does not. If the intent of the Act of 1879 was to make this a criminal proceeding, it is singular, to say the least, that The Code of 1883 should retain the provision in section 32, that "the affiant, the woman or the defendant," may appeal; or, that by the same section, the examination of the woman should not only be competent to be read as evidence, but is presumptive evidence.

Cited: Myers v. Stafford, 114 N. C., 240; *S. v. Cagle, ib.,* 840; *S. v. Parsons,* 115 N. C., 732, 5, 6; *S. v. Crook, ib.,* 764; *S. v. Wynne,* 116 N. C., 982, 986; *S. v. Ostwalt,* 118 N. C., 1209, 1216, 1217; *S. v. Mitchell,* 119 N. C., 787; *S. v. Rogers, ib.,* 794; *S. v. Nelson, ib.,* 799; *S. v. White,* 125 N. C., 678, 682, 686; *S. v. Addington,* 143 N. C., 686; *Burns v. Tomlinson,* 147 N. C., 635.

NOTE.—Bastardy is not a criminal proceeding. *S. v. Liles,* 134 N. C., 735.

STATE v. DOCK ALSTON.

Burglary—Immaterial Error—Instructions in a Criminal Action.

1. Under chapter 434, Acts 1889, creating two degrees of burglary, the jury are not vested with the discretionary power as to the degree for which they should convict, but should find according to the evidence, as they believe the facts to be. (*S. v. Fleming,* 107 N. C., 905.)
2. The defendant cannot except to an error favorable to himself. Hence, when the judge erroneously instructed the jury that they might, in their discretion, find the defendant guilty of burglary in the second degree, "although the family was in the house at the time of the entry," the defendant is not entitled to a new trial.
3. The court could not charge, in a criminal case, that if "all the evidence was that the family was in the house at the time of the burglarious entry, the defendant was guilty of burglary in the first degree," because the credibility of such evidence, though uncontradicted, is for the jury. (*S. v. Riley, ante,* 648.)

(Syllabus by CLARK, J.)

ACTION, tried at October Term, 1893, of FRANKLIN, before *Hoke, J.,* and a jury.

The indictment charged that the defendant entered the dwelling house of one Sallie Ham, in the night time, with intent to com- (667) mit rape on an inmate of the house, and that he made an assault on the latter with intent to commit rape. All the evidence tended to show that the family was actually present in the house at the time it was entered.

His Honor charged the jury that, although all the evidence was that the family was present in the house at the time it was alleged to have been entered, they might find that he was guilty of burglary in the first or second degree.

There was a verdict of guilty of burglary in the second degree, and from the judgment thereon defendant appealed.

The Attorney-General for the State.
N. Y. Gulley for defendant.

CLARK, J. The defendant was indicted for burglary. The court charged the jury that, "although all the evidence was that the family were present in the house" at the time it was alleged to have been entered, they might find the prisoner guilty of burglary in the first degree, or they might find him guilty of burglary in the second degree. The jury returned a verdict of guilty of burglary in the second degree, and the prisoner assigns the above instruction as error.

The court should have charged the jury that if they believed from the evidence that the family was present in the house at the time of the felonious entry, as charged, they should convict the defendant of burglary in the first degree. Under such circumstances, the jury are not vested with the discretionary power to convict of burglary in the second degree. The power to commute punishment does not reside with the jury. This very point was passed upon and decided in *S. v. Fleming,* 107 N. C., 905 (on page 909). But there was no prayer by defendant for such instruction. The court could not have charged, as this exception implies, that because "all the evidence was that the family was in the house at the time of the felonious entry," etc., the (668) jury should find the defendant guilty of burglary in the first degree. It is only when the jury believe that to be the fact that they could return such verdict. *S. v. Riley, ante,* 643. The jury must pass upon the credibility of the evidence, and, although all the evidence was that the family was then present, still, if the jury did not believe that part of the evidence, but believed only the evidence tending to show that the prisoner entered the dwelling in the night time with the felonious intent as charged, a verdict of guilty of burglary in the second degree was proper. There is nothing which indicates how the jury found as to

the truth of the evidence of the presence of the family. There was no exception as to the charge in other respects.

Besides, the appellant in any case, civil or criminal, cannot complain of any error which is not injurious to him. *S. v. Frank,* 50 N. C., 384; *Ray v. Lipscomb,* 48 N. C., 185; *Hobbs v. Outlaw,* 51 N. C., 174; *Moore v. Parker,* 91 N. C., 275; *S. v. Dick,* 60 N. C., 440.

If there was error here, the effect was to cause a verdict for the lesser offense to be found against the appellant than should have been rendered. It does not lie in the prisoner's mouth to complain that he is to be sent to the penitentiary for seven years—the sentence imposed in this case—when the evidence might have justified a verdict and sentence against him for the capital offense charged in the indictment.

No error.

Cited: S. v. Covington, 117 N. C., 864; *S. v. Gadberry, ib.,* 831; *S. v. Locklear,* 118 N. C., 1159; *S. v. Johnston,* 119 N. C., 896.

(669)

STATE v. THOMAS JONES ET AL.

Practice—Habeas Corpus—Continuance of Hearing—Return—Evidence—Burden of Proof.

1. If it appear from the return on a writ of *habeas corpus* that the petitioner is detained on a criminal charge, the court may continue the hearing for a reasonable time to give the solicitor an opportunity to examine into the case.
2. The presumption of innocence applies only on a trial, and does not avail to furnish a presumption that the detention of a party on regular process, when the committing officer has jurisdiction, is illegal; therefore,
3. Where, upon the return of a sheriff to a writ of *habeas corpus,* it appeared that the petitioners were in custody on a *mittimus,* regular in every way, from a justice of the peace, for failure to give bond for their appearance at the next term of the Superior Court to answer a criminal charge of which the court had jurisdiction, the detention, nothing else appearing, was clearly legal, and the burden was upon the petitioner to show wherein it was illegal, and not upon the State to show that they were lawfully in custody.

This is an application for a *certiorari* to review the action of *Bryan, J.,* in refusing to discharge the petitioners on *habeas corpus.* Notice was given as required by Rule 43 of this Court, the time being shortened

by consent of the Attorney-General. The petitioners filed a certified copy of the record and proceedings as a part of their application. From them it appears that the petitioners were arrested and brought before a justice of the peace upon an affidavit and warrant for unlawfully disposing of mortgaged property under The Code, sec. 1089, and upon the trial the justice bound them over to the Superior Court in the sum of two hundred dollars. Upon their failure to give the bond, they were sent to jail, under a *mittimus,* regular in every respect.

The petitioners thereafter applied to the judge for a writ of *habeas corpus,* upon a petition which sets out that they had been committed to jail by virtue of a *mittimus* from a justice of the peace (670) (annexing a copy), but averring that there was no evidence before the justice that any crime had been committed in said county, and that the committal was made through the ignorance or malpractice of the justice.

Upon the return the sheriff produced the petitioners and made his return, setting forth the *mittimus* as the cause of the detention. The court continued the cause till next morning, that the solicitor might have some time to examine into the matter, the petitioners giving bond in the sum of one hundred dollars each for their appearance. To this continuance the petitioners, through their counsel, excepted. On the return, it appearing that the detention was upon a *mittimus* from a justice of the peace for the failure to give bond on a charge for unlawfully disposing of mortgaged property, the court ruled that the burden was on the petitioners to show that they were illegally restrained of their liberty. To this the petitioners excepted and appealed. The petitioners refusing to proceed with their evidence the court refused to discharge them, and they were permitted to go upon their bond already given.

The Attorney-General for the State.
Geo. M. Lindsay and E. C. Smith for petitioners.

CLARK, J. (after stating the case). The learned counsel for the petitioners properly and frankly admitted that this was a case of "novel impression." The continuance of the hearing till the next morning was not subject to exception. It is difficult to see how it injured the petitioners who were admitted to bail, or how, if injurious, this could be remedied by an appeal. It is *res acta* and cannot be undone. Besides, the delay was to give the solicitor opportunity to examine into the case, and was expressly authorized by The Code, sec. 1635.

Upon the return of the sheriff it appeared that the petitioners (671) were in custody upon a *mittimus* (which, indeed, was also set out in the application for *habeas corpus*), regular in every way, from

a justice of the peace, for failure to give bond for their appearance at the next term of the Superior Court to answer a criminal charge of which that court had jurisdiction. Nothing else appearing, the detention was clearly legal. The court thereupon called upon the petitioners to show wherein it was illegal. They declined to furnish him any evidence, but contended that the burden was upon the State to show that they were lawfully in custody. The State had already done so. It was not called upon to go further till testimony to the contrary was offered. The sheriff knew probably nothing whatever of the detention, except the *mittimus*. He was not called upon to bring up the witnesses, to show what they testified to, or to prove that the peitioners were guilty of the charge. That fact will be inquired into by a grand jury, and afterwards by a petit jury, if a true bill should be found, at the next term of the court. The presumption of innocence applies only upon such trial, and does not avail to furnish a presumption that the detention of a party upon regular process, when the committing officer has jurisdiction, is illegal, and to call upon the State in a proceeding like this to show that the defendant is guilty in order to justify the detention. The detention is to give opportunity for a jury to pass upon the question of the defendant's guilt. In *S. v. Herndon,* 107 N. C., 934, the judge refused to hear any evidence, deeming the commitment (thereupon a true bill was found by a grand jury) conclusive of probable cause. The court held that the strong presumption was in favor of the correctness of the action of the grand jury, but that it was not conclusive, since there might be other evidence not before them; hence, that it was error to refuse to hear evidence, but that in no event, after indictment found, could the court discharge the prisoner. (672) It might, in a proper case, admit to bail. But here the court did not refuse to hear evidence. It asked for it. The production of the *mittimus* was sufficient, *prima facie,* to show a legal detention. The petitioners had upon them the burden of showing evidence to rebut this, and the court made all the inquiry it was called upon to make (The Code, sec. 1644) when it told them to proceed with their evidence, which they refused to do. If the petitioners had shown that there was no evidence at all before the justice, the judge could examine into the case *de novo,* unless they had waived the examination before the committing officer (9 A. & E., 197), and bind over or discharge them; or, if the facts proved did not constitute a crime, he might discharge them, or, if the bail was excessive in amount, reduce it.

There may arise cases where the court, *ex mero motu,* as it has power to do, may issue the writ (The Code, sec. 1632), and of course it may in all cases summon witnesses and investigate whether the *prima facie* case of legal detention is not rebutted. But the present case does not

raise a question of the power to do this. The petitioners are in court. There is nothing that indicates that they are weak, helpless or ignorant of their rights. Indeed, they are represented by counsel. The judge does not refuse to hear testimony. He calls upon the State to show the cause of the detention. This it does satisfactorily by the sheriff's return. The court then asks the petitioners for their evidence. They refuse to give any. The court could do no otherwise than to refuse to discharge them. (The Code, sec. 1645.) It seems, indeed, that the petitioners in fact, are not even in custody, but are now out on bail. They have no ground to complain in any particular.

Petition dismissed.

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(673)

STATE v. DANIEL GILCHRIST.

Murder—Degree—Indictment—Counts—Verdict.

1. Where a bill of indictment charged a murder on 9 February, 1893, prior to the ratification on 9 February, 1893, of the act dividing murder into two degrees, and the evidence was that the killing was "on a Thursday night" in that month, and the 9th was Thursday, but there were two Thursdays in that month preceding, and the crime was committed after the ratification of said act.
2. A bill of indictment following the form authorized by chapter 58, Acts 1887, and using the words "feloniously, wilfully, and of malice aforethought," charges a wilful, deliberate, and premeditated killing which, according to section 1, chapter 85, of the act of 1893, is murder in the first degree, and as the highest crime is charged, the law permits a verdict of guilty of this crime or of murder in the second degree or of manslaughter.
3. In such case, it being in the power of a jury to render either one of three verdicts, it is as if there were three counts in the bill, and it is settled that where there are various counts in an indictment and testimony is offered as to one count only, and there is a general verdict of guilty, the verdict will be presumed to have been rendered upon the count to which the evidence was applicable.
4. In the trial of an indictment following the form authorized by chapter 58, Acts 1887, and charging that the accused "feloniously, wilfully, and with malice aforethought did kill and murder," etc., the evidence was that the accused and deceased had quarreled and that the latter had made threats, and the only evidence as to the manner of killing was that the accused had concealed himself and waylaid the deceased, striking him, as he passed, on the head with an ax, and killing him instantly. The court charged that the crime was murder or nothing, and the jury found accused guilty of the felony and murder in the manner and form as charged in the bill of indictment: *Held* that, upon the evidence, only a verdict of

guilty in the first degree was warranted, and the general verdict was in response to the charge of murder in the first degree and determined the degree in accordance with the Laws of 1893.

INDICTMENT for murder, tried at September Term, 1893, of RICHMOND, before *Connor, J.*

There was evidence that the prisoner and the deceased (Frank
(674) McKoy) had some difficulty a short time before the homicide, and that prisoner had made threats against deceased. There was evidence tending to show that prisoner killed deceased by waylaying the road on which deceased was returning from his work at night, that prisoner concealed himself behind some trees on the side of the road, and as deceased was passing by knocked him on the head with an axe, killing him instantly. This was the only evidence as to the manner of the killing.

The prisoner asked the court to instruct the jury that there was no evidence of murder in the first degree. This was refused, and the court instructed the jury that the prisoner was guilty of murder in the first degree, or nothing.

The only evidence in regard to the time of the killing was that it was committed on a Thursday night in February, 1893. The indictment charged the offense to have been committed on 9 February, 1893. Thursday was 9 February.

The jury rendered a verdict of guilty in manner and form as charged in the indictment. The prisoner moved for a new trial upon the ground that the jury, in their verdict, did not determine whether the homicide was murder in the first or second degree, and for error in that the court refused to give the instruction asked for. The motion was refused, and the prisoner excepted. A motion in arrest of judgment was also made, because the jury did not determine, in their verdict, whether the homicide was murder in the first or second degree. Prisoner excepted, and appealed from the judgment.

The Attorney-General for the State.
No counsel contra.

MACRAE, J., (after stating the facts): The bill of indictment was drawn under the form authorized in chapter 58 of the Laws of
(675) 1887, and reads as follows: "The jurors for the State, upon their oath, present that Daniel Gilchrist, late of the county of Richmond, with force and arms, at and in said county, on 9 February, 1893, feloniously, wilfully and with malice aforethought did kill and murder one Frank McKoy, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

At the time of the passage of the Laws of 1887 there were no degrees in the crime of murder in this State, but on 11 February, 1893, an act was passed "to divide the crime of murder into two degrees, and define the same." This act reads as follows:

"SECTION 1. All murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree, and shall be punished with death.

"SEC. 2. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the penitentiary.

"SEC. 3. Nothing herein contained shall be construed to require any alteration or modification of the existing form of indictment for murder, but the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree.

"SEC. 4. That the provisions of this act shall not apply to any crime which shall have been committed prior to the ratification of this act, and shall not affect the existing distinction between murder and manslaughter, nor the punishment for manslaughter as now provided by law.

"SEC. 5. That this act shall be in force from and after its ratification. Ratified 11 February, 1893."

It will be noted that the crime is alleged in the bill to have (676) been committed on 9 February, 1893, prior to the ratification of the act last recited, and that the only evidence as to the time of the homicide fixed it on a Thursday night in February, 1893, and that the 9th of February was on Thursday. So it appears that there were two Thursday nights in February of this year before and two after the 11th. It will be assumed, in favor of human life, that the crime was committed after the passage of the said act.

The verdict is as follows: "That they find the prisoner at the bar, Daniel Gilchrist, guilty of the felony and murder in the manner and form as charged in the bill of indictment." Section 3 of the Act of 1893, as above cited, provides that the jury before whom the offender is tried shall determine in their verdict whether the crime was murder in the first or second degree.

The bill of indictment, using the words "feloniously, wilfully and of *malice aforethought*," charges a wilful, deliberate and premeditated killing, which, according to section 1 of the Act of 1893, is murder in the first degree. The bill charges the highest crime, and the law permits

a verdict of guilty of this crime, or of either murder in the second degree or of the felonious slaying called manslaughter.

The verdict should be taken in connection with the charge of his Honor and the evidence in the case. *S. v. Long,* 52 N. C., 24; *S. v. Leak,* 80 N. C., 403; *S. v. Thompson,* 95 N. C., 596. A perusal of the testimony, as stated in the case on appeal, will show that there was no ground for the prayer for instruction "that there was no evidence of murder in the first degree," and that there was no error in the instruction that he was guilty of murder in the first degree, or of nothing.

The cases cited above settle that where there are various counts in a bill of indictment, and testimony is offered as to one count only, (677) and there is a general verdict of guilty, the verdict will be presumed to have been rendered upon the count to which the evidence was applicable. As the jury in this case, upon proper evidence, could have rendered either one of three verdicts of guilty, it is as if there had been three counts in the bill—one for murder in the first degree, one for murder in the second degree, and one for manslaughter. There was no evidence on which to warrant a verdict of guilty of murder in the second degree or of manslaughter. The evidence, if believed, would warrant only a verdict of guilty of murder in the first degree, and that is what, in manner and form, is charged in this bill, and, therefore, the general verdict was in response to the charge of murder in the first degree, and determined the degree in accordance with the statute. We are not unmindful of the fact that our conclusion is apparently at variance with the decisions of the courts of several other States, and with section 2540 of Thompson on Trials, but an examination of the cases cited will show quite a difference in the words of their statutes and ours.

The bill of indictment charging murder in the first degree, this verdict determines the degree, for it alleges that he is guilty as charged. *Commonwealth v. Earl,* 1 Wharton (Penn.), 525.

After a careful examination of the record, we find that there is

No error.

Cited: S. v. Covington, 117 N. C., 864, 866; *S. v. Gadberry, ib.,* 822, 834; *S. v. Locklear,* 118 N. C., 1159; *S. v. Freeman,* 122 N. C., 1016; *S. v. Hunt,* 128 N. C., 586; *S. v. May,* 132 N. C., 1021; *S. v. Daniels,* 134 N. C., 676; *S. v. Lipscomb, ib.,* 693, 698; *S. v. Matthews,* 142 N. C., 624; *S. v. Spivey,* 151 N. C., 683; *S. v. Gregory,* 153 N. C., 647; *S. v. Walker,* 170 N. C., 719; *S. v. Wiggins,* 171 N. C., 817.

(678)

STATE v. S. REAVIS ET AL.

Assault—Intent.

1. Where an unequivocal purpose of violence is accompanied by an act which, if not stopped or diverted, will be followed by personal injury, the execution of the purpose, the battery, is begun and a criminal assault is committed; therefore,
2. Where defendants—one with a pistol in his hand, one with a drawn sword, and one with a pistol in his pocket—went to the door of the prosecutor's house, where he was sitting, with the admitted purpose of compelling him to leave his home and accompany them to find and to appear as a witness against a person for whom they had a warrant (they not being officers of the law and having no warrant or subpœna for the prosecutor), and told him that he had to go with them, and ordered him to do so: *Held*, that the defendants were guilty of an assault, though they were prevented from actually doing violence to his person by the interference of others.

ACTION, tried before *Winston, J.*, and a jury, at May Term, 1893, of IREDELL.

The defendants and one Houston Brown were indicted for an assault with a deadly weapon on one Way. There was evidence introduced on the part of the State tending to prove the guilt of all of the defendants, except Brown, and as to him, a *nol. pros.* was entered. The defendant Reavis, testifying in his own behalf and in behalf of the other defendants, said that they had a warrant for the Carson boys, and went in the night to Way's dwelling to get him to go and show them where the Carson boys were; had met Way that day, and told him they were looking for them; he said he had not seen them in two weeks. That night the witness and the other defendants, Reynolds and Hays, and one Miller, went in the yard of Way—went in one step of the door—called to him, and told him he had told them a lie that day when he said he had not seen the Carson boys in two weeks, and "that he must come and show them to us, that they had come for him as a witness." He admitted that they stayed near the door three or four minutes; that he had out his pistol in his right hand; that defendant Hays was two or three steps from him with a drawn sword in his hand; that Miller was there with a pistol in his pocket; that there were about a dozen men of their crowd near by in the road; that Way was sitting near the door, it being open, when the defendants went in the yard and to the door; that (679) when they notified Way to go with them, etc., he got up and slapped his hand on his breast and told them to shoot; that his wife "acted like a wild woman," and ran out into the yard and "screamed at the top of her voice;" Way and his wife ordered them to leave; they

remained near the door three or four minutes, and in the yard fifteen minutes. They had searched the house that day. The noise and confusion that night were very great. The neighbors came in. He admitted that the defendants (except Brown) and Miller went to the house to make Way go as a witness, if he resisted them and was not willing to go. They had a warrant for the Carsons, but they had neither a warrant nor a subpœna for Way, and had no warrant when they searched his house. They were not officers of the law. The other defendants, Reynolds and Hays, testified in substance to the same facts. His Honor told the jury that these three defendants were guilty "upon their own showing." The jury rendered a verdict of guilty against them, and they appealed from the judgment pronounced.

The Attorney-General for the State.
No counsel contra.

BURWELL, J. We consider what his Honor told the jury as equivalent to saying to them, that if they believed what the defendants themselves testified was true, each of them having given the same account of the affair, they should return a verdict of guilty against them. Hence, if putting the construction most favorable to them upon what they testified to, we find that they were guilty of an assault upon the prosecutor Way, they are not entitled to a new trial.

An assault is defined by *Gaston, J.*, in *S. v. Davis,* 23 N. C., 125, to be "an intentional attempt by violence to do an injury to the person of another." It is elsewhere said to be "an attempt unlawfully to apply any—the least—actual force to the person of another, directly or indirectly." 1 A. & E., 779. In the case cited above the learned
(680) judge says that "it is difficult in practice to draw the precise line which separates violence menaced from violence begun to be executed, for until the execution is begun there can be no assault." And he adds, "we think, however, that where an unequivocal purpose of violence is accompanied by any act, which, if not stopped or diverted, will be followed by personal injury, the execution of the purpose is then begun, the battery is attempted." Now, in the case before us, each of the defendants stated that they went to the house of the prosecutor to make or force him to leave his home and accompany them. They had no authority to do this. They purposed by force or fear to compel him to go where they wished. Their intention was, they admit, to do this great violence to his person, to thus falsely imprison him. And false imprisonment generally includes an assault and battery, and always, at least, a technical assault. *S. v. Lunsford,* 81 N. C., 528. We have proof, then, of intended violence to the person of the prosecutor, not from

threatening words or gestures, but by their own admission. The intention is unequivocal. Was this unequivocal purpose of violence accompanied by any act, which, if it had not been stopped or diverted, would have been followed by personal injury? If so, according to the high authority cited above, the execution of the purpose was begun, and there was an assault.

We think it very clear from their own statement that the unlawful and most outrageous acts of the defendants would have been followed immediately by personal injury to the prosecutor, in which we, of course, include the enforced subjection of his body through fear or force to the command of the defendants, if their purpose had not been thwarted. The three defendants, accompanied by another, one with a pistol in his right hand, one with a drawn sword, and one with a pistol in his pocket, went to the door of the prosecutor's house, where he was sitting. All that is needed to make such an approach to a man an assault, that it is the beginning of the execution of violence to his person, is to (681) prove that there was a present purpose to commit such violence. That purpose may be proved by the words or gestures of the armed and advancing party, or, if the approach or attack is made in such a manner as to put a reasonable man in fear, and it does put him in fear, that will establish the purpose to commit violence, of the execution of which the act is the beginning. Here we have no need of the direct attempt or offer to shoot or strike to prove the purpose to commit violence. They admit it, and themselves testify to the commission of acts in the immediate presence of the prosecutor, which could have no other object than the consummation of that purpose. By their own testimony they established the fact that they passed "the line that separates violence menaced from violence begun to be executed," and, therefore, they were guilty of an assault.

No error.

Cited: S. v. Daniel, 136 N. C., 574; *S. v. Hemphill,* 162 N. C., 634.

STATE v. E. N. S. LEE.

Peddler—Selling by Sample Without License.

1. A "peddler" is one who sells and delivers the identical goods he carries about with him.
2. One who sells ranges, etc., by sample and by taking orders for goods to be thereafter delivered and paid for, is not indictable for failure to pay the tax imposed upon the business of peddling ranges, etc., by section 28, chapter 294, Acts 1893.

ACTION, tried at Fall Term, 1893, of YANCEY, before *Boykin, J.*, and a jury.

The jury returned a special verdict, upon which his Honor adjudged the defendant "not guilty," and the State appealed.

The facts are stated in the opinion of *Mr. Justice Clark.*

(682) *The Attorney-General for the State.*
G. S. Ferguson for defendant.

CLARK, J. Whether the taxing of the occupation of selling "clocks, stoves or ranges," by sample, under the state of facts found by the special verdict in this case, and whether to do so would be an interference with interstate commerce, is an interesting one. There are cases which would seem to indicate that the State could lawfully collect such tax upon the facts here found to exist, if the Legislature had seen fit to impose it. *Machine Co. v. Gage,* 100 U. S., 676; *S. v. French,* 109 N. C., 722. But we need not and do not pass upon that point.

The tax, for the failure to pay which the defendant is on trial, is that which is levied by section 28, chapter 294, Laws 1893, which provides, "on every itinerant person or company peddling clocks, stoves or ranges, fifty dollars annually on each wagon (if wagons are used) in each county where he or they may peddle. If wagons are not used, the tax shall be paid on each agent." The special verdict finds that the defendant sold the ranges by a sample range which he carried around in his wagon, and that he "did not sell any sample range." The tax is laid only on "peddling," and the defendant did not peddle his ranges. The usual and ordinary significance of that word indicates the occupation of an itinerant vendor of goods, who sells and delivers the identical goods he carries with him, and not the business of selling by sample and taking orders for goods to be thereafter delivered and to be paid for wholly, or in part, upon their subsequent delivery. Webster's International Dictionary defines "peddle—to sell from place to place; to retail by carry-

ing around from customer to customer; to hawk. Hence, to retail in very small quantities." Also, "to travel about with wares for sale; to go from place to place or from house to house for the purpose of retailing goods; as, to peddle without license." Worcester defines it simply "to carry about and sell to retail as a peddler." To the (683) same purport are the other dictionaries.

As the defendant did not "carry about and sell' the ranges, but sold only by sample, he did not violate the statute by failure to pay the tax upon the business of "peddling ranges."

No error.

Cited: S. v. Gibbs, 115 N. C., 702; *Range Co. v. Carver,* 118 N. C., 333; *S. v. Frank,* 130 N. C., 725; *S v. Ninestein,* 132 N. C., 1042; *Range Co. v. Campen,* 135 N. C., 524.

STATE v. J. T. WARREN.

Practice—Appeal from Judgment on a Plea of Guilty—Constitutional Law—Freedom of Speech—Local Police Regulations.

1. Where a defendant pleads guilty, his appeal from a judgment thereon cannot call into question the facts charged, nor the regularity and correctness of the proceedings, but brings up for review only the question whether the facts charged and admitted by the plea constitute an offense under the laws and Constitution.
2. An act of the Legislature (ch. 42, Laws 1891) which makes it unlawful to use profane language to the disturbance of the peace on the lands of the Henrietta Cotton Mills of Rutherford County is not an undue interference with the freedom of speech guaranteed by the Constitution, although the language used falls short of being a nuisance, punishable by State laws, from not having been "committed in the presence and hearing of divers persons, to their annoyance," etc.
3. An act of the Legislature making it unlawful to use profane language in certain localities, being a police regulation, is not obnoxious to the Constitution on the ground that it is not uniform and in effect over the whole State. Such police regulations may be limited in their operations to such localities as the Legislature may prescribe, as in the case of the prohibition of the sale of seed-cotton, liquor, and other commodities in certain localities.

The defendant was convicted on his plea of guilty, before a justice of the peace, of a violation of the provisions of chapter 42, Laws 1891,

making it unlawful, among other things, to use profane language
(684) to the disturbance of the peace on the lands of the Henrietta Cotton Mills in Rutherford County. On appeal to the Superior Court of RUTHERFORD, *Armfield, J.*, at Spring Term, 1893, affirmed the judgment of the justice of the peace, and defendant appealed.

The Attorney-General and John Devereux for the State.
No counsel contra.

CLARK, J. The defendant was arrested upon a warrant issued under chapter 42, Laws 1891, for "unlawful and wilful use of profane and indecent language that did disturb the peace on the lands of the Henrietta Mills." On the trial before the justice of the peace, the defendant pleaded guilty. He was fined $50, and appealed. The sworn complaint was made on 31 October, 1892, and the warrant issued on the same day. The trial was had, and a plea of guilty was entered on 3 November, 1892. We only note that the officer returned the warrant "served on October 12, 1892," to say that this was a palpable inadvertence of no purport, since the defendant appeared in the action. If pleaded at the trial, the justice should have granted the officer leave to amend the return. The Code, sec. 908. Not being pleaded, the plea upon the merits cured the error as to the defendant.

The defendant having pleaded guilty, his appeal could not call in question the facts charged nor the regularity and correctness in form of the warrant. The Code, sec. 1183. He is concluded as to these. Though, in fact, the proceedings are regular in form. The words used by defendant need not have been set out. *S. v. Cainan,* 94 N. C., 880. The appeal could only bring up for review the question whether the facts charged, and of which the defendant admitted himself to have been guilty, constitute an offense punishable under the laws and Constitution. Wharton Cr. Pr. & Pl., 9 Ed., sec. 413. The record proper
(685) states that in the Superior Court the defendant was tried by jury and found guilty. But, having pleaded guilty, the effect of the appeal could only be to test the validity of the statute. In fact, the judgment was arrested by the court upon the ground that the act of the Legislature was unconstitutional. There are two grounds upon which the unconstitutionality of the statute may be urged: First, that it is an interference with the freedom of speech. The Legislature could have empowered a municipality to make the use of such language punishable by its ordinances, when it falls short of being a nuisance, punishable by State law, from not having been "committed in the presence and hearing of divers persons, to their annoyance," etc. *S. v. Cainan,* 94 N. C., 880; *S. v. Debnam,* 98 N. C., 712. Of course the Legislature could do

this directly, if it could do it indirectly, as by authorizing a municipality to make an ordinance to that effect. Secondly, it may be urged that this is a criminal law, and hence must be uniform and take effect over the whole State. But, on the contrary, it is a police regulation, and hence may be limited in its operation to such localities as the Legislature may prescribe. The distinction between the two has been too often pointed out to require reiteration. Such public local acts have been often sustained by this Court, in cases of prohibition of sale of seed cotton in certain counties, of intoxicating liquors in prescribed localities, or the sale of certain commodities in places named, without being weighed, and the like. These precedents and the reasons for the distinction drawn are given by *Avery, J.*, in *S. v. Moore,* 104 N. C., 714, which is cited and approved in *S. v. Moore, post,* 697.

The court should have overruled the motion in arrest, and affirmed the judgment, the defendant having pleaded guilty before the justice. This case differs from *S. v. Koonce,* 108 N. C., 752. There the defendant pleaded not guilty. Having been convicted, he moved in arrest of judgment. This being denied, he appealed. The court properly held that on such appeal the whole case was open and the (686) trial was *de novo* (The Code, sec. 900), and not restricted to the motion in arrest of judgment. But here, the defendant has restricted himself by his plea of guilty. There can be no facts left open for consideration by a jury after such plea, and the sole question for review is the legal one which we have discussed.

The judgment of the Superior Court is set aside, and the case is remanded that judgment may be entered below affirming the sentence of the justice of the peace.

Reversed.

Cited: S. v. Horne, 115 N. C., 741; *S. v. Sherrard,* 117 N. C., 719; *S. v. Moore,* 120 N. C., 568; *S. v. Howie,* 130 N. C., 679.

STATE v. N. W. SPRAY ET AL.

Indictment—Disturbing Public School.

1. Where, in the trial of an indictment under section 2592 of The Code for disturbing or interrupting a public school, it appeared that the defendants, claiming the right to occupy a schoolhouse, refused to surrender it to one who had been elected to teach a public school thereat and thus

prevented a school being held there: *Held*, that defendants were not guilty of interrupting or disturbing a public school.

2. It is not necessary to enter a formal verdict in accordance with the opinion of the court on a special verdict rendered by the jury.

The defendants were tried and convicted before a justice of the peace on a warrant issued for a violation of section 2592 (interrupting and disturbing a public school), and on the trial on appeal, before *Graves, J.*, at Spring Term, 1893, of SWAIN, the jury rendered a special verdict as follows:

"The Big Cove Indian Schoolhouse was built, as to the walls and roof thereof, by the Cherokee Indians, and the building thus made was paid for out of the common school fund, the building was finished and
(687) furnished under the direction of the Society of Friends, and paid for partly out of the church fund and partly out of money furnished by the United States for that purpose. There was in the house a box of books, the property of the defendant Spray. The schoolhouse had been under the supervision of the Society of Friends as a day School, and had been leased, so far as their right extended, to their agent Spray. There had not been any school taught there since May, 1892. The house was after that taken possession of by the committeemen of the common school, and in December, 1892, they employed Lula Hayes to teach the school for Indians in that house, and she went in and began to teach. After she had taught for three or four days the defendant Spray went to the schoolhouse and notified her that she could not occupy the house to teach in until the property rights were adjusted, and for a few days the said Lula Hayes did not teach therein. She began to teach in the same house on 11 December, 1892, and taught three days. On the morning of 12 December, she went to the schoolhouse for the purpose of continuing to teach her school, and found the house occupied by the defendants. She asked to be allowed to occupy the house, and proceed to teach her school, when the defendant Spray forbade her and said she should not. James Blythe, one of the defendants, was in the house. By the conduct of the defendants she was prevented from occupying the said schoolhouse and prevented from teaching therein. There were no pupils present at the time she was so prevented, and none came to the house before she left, but on leaving she met three scholars on their way to school, being about a mile from the schoolhouse."

Upon this special finding of facts his Honor adjudged the defendants not guilty, and the solicitor, for the State, appealed.

No formal verdict of not guilty was entered.

(688) *The Attorney-General for the State.*
No counsel contra.

BURWELL, J. We concur with his Honor in the opinion that the facts found by the special verdict do not constitute a violation of section 2592 of The Code, which makes it a misdemeanor to wilfully interrupt or disturb any public school. The act of the defendant may have prevented the coming together of the school, meaning thereby an assemblage of pupils and teachers, but it cannot be said that it interrupted or disturbed such an assemblage. The statute was contrived to put the schools of the State under the protection awarded by law to religious assemblages, and the principles that govern the prosecution of persons charged with disturbing religious meetings (*S. v. Jacobs,* 103 N. C., 397) must control this. There was no formal verdict of not guilty in accordance with the opinion of the court, as seems to be required by the ruling in *S. v. Moore,* 107 N. C., 770, and *S. v. Monger, ib.,* 771. This is not necessary since the decision in *S. v. Ewing,* 108 N. C., 775, which has established what is the better practice.

No error.

Cited: S. v. Robinson, 116 N. C., 1048.

(689)

STATE v. PETER DEGRAFF.

Indictment—Motion to Quash After Plea—Grand Juror—Petit Juror, Qualification of—Admission by Prisoner—Caution to Prisoner by Committing Magistrate—Expert Witness—Comparison of Handwritings—Newly Discovered Testimony—New Trial.

1. A motion to quash a bill of indictment for the disqualification of a grand juror, if made before plea, will be granted as a matter of right, but if made after plea it may be granted or not, in the sound discretion of the trial judge; and in the latter case, if the motion be declined without the assignment of any reason, it will be assumed that such discretion was exercised, and no appeal will lie.
2. Where a petit juror, upon being challenged and examined, declared that his opinions, adverse to the prisoner, had been founded on rumor only, and that, after hearing the evidence, he could render a fair and impartial verdict, an exception to the finding of the court that he was not impartial cannot be sustained.
3. The fact that an officer pointed his pistol at the accused to effect his arrest, advising him to give up, does not render incompetent the subsequent admissions of the prisoner, especially since no threats or promises were made to induce them, and the conduct of the prisoner showed that he had no actual fear of violence.

4. Where, at the commencement of the examination of a prisoner before the committing magistrate, the former was "duly warned and told that he need not say anything unless he wanted to, and it would not be used against him if he did not testify, and it was dangerous to go on the stand," etc.: *Held*, that the warning so given was a substantial compliance with the requirements of the statute (section 1146 of The Code), which provides that the magistrate shall inform the prisoner that he may refuse to answer any question put to him, and that such refusal shall not be used to his prejudice. It is not necessary, in giving such caution, that the exact language of the statute should be used.

5. Where a witness, offered as an expert, testified that he had been a bookkeeper for many years, was secretary and treasurer of the city, and as such it was his duty to compare handwritings to determine which are genuine and which are not; had been in the business fifteen years, and that his experience had been such that he could compare a paper with one known to be genuine and determine the genuineness of the former: *Held*, that the witness was properly qualified as an expert, and competent as such to compare a signature admitted to be the prisoner's with one attached to a paper found on the person of the deceased.

6. Where a witness testified that he had been, four or five years, register of deeds, had occasion to examine signatures, was frequently called on to prove signatures of deceased persons in the clerk's office, used magnifying glasses to detect erasures, and had such experience that he could compare a writing with one known to be genuine and determine the genuineness of the former: *Held*, that he was properly qualified and competent as an expert to make such comparison.

7. An admittedly genuine signature to an affidavit made by an accused person in the case in which he is being tried is a proper criterion for the comparison of incriminating writings purporting to be signed by him.

8. Testimony evoked on the cross-examination of a witness by a prisoner on trial cannot form the ground of an exception, especially when it is immaterial and in no view prejudicial to the prisoner.

9. The granting of a new trial upon newly discovered testimony is, in the absence of gross abuse, within the discretion of the trial judge, and a refusal to exercise such discretion is not reviewable upon appeal. Such discretion will not be exercised where the new testimony is merely cumulative or only tends to contradict or discredit the opposing witness; hence, where the newly discovered evidence upon which a new trial was asked by the prisoner was that a witness for the State had, before trial, spoken in hostile terms of the prisoner and wished for his conviction, the discretion of the judge was properly exercised by refusing the motion.

10. Where the facts are not found by the trial judge and spread upon the record, affidavits of grounds for a new trial cannot be considered in this Court in reviewing the refusal of the motion.

(690) INDICTMENT for murder, tried before *Winston, J.*, and a jury, at August Term, 1893, of FORSYTH.

The defendant was convicted, and appealed. The exceptions, etc., upon which the appeal was based are stated in the opinion of *Chief Justice Shepherd.*

The Attorney-General for the State.
No counsel contra.

SHEPHERD, C. J. The prisoner was indicted for the murder of one Ellen Smith, and, after his arraignment, moved to quash the indictment, on the ground that one of the grand jurors was a cousin of the deceased and therefore disqualified to participate in the finding of the bill.

In *S. v. Gardner,* 104 N. C., 739, it is held that, if a motion to quash for the disqualification of a grand juror is made before plea, the prisoner has a right to have the motion granted, but if the motion be made after plea, but before the jury is impaneled, it may be granted or not, in the sound discretion of the judge; and in such latter case, if the motion is simply declined without the assignment of any reason, it will be assumed that such discretion was exercised, and no appeal will lie from the ruling. The exception, therefore, to the refusal (691) of the motion is without merit.

Two of the petit jurors were challenged and, after examination, the court found that they were impartial, and they were sworn. It appears that their opinions, adverse to the prisoner, were based upon rumors only, and they both stated that, after hearing the testimony, they could render a fair and impartial verdict. The exceptions to the rulings of the court upon the question of indifference, based upon such examination, cannot be sustained. *S. v. Ellington,* 29 N. C., 61; *S. v. Collins,* 70 N. C., 243; Busbee Crim. Digest, 336 and 337.

In the course of the trial certain confessions were offered by the State, and their admission was excepted to because of alleged threats made by the witness on the occasion of the arrest of the prisoner. The witness, Adams, a policeman, testified as follows: "I went to help arrest the prisoner; the sheriff and two others went along; saw prisoner at the window of Russell's house at about 12 o'clock at night; he pulled the curtain back. I said to the prisoner, 'Peter, you had just as well give up; you may get one of us, but we will get you.' We went in, and I pointed my pistol at the prisoner; prisoner had three heavy pistols and fifty-two rounds of cartridges in a trunk by the bed. After the prisoner put on his clothes he began to make fun of us for coming after him with little popguns (we had Smith & Wesson pistols). He said, 'Let me show you some pistols,' and he showed us these three large pistols. He rode behind me on a horse to Winston; he was not frightened, nor was he tired. No threats were made by him, and no promises, and his state-

ments were voluntary." The witness, at another stage of the trial, was examined again upon this subject, but his testimony was substantially the same. The witness then testified to declarations made by the prisoner concerning his flight to Roanoke and New Mexico, and his subsequent return to this State. It is hardly necessary to cite authority in (692) support of the ruling of the Court. The single circumstance of pointing the pistol at the prisoner, in connection with the language of the witness, indicating that it was done only for the purpose of effecting the arrest, very clearly would not have authorized the exclusion of the declarations subsequently made; and especially is this so in view of the conduct of the prisoner, showing that he had no actual fear of violence, and also because of the entire absence of any circumstances whatever that were likely to produce such an apprehension.

It appears that when the officer was on the porch of the house where the prisoner was staying, the owner inquired who it was. It also appears that the prisoner was in the room and heard the remark. The remark was harmless, but, had it been otherwise, having been made in the presence of the prisoner, it was plainly admissible. *S. v. Ludwick,* 61 N. C., 401. This exception, like several others, is so trivial that, but for the gravity of the charge, it would be overruled without comment.

Neither is there any force in the objection to the admission of the statements of the prisoner before the committing magistrate. The testimony upon this point is that "he was duly warned—told that he need not say anything unless he wanted to, and it would not be used against him if he did not testify, and it was dangerous to go on the stand," etc. It is well settled that, in cautioning the prisoner, under such circumstances it is not necessary that the exact language of the statute (The Code, sec. 1146) should be used. A substantial compliance is sufficient, and such was the case in the present instance. *S. v. Rogers,* 112 N. C., 874.

Equally untenable is the objection to the testimony touching the general character of the witness Davis, and the same is true as to the question asked the said witness, whether the prisoner told him where the deceased was at a certain time. The witness gave a negative answer; and, even if the question were objectionable (and we do not see that (693) it is), the prisoner could not have been prejudiced thereby. The State introduced a letter found in the bosom of the dead woman, and introduced Wilson as an expert to prove that the said letter was in the handwriting of the prisoner. Wilson being examined by the court as to his qualifications as an expert, testified as follows: "Was bookkeeper many years. Am secretary and treasurer of the city. It is my duty as such to compare handwritings to see which are genuine and

which are not; to examine checks and drafts; have been in the business fifteen years; I have had such experience in the business of inspecting handwritings that I can compare a paper with one whose genuineness is known and tell if the former paper is genuine." His Honor held that the witness had been properly qualified as an expert, and the prisoner excepted. The witness was then handed an affidavit made by the prisoner in this case, the signature to which was admitted to be genuine, and the witness was permitted to compare the same with the letter, and to give his opinion as to whether the letter was in the handwriting of the prisoner, and the prisoner excepted.

Another witness, J. P. Stanton, was also examined, and gave similar testimony. He testified in reference to his competency as an expert as follows: "Have been four or five years register of deeds of the county; had occasion to examine signatures; frequently called on to prove signatures in clerk's office of dead men's names; used magnifying glass to detect erasures; have had such experience that I can compare a writing with one admitted to be genuine and tell if the latter is genuine." All of the exceptions addressed to the admission of this testimony are so fully discussed in the elaborate opinion of this Court in *Tunstall v. Cobb,* 109 N. C., 316, that it is only necessary to refer to it as decisive authority as to the qualification of these witnesses as experts, and in support of the ruling under which they were permitted to state their opinions, based upon the comparison of the writings in evidence. See also *Yates v. Yates,* 76 N. C., 142, and *Fuller v. Fox,* 101 (694) N. C., 119.

The testimony as to Ray's leaving after the homicide was evoked by the prisoner upon cross-examination, and cannot form a ground of exception. It seems, however, to have been immaterial, and in no view could it have prejudiced the prisoner.

After the verdict the prisoner moved for a new trial, on the ground of newly discovered evidence, which was to the effect that on Brewer, a witness for the State, had before the trial expressed himself in very bitter terms against the prisoner, stating in effect that he desired his conviction, etc. The affidavit also states that the prisoner did not know of the hostility of said witness until after the counsel had argued the case. It is well settled that the granting of a new trial upon newly discovered evidence is, in the absence of gross abuse, a matter within the discretion of the court, and that its refusal to do so is not reviewable upon appeal. It is also well established that the court will not exercise such a discretion where the new testimony is merely cumulative or, as in this case, only tends to contradict or discredit the opposing witness. Therefore, even if the ruling of his Honor were the subject of review, we would have but little hesitation in sustaining it. *S. v. Starnes,* 97

N. C., 423; *Carson v. Dellinger,* 90 N. C., 226; *Brown v. Mitchell,* 102 N. C., 347. It may be observed in passing from this exception that there was abundant evidence, besides the testimony of Brewer, to support the conviction of the prisoner, and that the hostility of this witness, if known to the jury, would very probably have had no influence upon the verdict.

The remaining question to be considered grows out of the affidavit of one Hudson, to the effect that two of the jurors who tried the case had on several occasions before the trial expressed the opinion that the prisoner was guilty, and that the affiant did not inform either the
(695) prisoner or his counsel of the fact. It is stated in the motion, but not in the affidavit, that these jurors made a contrary statement on the *voire dire.* His Honor overruled the motion, but found no facts, and it is settled by repeated decisions that where the facts are not found the affidavits cannot be considered in this Court. In *S. v. Godwin,* 27 N. C., 401, *Chief Justice Ruffin* discussed the question very elaborately and adopted the above conclusion as "unavoidable." In that case the prisoner was convicted of murder, and moved for a new trial, on affidavits tending to show improper conduct on the part of the jury. The *Chief Justice* said: "It is not in the power of this Court to look into the affidavits, or, at least, to act on them. One would think this must be understood upon a moment's reflection on the nature of the jurisdiction of the Court. In matters of common law it is strictly a Court of errors, and can only review the matters of law. We cannot, therefore, go out of the record, or pay any regard to affidavits, for the evidence forms no part of the record. A record is constituted of the pleadings, the acts of the parties in court and the acts and doings of the jury and court thereon. If advantages is sought by any ejtrinsic matter which occurs at the trial or in the course of proceeding, it must be put in the record *as a fact* or be stated in an exception, and not left to be collected by this Court upon evidence. This evidence is directed exclusively to the judge who tried the cause, and his determination on it is conclusive. He ought not to state, therefore, the evidence submitted to him, but his judgment as to the fact itself, which the evidence was offered to establish. . . . When, therefore, a motion is made to vacate a verdict for certain alleged causes, the first thing is to ascertain whether the alleged causes really exist, for, until the facts be found, no question of law can arise, and, as this Court is confined to the consideration of the matter of law only, we can in such case do nothing, . . . and, therefore,
(696) acting judicially, we must assume that the application was unsupported in point of fact, though we might in our private judgment think there was evidence before the judge on which he might or ought to have found the fact" in favor of the prisoner's contention.

In *Rhinehart v. Potts,* 29 N. C., 403, the motion for a new trial for gross misconduct of the jurors was based upon an uncontradicted affidavit, and *Daniel, J.,* in delivering the opinion of the Court said: "The case sent up here only states (as in the present case) that 'the court refused the motion.' We do not know upon what grounds the judge refused the said motion; it may have been because he did not believe the affidavit of Dowdle. The defendant did not pray the court to give the reason for rejecting the motion, and we cannot see that it was in fact overruled against law. We cannot say there was any error in the judgment of the judge on this part of the case. We have often stated that this Court cannot act upon affidavits offered in the court below."

In *S. v. Smallwood,* 78 N. C., 560, after a conviction for murder, the prisoner made a similar motion, based upon uncontradicted affidavits, and the Court, on the authority of the above decisions, held that it would not look into the affidavits. *Bynum, J.,* in delivering the opinion, said: "They (the Court) only decide upon the record presented to them, and therefore, if such motion is designed to be submitted to their revision, the facts must be ascertained by the court below and spread upon the record. That has not been done in this case." This point was recently before the Court in *S. v. Best,* 111 N. C., 638, in which the authority of the foregoing cases was again recognized and approved, and we think that no rule of practice is better established in this State. The prisoner is required, under this rule, to request a finding of facts, and, if this is refused and there is any phase of the testimony which presents a legal and not merely a discretionary ground for a new trial, it seems that it will be awarded by this Court. While this requirement of the prisoner may be attended, in some instances, with injustice by (697) reason of his neglect, yet it would seem to be no more than the application of the general principle that all motions and exceptions must, even at the peril of life, be taken in apt time. We cannot, however, forbear repeating the earnest injunction of *Chief Justice Ruffin,* that the facts be found in motions of this nature, whether requested by the prisoner or not. In the present case, the judge, in view of all the circumstances, may have acted wisely, supposing he was vested with discretionary power under the ruling in *Spier v. Fulghum,* 67 N. C., 18 (a point which it is unnecessary to decide), or he may have concluded that the affidavit was unworthy of belief, or that no challenge was in fact made to the jurors. *S. v. Perkins,* 66 N. C., 126; *Baxter v. Wilson,* 95 N. C., 137.

However this may be, we are not, under the rule to which we have referred, and which has ever been so rigidly followed, permitted to act upon the affidavit offered by the prisoner. Until the rule is relaxed, the

only remedy to be found in a meritorious case, is in the executive department of the government.

After a patient and careful investigation of the record, we have been unable to discover any error in the rulings of the court, and, in view of the whole testimony, we see no reason for disturbing the verdict.

Affirmed.

Cited: S. v. Fuller, 114 N. C., 894, 905; *Kornegay v. Kornegay,* 117 N. C., 244; *S. v. Noe,* 119 N. C., 851; *S. v. Council,* 129 N. C., 517; *S. v. Maultsby,* 130 N. C., 665; *Ratliff v. Ratliff,* 131 N. C., 431; *Turner v. Davis,* 132 N. C., 190; *S. v. Register,* 133 N. C., 751; *S. v. Exum,* 138 N. C., 607; *S. v. Burnett,* 142 N. C., 579; *S. v. Bohanon, ib.,* 697, 699; *Aden v. Doub,* 146 N. C., 13; *S. v. Banner,* 149 N. C., 522; *Chrisco v. Yow,* 153 N. C., 436; *S. v. King,* 162 N. C., 581; *Johnson v. R. R.,* 163 N. C., 454; *S. v. Trull,* 169 N. C., 370; *S. v. Foster,* 172 N. C., 962; *Alexander v. Cedar Works,* 177 N. C., 537; *S v. Pitts, ib.,* 545; *S. v. Bailey,* 179 N. C., 726.

(698)

STATE v. T. L. MOORE.

Constitutional Law—Taxation—Privilege—License—Uniformity—Police Regulation—Excessive License Fee.

1. Uniformity, in its legal and proper sense, is inseparably incident to the power of taxation, whether applied to taxes on property or to those imposed on trades, professions, etc.; therefore,
2. Acts 1891, ch. 75, defining an "emigrant agent" "to mean any person engaged in hiring laborers in the State to be employed beyond the limits of the same," and providing that emigrant agents shall pay the State Treasurer a license fee of $1,000 before they can hire laborers in certain counties of the State, to be employed beyond the limits of the State, is, if considered as an exercise of the taxing power of the Legislature, in contravention of the Constitution, Art. V, sec. 3, authorizing the Legislature to tax "trades, professions, franchises," etc., and is void for want of uniformity.
3. The occupation of an "emigrant agent," as defined in chapter 75, Acts 1891, does not belong to that class of trades or occupations which are so inherently harmful or dangerous to the public that they may, either directly or indirectly, be restricted or prohibited.
4. Since the act does not prescribe any regulation as to how the business shall be carried on, nor any police supervision, and since it exacts a very large license fee, it is restrictive and prohibitory of the business mentioned therein, and if considered as an exercise of police power, is void for that reason.

5. There being no regulation of such occupation, and therefore no expense in supervising it, or any expense whatever beyond the amount necessary to defray the cost of issuing the license, the act, if considered an exercise of police power, is also void for the unreasonableness of the license fee.

INDICTMENT for violation of the provisions of chapter 75, Laws 1891, tried before *Meares, J.*, at May Term, 1893, of NEW HANOVER Criminal Court.

The State appealed.

The Attorney-General for the State.
Junius Davis for defendant.

SHEPHERD, C. J. This is an indictment for the violation of chapter 75, Laws 1891, and it is found in the special verdict that the defendant, "without having first procured a license therefor from the Treasurer of the State of North Carolina, did hire six laborers in the county of New Hanover, in the State aforesaid, to be employed beyond the limits of the said State, and did solicit other laborers in said county to hire themselves to be so employed; and that the said defendant, on the (699) day aforesaid and in the county aforesaid, was engaged in the business of hiring in the said county laborers to be employed beyond the limits of said State; and that the said county of New Hanover is east of the line as at present established, and as so established on 6 February, 1891, for the receiving of patients by the North Carolina Insane Asylum."

The act referred to excludes, in express terms, from its operation any of the counties in the State which are west of the said line, except a few which are therein specifically named; and thus it appears that the same occupation may be lawfully and freely pursued in many of the counties of North Carolina, while in others a license fee of $1,000 is required to be paid into the State treasury; and its pursuit, without such a license, is denounced as a criminal offense and punishable by a fine of "not less than $500 and not more than $5,000," or by imprisonment in the county jail "not less than four months, or confinement in the State prison at hard labor not exceeding two years, for each and every offense, within the discretion of the court."

It must be manifest from these provisions that the principle of uniformity is entirely disregarded, and that, if the act is to be considered as an exercise of the taxing power of the Legislature, it must, under the repeated decisions of this Court, be declared unconstitutional and void.

The Constitution, Article V, section 3, authorizes the Legislature to tax "trades, professions, franchises," etc., and, although it is not expressly provided that such taxes shall be uniform, "Yet," says *Rodman, J.*,

speaking for the Court in *Gatlin v. Tarboro,* 78 N. C., 119, "a tax not uniform, as properly understood, would be so inconsistent with natural justice and with the intent which is apparent in the section of the Constitution above cited, that it would be restricted as unconstitutional."

In *Worth v. R. R.,* 89 N. C., 291, the principle just stated was
(700) distinctly recognized and declared to be within the spirit and meaning of the fundamental law. *Smith, C. J.,* in delivering the opinion of the Court said: "We should be reluctant to hold, if there were no questions of constitutional right involved, that this method of levying taxes was sanctioned by our Constitution and consistent with the equality and uniformity which it contemplates. The 'uniform rule' to be observed in the exercise of the taxing power seems so far applicable to the taxes imposed on trades, professions, etc., as to require that no discriminating tax be imposed upon persons pursuing the same vocation, while varying amounts may be assessed upon vocations or employments of different kinds." Again in *Puett v. Commissioners,* 94 N. C., 709, it was said: "The principle of uniformity pervades the fundamental law, and, while not in the Constitution applied in express terms to the tax on trades, professions, etc., necessarily underlies the power of imposing such a tax." In this last case the Court adopted the words of *Miller, J.,* in the *Railroad Tax Cases,* 92 U. S., 575: "That, while one tax may be imposed upon innkeepers, another upon ferries, and a still different tax on railroads, the taxation must be the same on each class—that is, the same tax upon all innkeepers, upon all ferries and upon all railroads, in their respective classes as taxable subjects." And again, in *S. v. Powell,* 100 N. C., 525, the same language was accepted as a correct definition of "uniformity," and it was repeated "that uniformity, in its legal and proper sense, is inseparably incident to the power of taxation."

The act under consideration, if intended to impose a tax in the legal significance of the term, very plainly falls within the inhibition of the organic law as interpreted so often by this Court, for it cannot, with the least show of reason, be contended that the principle of uniformity is not violated when the same occupation is heavily taxed in one county, while in an adjoining county it is entirely free and untrammeled.
(701) It is too plain for argument that, if the Legislature had passed an act imposing a tax upon merchants doing business in the counties of New Hanover, Pender and Bladen, while like merchants in the counties of Brunswick, Robeson and Richmond were not required to pay such tax, the act would be void. And yet such a discrimination in taxation would be no greater than that which is attempted to be made under the statute in question.

It is not very unusual in this country for the State, either directly or through its various municipal corporations, to require the payment of a

certain amount for the privilege of prosecuting one's profession or calling, and this is required indiscriminately of all kinds of occupations, whatever be their character, whether harmful or innocent, whether the license is necessary to the protection of the public or not. "While the courts are not uniform in the presentation of the grounds upon which the general requirement of a license for all kinds of employments may be justified, on one ground or another, the right to impose the license has been very generally recognized. Whatever refinements of reasoning may be indulged in, there are but two substantial phases to the imposition of a license tax on professions and occupations. It is either a license, strictly so called, imposed in the exercise of the ordinary police power of the State, or it is a tax laid in the exercise of the power of taxation." Tiedeman Lim. of Po., p. 101; Cooley Taxation, 403. We have seen that under the latter view the law under consideration cannot be sustained for the want of the uniformity required by the Constitution, and this brings us to the other branch of the inquiry, whether it can be upheld as a regulation under the police power of the State.

2. "The police of a State, in a comprehensive sense, embraces its whole system of internal regulation, by which the State seeks not only to preserve the public order and to prevent offenses against the State, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are (702) calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others." Cooley Const. Lim., 704. "The power is very broad and comprehensive, and is exercised to promote the health, comfort, safety and welfare of society. Its exercise in extreme cases is frequently justified by the maxim, *salus populi suprema lex est.* It is used to regulate the use of property by enforcing the maxim, *sic utere tuo ut alienum non lædas,* and under it the conduct of an individual and the use of property may be regulated so as to interfere to some extent with the freedom of the one and the enjoyment of the other." *In re Jacobs,* 98 N. Y., 198; Tiedeman, *supra,* 1. This power, under our Federal system of government, has been left with the States, and "the only limits to its exercise in the enactment of laws by their Legislatures is that they shall not prove repugnant to the fundamental law, the State Constitution and the Federal Constitution, with the laws made under its delegated powers." *S. v. Moore,* 104 N. C., 714; Cooley Const. Lim., 574. In its fair and reasonable exercise the Legislature, by reason of the very nature of the power, is not restricted by constitutional provisions in reference to uniformity as, says *Judge Cooley,* "the circumstances of a particular locality, or the prevailing public sentiment in that section of the State may require or make acceptable different

police regulations from those demanded in another. These discriminations are made constantly, and the fact that the laws are of local or special operation only is not supposed to render them obnoxious in principle." Cooley, *supra,* 480.

This principle has been fully recognized in this State, and is illustrated by many decisions. In *Intendant v. Sorrel,* 46 N. C., 49, an ordinance of the city of Raleigh requiring, under penalty, oats to be weighed by the public weighmaster, before being offered for sale, was
(703) sustained as a valid police regulation. So, an ordinance forbidding the sale of fresh meat in the town of Durham except at the market-house *(S. v. Pendergrass,* 106 N. C., 664), and an act regulating the sale of seed-cotton in certain counties of the State, were held to be a proper exercise of the police power. So, also, it may be stated, as a general principle, that all callings and professions, which, by reason of their peculiar character, may, directly or indirectly, do harm to the public, are subject to police regulations, and a license may be required for their prosecution. On this principle, says Tiedeman, *supra,* 101, "attorneys, physicians, druggists, engineers and other skilled workmen may be required to procure a license, which would certify to their fitness to pursue their respective callings, in which professional skill is most necessary and in which the ignorance of the practitioner is likely to be productive of great harm to the public and to individuals coming into business relations with them. So, also, the licensing of dramshops, green-grocers, hackmen and the like, is justifiable, in order that these callings may be effectually brought within the police supervision, which is necessary to prevent the occupation becoming harmful to the public." It must not be understood, however, that the exercise of the police power is without limit. On the contrary, it is settled, by abundant authority, that, while it is for the Legislature to determine what regulations are needed to protect the public health and secure public comfort and safety, and its measures calculated and intended to accomplish these ends are generally within its discretion, and not the subject of judicial review, it is nevertheless true that this extensive authority must be exercised in subordination to those great principles of fundamental law which are designed for the protection of the liberty and the property of the citizen. "Liberty, in its broad sense, as understood in this country, means the right not only of freedom from actual servitude, imprisonment or restraint,
(704) but the right of one to use his faculties in all lawful ways, to live and to work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or vocation." *In re Jacobs, supra; People v. Gillson,* 109 N. Y., 389.

In *Butcher's Union Co. v. Crescent City Co.,* 111 U. S., 746, *Mr. Justice Field* said: "That among the inalienable rights, as proclaimed

in the Declaration of Independence, is the right of men to pursue any lawful business or vocation in any manner not inconsistent with the equal rights of others. . . . The right to pursue them without let or hindrance, except that which is applied to all persons of the same age, sex and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright." In the same case *Mr. Justice Bradley* said: "I hold that the liberty of pursuit, the right to follow any of the ordinary callings of life, is one of the privileges of a citizen of which he cannot be deprived, without invading his right to liberty within the meaning of the Constitution." In *Berthief v. O'Riley,* 74 N. Y., 509, *Andrew, J.,* remarked, that a man's right to liberty includes "the right to exercise his faculties and to follow a lawful vocation for the support of life." *Judge Cooley* says, "The general rule undoubtedly is, that any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching on the rights of others. It is not competent, therefore, to forbid any person, or class of persons, whether citizens or resident aliens, offering their services in lawful business, or to subject others to penalties for employing them."

These authorities are referred to for the purpose of showing that under the mere guise of a police regulation a person cannot be unduly restricted or substantially prohibited from pursuing a lawful occupation. In order to justify such legislation, the business must itself be of such a nature that its prosecution will do damage to the public, whatever may be the character and qualification of those who engage in it. Mr. Tiedeman, in his very reliable work (*supra,* 290), remarks: "In (705) order to prohibit the prosecution of a trade altogether, the injury to the public, which furnishes the justification for such a law, must proceed from the inherent character of the business. . . . But if the business is not inherently harmful, the prosecution of it cannot rightfully be prohibited to one who will conduct the business in a proper and circumspect manner. Such an one would be 'deprived of his liberty' without due process of law." It is on the ground of their inherently harmful and dangerous character that the keeping of gaming tables, or the selling of intoxicating liquor or other things of a demoralizing nature may be absolutely prohibited. *Mugler v. Kansas,* 123 U. S., 623; *S. v. Joyner,* 81 N. C., 534. This may be and is often directly accomplished by legislation, which, in its terms, is expressly prohibitory, instead of the circuitous method of imposing a burden, in the nature of a license as a police regulation, which is difficult or impossible to be borne, and which, in the end, may make the occupation unprofitable. Cooley Taxation, 404.

It must be apparent, from an examination of the statute in question, that the occupation of an "emigrant agent," as defined therein, does not belong to that class which is so inherently harmful or dangerous to the public that it may, either directly or indirectly, be restricted or prohibited. The statute defines the said occupation "to mean any person engaged in hiring laborers in this State to be employed beyond the limits of the same." It cannot be seriously contended that a laborer, under our system of government, as indicated by the unquestionable authorities to which we have referred, does not possess the right of hiring his services to any one, either within or without the State. And if he may do this, we are unable to see, as we have just remarked, how an agent or other person engaged in hiring him to be employed without the State can be considered as following an occupation which, in itself, is
(706) inherently dangerous or harmful in the sense above mentioned. Indeed, this position is fully conceded by the Attorney-General, and we will now consider whether the license imposed by the act is restrictive or prohibitory in its character.

While the probable harm and inconvenience of immigration to the public may not be averted by such legislation, it is of the greatest importance to all of the citizens of the State that the inexperienced and artless laborer may not be imposed upon by the false representations and other fraudulent practices of an emigrant agent, and it is one of the highest duties imposed upon the lawmakers to prevent such abuses by prescribing rigid and appropriate regulations under which the said occupation can alone be followed. Regulations of this nature may be made in a variety of ways, but that which is most commonly adopted is the requirement of a license fee which is exacted for the purpose of defraying the probable expenses of ascertaining the moral and other qualifications of the proposed licensee, and the proper inspection or other necessary police supervision under which the particular business is to be conducted. While the means adopted must have a relation to the accomplishment of these ends, it is not absolutely necessary in all cases that the law or ordinance imposing the license should prescribe any specific regulation, and it is sufficient if the court can see that the fee exacted is a reasonable proportion of the necessary expenses incident to the general police supervision. The entire absence, however, of any regulation, or of any police supervision whatever, is a powerful aid (and especially where the amount exacted is very large) in determining whether the license is not really a disguised species of taxation or an indirect method of unduly restricting or prohibiting the business altogether. In this case, however, we have no hesitation in reaching the conclusion that the act in question is not and was not intended as a mere regulation, but its object was either to tax or to restrict or prohibit the

particular occupation mentioned therein. This is evident from (707) the fact that it does not contain any of the features of a police regulation, nor is it connected in any way with any police supervision, No provision whatever is made for the ascertainment of the moral character or other qualities of the applicant. The statute provides that "any person shall be entitled to a license" upon the payment of the prescribed fee, and therefore the vilest imposter may demand a license and the State Treasurer has no discretion to withhold it. Neither are there any regulations as to the manner in which the business is to be carried on, and the licensee is left entirely unrestrained, except so far as he may be amenable to the general law. Even if there were such regulations, there is an utter absence of any provision for an inspector or other officer whose duty it is to enforce them. The general scope and tendency of the act, in connection with the exaction of the very large license fee, induce us to believe that, viewed as a police regulation, it is so far restrictive and prohibitory as to contravene those fundamental principles we have enunciated, and which are intended to protect the citizen in the pursuit of an occupation not inherently dangerous or harmful to the public. It may be regulated, but it cannot be indirectly prohibited by an exercise of the police power. Whatever doubt, however, that may possibly remain as to the validity of the act as a police regulation may be dissipated when we consider the reasonableness of the amount required for the license. We have already adverted to this principle and will refer to some of the many authorities upon the subject. In Cooley Taxation, 408, it is said: "Where the grant is not made for revenue, but for regulation, a much narrower construction is to be applied. A fee for the license may be exacted, but it must be such a fee only as will legitimately assist in the regulation, and it should not exceed the necessary or probable expense of issuing the license and of inspecting and regulating the business which it covers." (708)

In Tiedeman (*supra*, 274) it is said that, "In the regulation of occupations it is constitutional to require those who apply for a license to pay a reasonable sum to defray the expenses of issuing the license and maintaining the police supervision." The principle has been emphatically recognized by this Court in *S. v. Bean*, 91 N. C., 554. In that case it appeared that the town of Salisbury had, under its charter, the authority to regulate the manner in which provisions might be sold in its "streets and markets," and to enforce such regulations by appropriate penalties, etc. The ordinance provided that "No butcher or other person shall cut up and expose to sale any fresh meats within the limits of Salisbury without first obtaining a license from the commissioners of the town, which license shall authorize the person or persons to sell meat at a certain stand, shop or stall specified in said license, to

be used as a market, and for which license said person shall pay the sum of $3 per month, payable in advance." The Court held that, as the subjects of taxation were enumerated in the charter, and as the occupation of selling meat by butchers was not included therein, the town had no right to impose a tax upon that particular occupation; and when it was urged that the license fee could be sustained as a regulation under the police power, it was held that it was not a police regulation, but a tax. The opinion was based upon the unreasonableness of the amount required for the license. The Court (*Ashe, J.*) said: "There are authorities to be found to the effect that, under the police power, license may be granted for the exercise of particular avocations and employments, but in all such cases it is held that the fee or price exacted for the privilege must not be with a view to revenue; and in such cases it is competent and proper for the courts, where the effect and purpose of an ordinance are brought to be reviewed by them,

(709) to see that the fee or price paid for the privilege of exercising the franchise is reasonable and not for the purpose of raising revenue. Desty on Taxation, 306, and to the like effect is *S. v. Mayor, etc.*, 23 N. J., 280." The Court then proceeded to quote Dillon on Municipal Corporations, 357, to the effect that, in the case of a license under the police power, only "a reasonable fee for the license and the labor attending its issue may be charged." Several cases were cited to show that, because of the unreasonable amount exacted for a license, its imposition was considered as an exercise of the taxing and not of the police power. The authorities are abundant in support of the proposition, but its correctness is so fully established that it is hardly necessary to reproduce them in this opinion. We will refer, however, by way of further illustration, to the instructive case of *St. Paul v. Trager*, 25 Minn., 248. The city of St. Paul had, by ordinance, required a license fee of $25 for every huckster of vegetables who plied his trade in the streets of the city. In determining whether this was a license or a tax, the Court, in the course of the discussion, said: "It cannot be claimed that it was enacted in the exercise of any police power for sanitary purposes, or for the preservation of good order, peace or quiet of the city, because, neither upon its face nor upon any evidence before us, does it appear that any provision is made for inspection, etc. . . . The annual sum exacted for the license is manifestly much in excess of what is necessary or reasonable to cover expenses incident to its issue. . . . No regulations being prescribed in reference to its prosecution under the license, there could be little, if any, occasion for the exercise of any police authority in supervising the business or enforcing the ordinance, and no cause for any considerable expense on that account." The Court held that the ordinance was not a

police regulation. Inasmuch as a license fee must be prescribed in advance, and in many instances it cannot be determined with accuracy what the expenses incident to the regulation may be, the courts are not inclined to be too exact in placing an estimate upon them so long as the sum demanded is not altogether unreasonable. But we (710) have no difficulty in holding in the present case that the amount of $1,000, to be paid in each county in which the occupation is pursued, is enormously in excess of the probable expenses incident to the regulation. We have seen that, in fact, there is no regulation at all, and, therefore, no expense, except the insignificant amount necessary to defray the cost of simply issuing a license. If a license fee of three dollars per month was held excessive in *S. v. Bean, supra,* where very many of the elements of a police regulation were present, what shall we say of the license fee of $1,000 in this case, in which there is virtually no expense, and where there is not a single feature which indicates any police regulation whatever.

As the questions discussed are of much importance, and especially, because they involve the constitutionality of an act of the Legislature, we have been somewhat elaborate in the expression of our views. Entirely mindful of that most salutary principle, that no court should declare an act of the Legislature unconstitutional, unless it is plainly so, and deeply conscious as we are of the profound responsibility imposed upon those whose province it is to exercise so delicate a duty, we cannot hesitate in deciding that the act under examination is incapable of being sustained in any point of view.

Considered as a tax (and this we think is its true character), it is void for want of uniformity; and considered as an exercise of the police power, it is likewise void, because of its restrictive or prohibitory character, as well as the unreasonable amount exacted as a license fee.

Affirmed.

Cited: Crinkley v. Egerton, ante, 449; *S. v. Warren, ante,* 685; *S. v. Carter,* 129 N. C., 561; *S. v. Hunt, ib.,* 689, 690, 691; *Brooks v. Tripp,* 135 N. C., 160; *Carr v. Comrs.,* 136 N. C., 126; *S. v. Roberson, ib.,* 589; *Lane v. Comrs.,* 139 N. C., 445; *S. v. Williams,* 146 N. C., 628; *St. George v. Hardie,* 147 N. C., 97; *Dalton v. Brown,* 159 N. C., 182; *S. v. Snipes,* 161 N. C., 245; *S. v. Darnell,* 166 N. C., 304.

(711)

STATE v. CHARLES BARBER ET AL.

Jurors, when Excused—Discretion of Judge—Challenge for Cause—Indictment Containing Several Counts—Election—Judge's Charge.

1. The trial judge has authority, in the exercise of a sound discretion, to excuse a juror at his own request, as a favor to him, and before he has been accepted as one of the panel.
2. It was not error to sustain a challenge to the favor when it appeared that a juror was attending the court, whether under subpœna or not, in the expectation of being called upon as a witness for the opposite party, the danger of bias not being removed by showing that he had no knowledge of the material facts of the case, but expected to testify only as to the character of a defendant charged with a felony.
3. The unsupported testimony of an accomplice, if it produces entire belief of the prisoner's guilt, is sufficient to warrant a conviction, and the usual direction to a jury not to convict upon it unless supported by other testimony, is only a precautionary measure to prevent improper confidence being reposed in it, and the propriety of giving this caution must be left to the discretion of the trial judge.
4. Where, in the trial of an indictment containing two counts, one for larceny and the other for receiving, etc., the testimony tending to show that some of the defendants (who were convicted under the count for larceny) had been stealing tobacco from the same owner at various times, and had been disposing of it at a price much below its market value to B., who knew it to have been stolen, it was within the discretion of the trial judge to determine whether he would compel the State to elect on which count it should proceed against B.
5. Where a jury find a defendant guilty of larceny in a particular case, the law construes the verdict as if the words, "in manner and form as charged in the bill of indictment," were added to it, and the same is true as to the finding of another defendant guilty of receiving; therefore,
6. When, in the trial of an indictment against several defendants containing two counts (for larceny and receiving), the jury rendered a verdict that certain of the defendants "are guilty of larceny, and that the defendant B. is guilty of receiving, knowing the tobacco to have been stolen": *Held*, that the verdict as to the defendant B., taken in connection with the indictment, is sufficiently clear and intelligible to show that it is a conviction upon the second count, it not being essential to mention the property received or to specify it directly instead of by implication, as the verdict did.

(712) CRIMINAL ACTION, tried at May Term, 1893, of ROWAN, before *Winston, J.*

The defendants were indicted for larceny and receiving stolen goods, knowing them to have been stolen. The jury found the defendant Barber guilty upon the second count (receiving, etc.), and he alone appealed from the judgment pronounced.

When the case was called in the Supreme Court, counsel for defendant submitted a motion in arrest of judgment, upon the ground that the verdict was insufficient, being in these words: "Guilty of receiving, knowing the tobacco to have been stolen," and cited and relied upon the case of *S. v. Whitaker,* 89 N. C., 472.

The Attorney-General for the State.
C. M. Busbee and S. F. Mordecai for defendant.

AVERY, J. A talesman was called, who, upon being challenged for cause by the solicitor, stated that one of the defendants had spoken to him about the case and had requested him to attend as a witness to prove the character of that defendant, who had stated nothing but the fact that he was indicted; that he had agreed to become witness for the defendant and was attending the court without having been summoned to appear. Two jurors had already been challenged peremptorily for the State, but the defendants had twenty-eight peremptory challenges which were not exhausted by them. The prosecuting officer asked the court, in the exercise of its discretion, to excuse the juror, and he was so excused. The authority of the court, in the exercise of a sound discretion, to excuse a juror, at his own request, as a favor (713) to him, and before he is accepted as one of the panel, it seems to us, cannot be seriously questioned. If, however, taking the whole statement together, it is susceptible of the construction that the judge meant to excuse the juror because he was voluntarily attending for the purpose of being examined to prove the good character of one of the defendants, we think it equally clear that it was not error to sustain a challenge to the favor by either of the parties to an action upon the ground that the juror was attending the court, whether under subpœna or not, in the expectation of being called upon as a witness for the opposite party. The danger of bias is not removed by showing that the witness has no knowledge of the more material facts bearing upon the issue, and expects to testify only as to the character of a defendant charged with a felony. I Bish. C. P., secs. 767, 768.

The jury could not have been misled as to the weight to be given to the testimony of an accomplice. The defendant had no just ground to complain of the instruction "that they (the jury) might convict on the unsupported testimony of an accomplice, but that it was dangerous and unsafe to do so; but, if the story of the accomplice, taken with the other facts and circumstances in the case, carry conviction to the minds of the jury, then it is their duty to convict. The jury must be satisfied beyond a reasonable doubt of the guilt of the defendant before they can convict." *S. v. Mitchener,* 98 N. C., 689; *S. v. Miller,* 97 N. C., 484; *S.*

v. Stroud, 95 N. C., 626. "The unsupported testimony of an accomplice, if it produces entire belief of the prisoner's guilt, is sufficient to warrant a conviction, and the usual direction to the jury not to convict upon it unless supported by other testimony is only a precautionary measure to prevent improper confidence being reposed in it, and the propriety of giving this caution must be left to the discretion of the judge who tries the cause." *S. v. Holland,* 83 N. C., 625; *S. v. Haney,* 2 Dev. (714) & Bat., 390.

In *S. v. Morrison,* 85 N. C., 561, *Justice Ruffin,* delivering the opinion of the Court, says: "The common-law rule is that if an indictment contains charges distinct in themselves and growing out of separate transactions, the prosecutor may be made to elect, or the court may quash. But when it appears that the several counts relate to one transaction, varied simply to meet the probable proof, the court will neither quash nor force an election." "The same rule applies when there is but one count and testimony as to several transactions, either of which will be relied on to make a case under that count, and when there are several counts containing distinct charges and growing out of separate transactions, all punishable in the same way." *S. v. Parrish,* 104 N. C., 679.

In this case the testimony tended to show that several other defendants, who were convicted of larceny on the first count, had been stealing tobacco from the same owner at various times, and had been disposing of it to the defendant, who knew it had been stolen, at a price much below its market value. The defendant Barber, who alone appeals, was convicted on the second count of receiving. It was within the discretion of the trial judge to determine whether he would compel an election, and his ruling is not reviewable in this Court. *S. v. Harris,* 106 N. C., 682; *S. v. Allen,* 107 N. C., 805. The appellant certainly has no ground for complaint, since the jury were told that all of the defendants must be convicted, if at all, upon the evidence relating to a single transaction, and that so many of the defendants as did not participate in the particular transaction upon which the verdict should be founded must be acquitted. Bishop, *supra,* sec. 210. Where the jury find a defendant guilty of larceny in a particular case, the law construes the verdict as if the words, "in manner and form as charged in the indictment," were added to it, and where the finding as to another defendant is, "guilty of receiving, knowing the tobacco to have been stolen," it must (715) be interpreted in the same way. The verdict, as to the defendant Barber, taken in connection with the indictment, is sufficiently clear and intelligible to show that it is a conviction upon the second count. It was not essential that the jury should mention the property received, or certainly, that they specify it directly, instead of by implication arising out of the words, "knowing the said tobacco to

have been stolen," when read in connection with the charge contained in the second count. *S. v. Horan,* 61 N. C., 571, 576.

Upon an inspection of the whole record we find no sufficient ground for arresting the judgment. It is not clear that the judge who tried the case below intended to waive the objection that the prayer for instructions was offered too late. It does not follow from the fact that he gave a part of the instruction asked and refused other portions of it that he intended to make such a concession.

But we have considered the principal objections to the charge given and to the refusal to give instructions prayed for as if the exception had been well taken. There is

No error.

Cited: S. v. Black, 121 N. C., 579; *S. v. Perry,* 122 N. C., 1022; *Perry v. R. R.,* 129 N. C., 334; *S. v. Howard, ib.,* 656; *S. v. Burnett,* 142 N. C., 580; *S v. Peterson,* 149 N. C., 534; *S. v. Boynton,* 155 N. C., 465; *S. v. Little,* 174 N. C., 802; *S. v. Jones,* 176 N. C., 703; *S. v. O'Higgins,* 178 N. C., 710.

(716)

STATE v. GEORGE WHITT.

Murder—Challenge to Array—Amendment of Sheriff's Return on Writ and List of Special Venire—Accessory—Principal—Evidence—Res Gestæ—Dying Declarations—Natural Evidence.

1. The integrity and fairness of the entire panel of jurors summoned in obedience to a writ of *special venire* are not affected by the fact that one man named in the writ had removed from the county, and that another named therein was dead when the jury list was revised by the county commissioners; nor by the fact that one of those named on the venire was not summoned, nor by the fact that the sheriff, in copying the list of the venire furnished him, omitted by mistake the name of one, who in consequence was not summoned.
2. Where a sheriff, in making his return on a writ and list of special venire, indorsed thereon, "Received 25 October, 1893; executed 30 October, 1893, by summoning one hundred and fifty men," it was within the discretion of the court, at the term to which the writ was returnable, to permit an amendment of the return so as to show those of the list furnished him by the clerk who were actually summoned, and those not summoned, with the reasons why they were not.
3. A principal in the second degree is not an "accessory," but a "coprincipal."
4. On the trial of a prisoner charged with murder, not as an accessory before or after the fact, but as a coprincipal, it was not error in the court to

charge the jury that in determining the fact whether the prisoner was an aider and abettor in the murder, and therefore guilty in the second degree, they should not be influenced by the fact that another, charged with the murder, had been previously acquitted.

5. Although a conversation, which took place between a witness and deceased immediately after the latter was fatally wounded, in which he described the number and location of his wounds and the character of his sufferings, and stated his belief that he was killed (it being in evidence that deceased died within forty-eight hours after the wounds were inflicted), was not a part of the *res gestæ*, yet it, as well as the statement of what the deceased said about the transaction, would have been competent as dying declarations.

6. In such case, testimony as to the statement of the deceased concerning his wounds and suffering (the character of the former being proved otherwise, and it not being seriously controverted that they caused the death) could not prejudice a prisoner on trial for the killing. Besides, such statements not containing any reference to the transaction in which the wounds were received, were competent as natural evidence.

SHEPHERD, C. J., not being present, did not participate in the decision of this case.

INDICTMENT for murder, tried in BUNCOMBE Criminal Court, before *Jones, J.* The facts appear in the opinion. The prisoner appealed from the judgment pronounced.

The Attorney-General for the State.
Chas. A. Webb for the prisoner.

CLARK, J. The prisoner was indicted for murder and was convicted of murder in the second degree. There was a special venire of one hundred and fifty men ordered and drawn from the box by the court. The Code, sec. 1739; *S. v. Brogden,* 111 N. C., 656. The prisoner challenged the array—

1. Because one of the men named on the special venire had removed from the county, and another was dead at the time the jury list had been revised by the county commissioners.

2. Because the sheriff had indorsed on the writ and list of special venire: "Received 25 October, 1893; executed 30 October, 1893, by summoning a jury of one hundred and fifty men." The solicitor moved that the sheriff be allowed to amend his return, so as to show those of the list furnished him by the clerk who were actually summoned, and those of said list not summoned, with the reasons why they were not. The sheriff was permitted to amend his return, as moved, and the prisoner again excepted.

3. Because one of those named on the venire was not sum-
(718) moned.

4. Because the sheriff in copying the list of the venire by mistake failed to copy the name of one man, who, in consequence, was not summoned. The jury was selected before the prisoner had exhausted his peremptory challenges.

The first ground of exception was expressly held adversely to the prisoner in *S. v. Hensley,* 94 N. C., 1021. The amendment of sheriff's return was in the discretion of the court at this term, and removed the second ground of objection, if it had any merit. The other two grounds assigned likewise did not "affect the integrity and fairness of the entire panel," and were properly disallowed. *S. v. Hensley, supra.*

The prisoner excepted because the court refused to charge the jury that there was not sufficient evidence to go to them to show a conspiracy btween the prisoner and John Llewellen to murder the deceased. A consideration of the evidence sent up justifies such refusal.

The prisoner also excepted to the charge of the court:

1. In that the court charged, "if the jury should find from the evidence that there was no conspiracy between the prisoner and John Llewellen, it would then be their duty to consider whether he was an aider and abettor in the killing of Charles Brockers, that it, as principal in the second degree, and in determining that fact they should not be influenced by the fact that John Llewellen had been acquitted of the murder of Brockers, that the acquittal of John Llewellen should have nothing to do with their verdict in this case." Brockers was a deputy marshal, who had arrested John Llewellen on a warrant, and had been killed in attempting to carry him to jail. John Llewellen and his father had been tried and acquitted. The prisoner was charged, not as an accessory before or after the fact, but as a coprincipal. What another jury had done as to Llewellen was inadmissible for or against one charged as a principal. The case of *S. v. Jones,* 101 N. C., 719, therefore, has no application. A principal in the second degree is not an (719) accessory, but a coprincipal. 1 Bishop Cr. Law, sec. 604 (4). Even if the prisoner had been charged as principal in the second degree, he could have been convicted when the principal in the first degree had been acquitted. 1 Wharton Cr. Law, sec. 222, note 2, and numerous cases there cited; 9 A. & E., 574, note 2.

2. The prisoner further excepted because the court charged the jury "that, in order to find the prisoner guilty as a principal in the second degree, the jury must be satisfied from the evidence, beyond a reasonable doubt, that he actually aided and abetted John Llewellen in the killing of Brockers, that if they were satisfied beyond a reasonable doubt from all the evidence that the deceased was murdered by John Llewellen, and that just before the fight began, the prisoner stood at the northeast corner of the house with a pistol in his hand, and that John Llewellen came to

the door with a pistol in his hand, and the prisoner then said to him, 'You can go to Marshall, if you want to go, and if you don't you need not; by G—d, I am here,' and that this was said for the purpose of encouraging John Llewellen to resist a lawful arrest by the deceased, and that during the fight that ensued the prisoner had a pistol in his hand prepared and ready to assist John Llewellen if it should become necessary, and that he stood near the witness Samuel Cox, cocking his pistol backwards and forwards twice, either for the purpose of preventing the said Cox from assisting Brockers in the arrest, or for the purpose of showing John Llewellen that he was prepared to assist him, or encouraging him in resisting arrest, and that by reason of such action and words and behavior the said John Llewellen was encouraged and assured by the prisoner, that then, this would be an aiding and abetting by the prisoner, and he would be guilty, as a principal, in the second degree, whether he fired the fatal shot or not, and could be
(720) convicted of murder in the second degree." *Wallis's case,* 1 Salk., 334, is an authority exactly in point. He was tried at Old Bailey in 1703. The indictment was against A for murder, and against Wallis and others as persons present, aiding and abetting A therein. A was first tried and acquitted. When Wallis was afterwards put on trial and convicted, *Holt, C. J.,* determined that, though the indictment be against the prisoner for aiding and assisting and abetting A, who was acquitted, yet the indictment and trial of that prisoner (Wallis) was well enough, for all are principals, and it is not material who actually did the murder." *Brown v. State,* 28 Ga., 199; 9 A. & E., 570. Indeed, as is said by Dr. Wharton, 1 Criminal Law, 9 Ed., 221, "the distinction between principals in the first and second degrees, is a distinction without a difference." To same effect is 1 Bishop Criminal Law, 8 Ed., sec. 604, and other authorities.

The solicitor asked the witness Cox, "What did Brockers say to you immediately after the fight about his having a wound?" The prisoner objected on the ground that, not being a part of the *res gestæ* and not having been made in the presence of the prisoner, it was incompetent. The court ruled, after preliminary inquiry, that what Brockers then said to the witness about his feelings or the nature of the wound he had received, was competent, but anything that he said about the fight was incompetent. The witness then testified, that "not over ten minutes after the fight, and about one hundred or one hundred and fifty yards from the place of the fight, as soon as he and Brockers had gotten on their horses Brockers asked him if he was not shot. Witness told him No, and asked Brockers if he was. He said Yes, he thought he was killed. Witness then asked him where he was shot, and he said through the leg, the arm and the thigh and the body, and that he believed he could feel

the blood running inside of him." The prisoner excepted. It was also in evidence that Brockers died within forty-eight hours from the wounds received on that occasion.

The court correctly held that the conversation was not a part (721) of the *res gestæ*. *Cockburn, C. J.*, in *Rex v. Beddingfield,* 14 C. C., 341; Roscoe's Cr. Ev., 26, 29, and cases there cited; *S. v. Frazer,* 1 Hous., 176; *James v. State,* 71 Ind., 66. Upon the evidence it would seem that the court might well have held these dying declarations and have admitted what it excluded, to wit, Brocker's statement of the transaction. *S. v. Mills,* 91 N. C., 581, on p. 594. The declarations of the deceased were only admitted by the court as statements of his condition, that he thought he was killed and believed he could feel the blood running inside, and locating the wounds he had received. The latter was sufficiently proved by uncontradicted evidence, and as it is not seriously controverted they caused the death, we do not see how the recital of them by the deceased, nor his statement of the intensity of his suffering therefrom, as that he though he was killed, and could feel the blood running inside, could have possibly prejudiced the prisoner Besides, such statements not containing any reference to the transaction in which the wounds were received, are competent as natural evidence. 21 A. & E., 103; *Insurance Co. v. Moseley,* 8 Wall., 397; 1 Greenleaf Ev., sec. 102.

No error.

Cited: S. v. Stanton, 118 N. C., 1183; *S. v. Bishop,* 131 N. C., 760; *S. v. Jarrell,* 141 N. C., 724; *S. v. Worley, ib.,* 768; *S. v. Quick,* 150 N. C., 822; *S. v. Lumber Co.,* 153 N. C., 613; *S. v. Lewis,* 177 N. C., 558; *S. v. Alexander,* 179 N. C., 764.

(722)

STATE v. W. W. ROLLINS.

Murder—Evidence—Res Gestæ—Impeachment of Witness—Character of Deceased—Excessive Force—Instructions to Jury.

1. A witness, on a trial for murder, testified that on the night of the homicide, and near her house, she heard men cursing and quarreling, one saying, "I will cut his throat." In answer to her cries of "Murder," two or three men came to her door. The defendant proposed to ask her what she said to the men who came to her door, the purpose being to show that she told them that the men who were quarreling were cutting a man's throat, and to thus corroborate her statements on the trial: *Held,* that the question was properly excluded as irrelevant and immaterial, since what she said

to the men would not have served to corroborate her as to what she *saw*, but only to show her belief or surmise, at the time, of the nature of the occurrence.

2. What a defendant charged with murder said to a witness who, hearing pistol shots, ran to the scene of the homicide, arriving there between the third and fourth shots, and while several men present were struggling with each other, was competent as a part of the *res gestæ*, and also as corroborative of his testimony of the transaction as given on the trial.

3. While error in excluding competent testimony is cured by afterwards admitting it from the same witness, it is not cured by admitting another to testify to the same purport.

4. Where a witness for the State, in a trial for murder, testified as an eye-witness to the homicide, and on cross-examination stated that he was not drunk, it was error to exclude proof offered to show that he was "very drunk on that occasion," such proof not being intended to impeach his character (in which case his answer on cross-examination as to his condition would have been conclusive), but serving to contradict and impair his evidence, and to show his incapacity to know and remember with accuracy what took place.

5. Where, in a trial for murder, though the plea of self-defense was set up, it did not appear that defendant knew the character of the deceased for violence, evidence as to such violent character was properly excluded.

6. Where a person is lawfully under arrest and another attempts to rescue him, the officer in resisting such rescue is justified in using such force as would ordinarily be considered excessive, provided he acts in good faith and without malice.

7. But where an officer, having lawfully arrested a person and in resisting an attempted rescue uses such signal force that death is caused thereby, there is no presumption of law that he acted without malice and in good faith, i.e., without excess of force, being for the jury to judge of the reasonableness of the force used, and for the defendant to show matter of excuse or mitigation.

8. Good faith and want of malice apply as to extent of force used by an officer in resisting a rescue of a prisoner, when the arrest is legal, but do not validate an illegal arrest; hence, when a person submits to arrest and a rescue is attempted, the officer may not resist such rescue or use such force as is necessary to prevent the rescue if the original arrest was unlawful.

9. When a person is lawfully in the custody of an officer and a rescue is attempted, the officer may arrest the person attempting the rescue and may use such force as is necessary.

10. The use of a deadly weapon is proof of malice, for which one charged with murder must show excuse or mitigation; hence, where the killing of a person was admitted or conclusively shown to have been done by the prisoner, a prayer for an instruction to the jury that if the facts of the homicide are in doubt, "and the jury are unable to say how the deceased came to his death and under what circumstances, the jury will render a verdict of 'not guilty,'" was properly refused as inapplicable to the facts.

11. While, if the fact of killing by one on trial for murder is in doubt, it would be proper to instruct the jury that "if there is a reasonable hypothesis, supported by the evidence, which is consistent with the prisoner's innocence, then it is the duty of the jury to acquit," yet, where the killing by the prisoner is admitted or conclusively proven, such an instruction is not permissible as to matters of excuse or mitigation, the burden of proving which is upon the prisoner.

12. While the court may not single out a witness or witnesses and charge the jury that they must find in a designated way, if they believe such witnesses, yet if the opposite state of facts and the law applicable thereto have been called to the attention of the jury, it may properly tell the jury that if they believe a certain state of facts as deposed to by certain witnesses, then the law applicable is so and so, for thus the attention of the jury is directed not to the credibility of the witnesses, but to a certain state of facts or hypothesis.

13. On the trial of a policeman for murder, the court charged that an officer may arrest without warrant for a breach of the peace committed in his presence, but that he must, unless a known officer, notify the person that he is an officer, and if he fail to do so, especially on demand, the arrest is illegal and may be lawfully resisted by the person arrested, and if the person making the arrest kill any one of those resisting it, he would be guilty of murder, unless excessive force was used by those resisting it, in which latter case he would be guilty of manslaughter: *Held*, that the instruction was proper, and not objectionable as expressing an opinion that defendant was or was not a known officer.

14. On the trial of a policeman for murder of a person attempting a rescue of another under arrest, the court charged the jury that "where the arrest is made legally, by a lawful officer, he may use the amount of force necessary to prevent an escape or rescue, and no more, and if he use excessive force and death results, he is guilty of manslaughter; but if excessive force is used and he intentionally slays the person resisting arrest or attempting the rescue, he is guilty of murder": *Held*, that while it would have been proper for the judge to add that what would be excessive force in an individual in an ordinary encounter might not be so in an officer resisting the escape or rescue of a prisoner, yet the omission to so charge when not asked to do so was not error. An officer is not clothed with authority to judge arbitrarily of the necessity for killing, but that is a matter which the jury must judge in each instance.

INDICTMENT for murder, tried before *Bryan, J.*, and a jury, at March Term, 1893, of DURHAM.

There was a verdict of "not guilty of the felony and murder as charged in the bill of indictment, but guilty of the felonious slaying." From the judgment thereon the defendant appealed.

Defendant was a policeman of the town of Durham, assigned to special duty in a locality called "Smoky Hollow," just beyond the corporate limits of the town, the locality being inhabited, for the most part, by lewd women. On the evening of the homicide he was drunk and called, in company with Dick Happer, at a house of ill fame kept

by Nan White. While in Nan White's room, deceased and his brothers, John and Charles, stopped at the house. As to the circumstances connected with and leading up to the homicide, John Jones testified for the State, that he went upon the porch and knocked at the door, and
(725) was told by the woman that he could not come in. He knocked again, and defendant came up the steps and took him by the arm, advising him that he was under arrest. Witness asked him to show his authority, and defendant did not do so. Happer took witness by one arm, and defendant took him by the other, and deceased came up and told them to turn witness loose, saying that he would take charge of him. This defendant refused to do, and on being asked by witness to show his authority, pulled out his pistol and shot deceased. Before defendant shot, deceased took witness by his left arm and tried to get him out of defendant's hands. Witness and deceased then ran off in different directions, and deceased died an hour later. Dr. A. Cheatham was called, and testified that defendant died from a pistol wound in the stomach. After introducing witnesses to testify to the good character of John Jones the State rested.

Dick Happer testified in behalf of the defendant that on the night of the homicide he and defendant visited Nan White's house. Defendant went into her room, and witness into another room. Witness heard some one kicking at the door about fifteen minutes after. Witness heard a voice say: "It takes a damn good man to carry me up town." Then he heard defendant say: "Well, you will have to go." Witness went out and found deceased and his two brothers and defendant on the porch. One of them asked defendant to show his authority, and defendant said, "Here is my authority," and showed his badge. At defendant's request witness took John Jones's hand, and they started up town, deceased and Charles Jones followed them. Witness heard some one running up behind them, and looking back saw deceased and Charles right behind them. Deceased grabbed defendant on the shoulder and said, "You damn son of a bitch, you sha'n't carry my brother off!" Charles also seized defendant, and a struggle ensued. One of them said, "Cut his damn throat." Defendant fell, and deceased struck him, witness at the same time having his arms around deceased's waist.
(726) Charles had defendant by the throat and said, "Cut the damn son of a bitch's throat." Then a pistol was fired twice, and deceased said, "The damn son of a bitch has shot me twice." Defendant called out "Help," or "I'll give up," and witness ran for a policeman, and told him that defendant had tried to arrest some men in Smoky Hollow; that they had jumped on him, and the policeman had better go there quick. Mrs. Brandon's house was the closest house to the shooting.

Nan White testified that while Rollins was in her room some men came on her front porch and kicked the bottom of her door. She stepped into the hall and told them that she was sick, and that there was no one to see them, and asked them to go away. The kicking continued and she requested defendant to go out and take them away. The kicking at the bottom of the door was so severe that one of the panels was broken loose.

Mrs. Mary Brandon testified in substance: "I live on East Main street, near where Reams avenue runs into it. I live on left-hand side of street. No fence around my house; none in front; a wire fence at the side. The night of the homicide I was at my house, and heard some men coming from towards the railroad. They were coming towards town. There was cursing going on among them. Just as they got to the fence at my house the cursing was loudest. I heard a man say, 'I'll cut his throat.' Then a pistol fired, and then, right straight, another. Some one said, 'I will cut his G—d d—n throat. I'll cut his head off.' I opened front door, and shut it. Went to back door and hollered 'Murder' four or five times. Two or three came to my back door. Jasper Phipps was the only one I knew." Defendant asked witness, "What did you say to those that came to your door?" The State objected, and the answer was ruled out. The defendant excepted. (This was the *first* exception.) Defendant stated the purpose of the question to be to show that she said to those that came up that they were killing (727) a man at her door; that they were cutting a man's throat at her door, and insisted that it was competent as a part of the *res gestæ*, and that it tended to corroborate witness in what she now says. Witness had not been attacked.

Jim Potts, a witness for defendant, testified as follows: "I was in Smoky Hollow the night of the homicide, at Lilly Bennett's about three hundred and fifty yards from Mrs. Brandon's—back of Nan White's. Heard two pistol shots. Sounded as if shot in a box or house. Heard some one, in a woman's voice, holler 'Murder.' I saw Mrs. Brandon in her door hollering 'Murder.' She continued till I got there. I ran around to the front door. Saw defendant and Jasper Phipps, and some more men in front. I went on after them. Pretty soon Rollins overtook one, and caught hold of him. Phipps was in front of Rollins a little bit. By that time had gotten out of my sight. I kept going towards Rollins. Saw the blaze of a pistol. By that time I had gotten up to Rollins." Defendant then asked, "What did Rollins say to you as you ran up, between third and fourth shots?" State objected. Defendant stated that he expected to prove that defendant said, "Catch hold of this man; he has tried to kill me"; and insisted on its competency as a

part of the *res gestæ*. The answer was excluded, and defendant excepted. (This was the *second* exception.)

The witness further said: "I don't know who fired those last two shots. I could see the blaze, but it was too dark for me to see who shot. Rollins did not. I caught hold of the man that Rollins had. It was Charles Jones. Phipps was standing near, with John Jones." The defendant asked, "What was John Jones's condition?" The State objected. The defendant stated that he expected to prove that he was very drunk, to contradict John Jones, to impeach his credit as a witness and as a circumstance corroborating defendant's contention of self-defense. The answer was excluded and defendant excepted. (This was the
(728) *third* exception.)

J. W. Bradford testified, in substance, that he was chief of police of Winston; that he knew the deceased, Sandy Jones, and knew his general character. The defendant offered to prove by this witness that the deceased, Sandy Jones, was a man of most violent and dangerous character. The State objected. The defendant insisted on its competency, there having been introduced evidence going to establish self-defense, and further, as a circumstance going to show whether the said deceased introduced the knife into the difficulty, the evidence on this point having been circumstantial. The evidence was excluded, on the ground that it was not shown that the defendant knew deceased or his character, and that the evidence of the homicide is not circumstantial, and defendant excepted. (This was the *fourth* exception.)

Among the instructions requested by the defendant the following were refused and such refusal duly excepted to under exceptions from *five* to *ten*, as referred to in the opinion:

"9. If the jury shall believe that the said John D. Jones was under lawful arrest and in the custody of the defendant, and that the deceased, Sandy Jones, and Charles Jones, either or both of them, attempted to rescue the said John D. Jones from such custody, then the defendant, in resisting such attempt, would be protected in the use of such force that a jury would ordinarily consider excessive, if the defendant was acting in good faith and was free from malice.

"10. If the jury believes that the said John D. Jones was under lawful arrest, in the custody of the defendant, and that the deceased, Sandy Jones, or Charles Jones, both or either of them, attempted to rescue said John D. Jones from such custody, then the law presumes that in resisting such rescue the defendant acted in good faith and free from the influence of malice.

"11. If the jury shall believe that John D. Jones submitted
(729) to arrest by the defendant, and submitted to remain in the custody of the defendant, and after the defendant and the said John D.

Jones walked together for the distance of twenty or thirty yards, and if the jury believe that the deceased, Sandy Jones, or Charles Jones, or both or either of them, attempted then to rescue the said John D. Jones from such custody, the defendant had the power and authority to resist such rescue, even though the original arrest was unlawful, and to use such force as was necessary to prevent such rescue and escape.

"12. If the jury shall believe that after John D. Jones was arrested by the defendant, the deceased, Sandy Jones, or Charles Jones, both or either of them, assaulted the defendant, then the defendant had the power to arrest said Sandy Jones, or Charles Jones, or both of them, for such an assault, and to use such force as was necessary to make such arrests." (This was given with a modification, providing that the arrest of John D. Jones was lawful).

The sixteenth and eighteenth prayers for instructions, which were refused, are set out in the opinion.

The following charges were given at the request of the State, and excepted to by defendant:

"1. That the killing having been admitted or proven to have been done with a deadly weapon, it devolves upon the prisoner to show to the jury facts or circumstances to mitigate or excuse the crime, and if the testimony does not satisfy them of the mitigating facts and circumstances, then it is their duty to convict of murder." To this the defendant excepted (Exception 11), and assigned as error that the instruction not only ignores, but contradicts the principle that an officer, in resisting a rescue, is presumed not to use excessive force, nor to have been actuated by malice; the evidence having established he was a police officer, within his jurisdiction and territory.

"2. That if the jury shall find that John Jones was doing no more than knocking at the door of Nan White's house, and asking (730) for admission, as testified to by the said John Jones, W. B. McCullock and Charles Jones, then the court charges that the said John Jones was committing no offense and his arrest was illegal, and that he had the right to resist the arrest, and the deceased had the right to aid him in so doing, and that right existed as long as the arrest continued, and they had the right to use the necessary force to free said John Jones; and the killing of Sandy Jones, in resisting his attempts to free said John Jones, would be murder, unless excessive force was used by the said Sandy, or those acting with him, and, if excessive force was so used, then the crime would be manslaughter." The defendant excepted (Exception 12), and assigned as error that his Honor erred in singling out and naming certain State's witnesses, and telling the jury that if they believed what they said, they would find such and such a verdict, thus giving their testimony undue prominence and dignity, and further in-

sists that the right to resist unlawful arrest was personal to the one arrested, and did not extend to deceased, nor did it extend after John Jones had peacefully submitted.

"3. That an officer may arrest without warrant for a breach of the peace committed in his presence, but he must, unless a known officer, notify the person that he is an officer and has authority, and if he fails to do so, especially upon demand, then the arrest is illegal and may be lawfully resisted by the party arrested or third persons; and the person making the arrest, slaying any one of those making the resistance or rescue, would be guilty of murder, unless excessive force was used by those resisting, and then he would be guilty of manslaughter." The defendant excepted (Exception 13), and assigned for error that there is no evidence that defendant was not a known officer, the only evidence on that question being that he had been a policeman of the town, and recognized as such, for more than six months; that if he were an (731) officer, though not known to the one arrested to be such, his said failure would not make an arrest illegal; and further, that the right to escape, even from illegal arrest, was personal to the party so arrested, and did not extend to third persons.

"4. That where the arrest is made legally, by a lawful officer, then he may use the amount of force necessary to prevent an escape or rescue, and no more, and if he uses excessive force, and death results, then he is guilty of manslaughter; but, if excessive force is used, and he intentionally slays the person resisting arrest or the person attempting the rescue, he is guilty of murder." The defendant excepted (Exception 14), and assigned for error that his Honor failed to tell the jury that what would be excessive force in an individual in an ordinary encounter would not be so in an officer resisting the escape or rescue of a prisoner; and further, that in using the phrase, "if excessive force is used," his Honor failed to tell the jury by whom the excessive force, if used, led to such a conclusion, and left them to infer that, if used by any one, either defendant or deceased and his associates, the same conclusion followed, which was erroneous.

The Attorney-General and Fuller & Fuller for the State.
W. A. Guthrie, Boone & Parker and J. S. Manning for defendant.

CLARK, J. *Exception 1.*—The question was properly ruled out. It would not have served to corroborate witness as to what she saw, which would have been competent, but only to show her belief or surmise at the time of the nature of the occurrence. It was simply irrelevant, and could throw no light upon the facts attending the homicide. There was no attempt to "cut off the head" of any one. That the witness thought

and said otherwise that night, when she saw nothing that took place, is immaterial.

Exception 2.—The question was improperly excluded. It was competent to show the declaration of the prisoner made at the (732) time as a part of the *res gestæ* and also to confirm his testimony of the transaction as given on the trial. While error in excluding competent testimony is cured by afterwards admitting it from the same witness, it is not cured by admitting another to testify to the same purport. *State v. Murray,* 63 N. C., 31.

Exception 3.—The third exception is well taken. John Jones, on behalf of the State, had testified as an eye-witness to the homicide, and had stated that he was not drunk when it occurred. Had this been pertinent only to impeach his character, his answer would have been conclusive. *S. v. Roberts,* 81 N. C., 605. But it went rather to his capacity to know and remember with accuracy what took place. It was error, therefore, to exclude proof offered to show that he was "very drunk on that occasion." It would have served to contradict him and to impair the credit to be given to his evidence, and would have been somewhat corroborative of the prisoner's theory of self-defense. When a witness had testified as an eye-witness to a transaction, it would be competent to show that during the occurrence he was asleep or insensible, and, of course, also that he was very drunk.

Exception 4.—The evidence of the homicide was not circumstantial, and though the plea of self-defense was set up, it did not appear that the prisoner knew the character of deceased for violence. Evidence to show such character was, therefore, properly excluded. *S. v. Turpin,* 77 N. C., 473; *S. v. Hensley,* 94 N. C., 1022.

Exception 5.—The 9th prayer for instruction was erroneously refused. *S. v. Sigman,* 106 N. C., 728, 731.

Exceptions 6 and 11.—The 10th prayer for instruction was properly denied. Much is left necessarily to the judgment of the officer in such cases, when acting in good faith and without malice. *S. v. McNinch,* 90 N. C., 695; *S. v. Sigman,* 106 N. C., 728; *S. v. Pugh,* 101 N. C., 737. But when force so signal is used that death is caused (733) thereby, there is no presumption of law that the officer acted without malice and in good faith, i.e., without excess of force. The jury must judge of the reasonableness of the force used (*S. v. Bland,* 97 N. C., 438), and the burden remains on the prisoner to show matter of excuse or mitigation. Good faith and the absence of malice are matters of defense.

Exception 7.—The 11th prayer for instruction was properly refused. Good faith and want of malice apply as to extent of force used when the

arrest is legal, but does not validate an illegal arrest. *S. v. Hunter,* 106 N. C., 796. *S. v. Black,* 109 N. C., 856, does not apply to cases where an officer is on trial for using excessive force, nor where the transaction is not fully completed and finished. If the arrest was invalid, while third parties had no right to assault the officer or take away the prisoner (*S. v. Armistead,* 106 N. C., 639), the officer was also guilty of an affray in attempting to hold the prisoner by force against the efforts of himself and friends.

Exception 8.—The 12th prayer for instruction was properly modified by inserting the words, "if the arrest was lawful."

Exception 9.—The 16th prayer for instruction was, "if the circumstances and facts of the homicide are left in doubt to the jury, and the jury are unable to say how the deceased came to his death and under what circumstances, the jury will render a verdict of not guilty." This would be correct in passing upon the killing, if not conclusively shown to have been committed by the prisoner. But if the killing is proved or admitted to have been done by the prisoner with a deadly weapon, as in this case, exactly the opposite of the prayer is the settled law in this State. *S. v. Smith,* 77 N. C., 488; *S. v. Gooch,* 94 N. C., 987. The use of a deadly weapon is proof of malice, for which the prisoner must show excuse or mitigation.

Exception 10.—The 18th prayer was, "If there is a reason-
(734) able hypothesis, supported by the evidence, which is consistent with the prisoner's innocence, then it is the duty of the jury to acquit." This would be correct as to finding the killing to have been done by the prisoner when that fact is left in doubt. But when, as in this case, the killing by the prisoner had been established, the instruction would be illegal as to matters of excuse or mitigation, and the prayer must be construed with reference to the evidence. *S. v. Tilly,* 25 N. C., 424. The law is too well settled in this State to be shaken now that if the killing is proved or admitted, all matters of excuse or mitigation devolve upon the prisoner. *S. v. Johnson,* 48 N. C., 266; *S. v. Ellick,* 60 N. C., 45; *S. v. Haywood,* 61 N. C., 376; *S. v. Willis,* 63 N. C., 26; *S. v. Bowman,* 80 N. C., 432; *S. v. Vann,* 82 N. C., 631; *S. v. Boone,* 82 N. C., 637; *S. v. Brittain,* 89 N. C., 481; *S. v. Mazon,* 90 N. C., 676; *S. v. Carland,* 90 N. C., 668; *S. v. Gooch,* 94 N. C., 987; *S. v. Thomas,* 98 N. C., 599; *S. v. Byers,* 100 N. C., 512, and there are others to same effect. The case of *S. v. Miller,* 112 N. C., 878, relied on by the prisoner, makes no change whatever in this well-established rule.

Exception 11.—This raises the same point as Exception 6.

Exception 12.—Is without merit. The court cannot single out a witness or witnesses and charge the jury, that if they believe those witnesses, to find so and so. *S. v. Rogers,* 93 N. C., 523, and cases there

cited. But there is no impropriety in saying to the jury, that if they believe a certain state of facts, as deposed to by certain witnesses, then the law applicable is so and so, when the court, as in this case, has called to their attention the opposite state of facts as deposed to by other witnesses and instructed as to the law applicable thereto. This directs the jury's attention not to the credibility of such witnesses, but as to a certain hypothesis or state of facts, and the reference to the witnesses is simply incidental to refresh them as to the evidence tending to show that particular state of facts. (735)

Exception 13.—There is no ground for this exception. The proposition of law was correctly stated (*S. v. Kirby,* 24 N. C., 201), and contained no expression of opinion that the prisoner was or was not a known officer.

Exception 14.—Is not well grounded. The prisoner has no cause to complain of the instruction. If so requested, the judge might have told the jury that what would be excessive force in an individual in an ordinary encounter, might not be so in an officer resisting the escape or rescue of prisoner. *S. v. McNinch* and *S. v. Sigman, supra.* But the omission was not error when the instruction was not asked. Nor is the officer clothed with authority to judge arbitrarily of the necessity for killing. It must be left to the jury to judge of the necessity in each case. *S. v. Bland,* 97 N. C., 438. Nor do we think that this instruction is open to the charge of ambiguity, pointed out by the exception.

Error.

Cited: S. v. Fuller, 114 N. C., 906; *S. v. Finley,* 118 N. C., 1172; *S. v. Neal,* 120 N. C., 620; *S. v. Byrd,* 121 N. C., 686, 688; *S. v. Rhyne,* 124 N. C., 857; *S. v. Clark,* 134 N. C., 707, 714; *S. v. Exum,* 138 N. C., 608, 610, 611; *S. v. Watkins,* 159 N. C., 485; *S. v. Blackwell,* 162 N. C., 680; *S. v. Rogers,* 166 N. C., 390; *S. v. Martin,* 173 N. C., 809; *S. v. Hines,* 179 N. C., 759.

APPENDIX

PORTRAIT OF JUDGE WILLIAM GASTON

PRESENTED TO THE SUPREME COURT ON 14 DECEMBER, 1893

Mr. FABIUS H. BUSBEE, addressing the Court, said:

To every loyal North Carolinian, layman or lawyer, it is a cause for sincere congratulation that the walls of its Supreme Court room are being rapidly filled with the portraits of the learned and sagacious men who laid deep the foundations, and wisely built the superstructure of our jurisprudence.

North Carolina owes an incalculable debt to its judiciary. Beguiled by pardonable State pride, we are sometimes prone to overestimate the relative importance of our State in the roll of American Commonwealths. But we can make no mistake in asserting the great value of her contribution to the complex system of American law. In spite of the fact that the State has never had a large town, that her commerce, trade and manufactures have been of comparatively small importance, and that, in consequence, her litigation, for the most part, has been based upon controversies concerning land or involving small amounts, yet the influence of her earlier judges is strongly marked in the general current of American decisions. With the enormous increase in the population, wealth, trade and industries of the newer States, almost magical in rapidity of their growth, many of them blessed with learned and industrious appellate tribunals, it is impossible for the older States to maintain their *comparative* influence, although the learning and character of their judges show no abatement. When we seek the fountain-head of the principles now firmly established as the system of American law, to trace the earlier application of the doctrines
(738) of the English common law to the strange conditions and peculiar environments of a new republic, or rather new system of republics, based upon written constitutions, along with New Hampshire and Massachusetts, New York and Pennsylvania, we find everywhere marks of the current of North Carolina decisions. There were no legal pioneers more fearless and conservative than our older judges in blazing the pathways through the virgin forests or breaking the untrodden snow in the new fields of judicial inquiry.

At a time when the Supreme Court of North Carolina reached perhaps its highest point of influence and usefulness, the honored name of *William Gaston* shines bright upon the pages which record its work. Unlike the large majority of the judges who constituted the Court he had

no preliminary training as a judge in the *nisi prius* courts, yet in the extent and variety of his labors as a lawyer he excelled them all. For thirty-five years he was in the constant practice of his profession. He attended the courts of a large circuit; he was familiar with the inner lives of the people, and studied human nature as faithfully and successfully as he did the law. From the white heat of conflict at the bar, in the acme of his powers, he was called to the serener atmosphere of the Bench. The zealous and successful advocate was merged into the impartial judge.

The recent publication in a contemporary legal magazine of an admirable sketch of *Judge Gaston,* written by a learned Justice of this Court,* renders it unnecessary for me to dwell upon the details of his life. We recall with moistened eye the striking tragedy of his infant days, when his father, the skilled English surgeon, who had warmly espoused the cause of the struggling colonies, in the frail, rocking canoe fell mortally wounded at the feet of his heroic wife, the victim of the craven bullet of a Tory neighbor which baptized with the red libation of his martyr blood the head of the prattling child. His boyhood gave evidence of great promise. He worshipped his mother and his marked success at school was largely caused by his desire to gratify her. (739) He was the first student to enter at the Catholic College of Georgetown, and one of the most notable buildings of that renowned institution bears his name. He graduated from the College of New Jersey at Princeton, and, after studying law in New Bern with Francis Xavier Martin, the eminent jurist, soon entered upon the practice. His success in the fields, both of law and politics, was immediate and pronounced. Of noble and engaging presence, most attractively modest in his demeanor, frank and cordial, of accurate and elegant diction, he soon won his way to every heart. By nature, he was born to persuade and to convince.

> "Some there are
> Who, on the tip of their persuasive tongue,
> Carry all arguments and questions deep,
> And replication prompt and reason strong,
> To make the weeper smile, the laugher weep.
> They have the dialect and different skill,
> Catching all passions in their craft of will,
> That in the general bosom they do reign,
> Of young and old, and either sex enchain."

He was soon sent to the General Assembly as a member of the State Senate, and afterwards as a representative of the borough town of New Bern. At a subsequent session he became Speaker of the House of Commons, which office he held with great acceptability for several terms.

*Justice Walter Clark, in *The Green Bag.*

In 1813 he was a member of Congress from the New Bern District, and in 1815 was reëlected for a second term. The impression made upon his contemporaries during his service in that body yet remains, and his published speeches show how well deserved was his reputation. He became the life-long friend of Webster and Clay, and both were his warm admirers. The House of Representatives had not at that time lost its character as a deliberative body, and its membership was not so unwieldy as to make length of service a prerequisite to success. In one respect his experience in Washington was in marked contrast to
(740) the present conditions surrounding official life. In his argument before the Convention of 1835, upon the subject of biennial sessions of the Legislature, *Judge Gaston* wittily said:

"When he looked around him, and noticed the zeal and meanness with which the Federal offices of every kind were courted and solicited, and recollected the stern integrity which used to prevail in this respect, he was humbled and alarmed—humbled at the change of manners in his honest State, and alarmed at the subserviency to power which it must generate. In old times, application for office from North Carolina was an extraordinary occurrence. During the four years which he spent in Congress but one application was made to him on the subject, and that came from perhaps the most despicable of his constituents. The letter ran somewhat in this fashion: 'I and my friends have constantly supported you. The times are hard and I want a post. I don't much care what post it is, so that it has a good salary attached to it.' It is needless (said *Mr. Gaston*) to state my answer, but I was strongly tempted to inform him that there was but one post for which I could recommend him—and that was the whipping-post."

From the day he left Congress, in 1817, until he entered upon his duties as Judge of the Supreme Court, in 1833, he maintained his position as the leader of the bar in the State, challenged, perhaps, as the years passed on, by the almost invincible *Badger*.

An examination of the reports of that epoch shows how singularly small was the number of lawyers whose names appear in the records of the Supreme Court. In 12 N. C., although in an unusually large number of cases there was no representation by counsel, *Mr. Gaston* appeared in forty-five cases, and *Mr. Badger* in perhaps as many. The other leading counsel whose names appear frequently in that volume are *Nash, Hogg, Wilson* and *Devereux*. In 1833 he was elected by the General Assembly a Judge of the Supreme Court to succeed
(741) *Chief Justice Henderson,* and he continued a member of the Court until his sudden death 20 January, 1844. His first opinion appears in 15 N. C., and his last opinion, clear and conclusive, is *Morrisey v. Love,* 26 N. C., 38. It would hardly be deemed appropriate in this connection to enter into a critical comparative review of the opin-

ions of *Judge Gaston* as found in the Reports. Coming directly to the Bench from active practice, we can sometimes see the traces of the warm language of the advocate, controlled by the impartial justice of the judge. His classical training and his familiarity with the best models of English literature lend a singular grace to his opinions. His facility of phrasing sometimes tempts him into longer discussions than was usual among his contemporaries. As a Chancellor his desire always seems to be to strike at the real merits and justice of the case, and noticeably, and ever and always, he is the upholder of the weak against the strong. In this there is no trace of any effort to "catch the ear of the groundlings," there is no seeking after popularity, but there is the unmistakable evidence of a man in whose heart there always abides the tenderest compassion for any human being in weakness or distress.

It is difficult for the present generations fully to appreciate the merits and the courage of the opinion in *S. v. Will,* 18 N. C., 121. We must fully realize in our minds the condition of a slave-holding people. The fear of negro insurrection always vaguely apprehended, and ever and anon becoming an imminent danger or a dread reality, the necessity upon the part of those who administered the law to relax no proper rule of restraint, and at the same time the equal necessity of imposing some check upon the brutality of cruel masters or reckless overseers, the sensitiveness of the public mind upon the subject in its political as well as in its legal and social aspects, combined to render the task of laying down the law in this case one of extreme delicacy. The inherent evils of slavery, which it were worse than folly to deny, were fully (742) understood by this humane slave-holder, and it was his high mission and earnest desire to mitigate every remediable hardship. This great opinion of *Judge Gaston,* in its clear analysis of the respective legal rights and duties of master and slave, its condemnation of the brutality too often shown towards the helpless, its sublime compassion for the hunted and terrified slave, sounded the keynote that never ceased to ring in North Carolina jurisprudence. A single quotation may be pardoned:

"An attempt to take a slave's life is then an attempt to commit a grievous crime and may rightly be resisted. But what emotions of terror, of resentment, may without the imputation of fiendlike malignity be excited in a poor slave by cruelty from his master that does not immediately menace death, that case neither determines nor professes to determine. In the absence then of all precedents directly in point or strikingly analogous, the question recurs, if the passions of the slave be excited into unlawful violence by the inhumanity of his master or temporary owner, or one clothed with the master's authority, is it a conclusion of law that such passions must spring from malice? Unless I see my way clear as a sunbeam, I cannot believe that this is the law of a

civilized people and of a Christian land. I will not presume an arbitrary and inflexible rule so sanguinary in its character and so repugnant to the spirit of those holy statutes which 'rejoice the heart, enlighten the eyes, and are true and righteous altogether.'"

If time permitted, it would be a pleasant duty to gather from the well-laden branches samples of the fruits of his labors in this Court, but I am speaking to those whose lives are spent in daily communion with the emanations of his genius, and to whom I can suggest nothing that is novel. While a member of this Court he was tendered the office of United States Senator, which, without hesitation, he declined as being inferior in dignity and usefulness to the office he then filled.

In 1835 he was a member of the Constitutional Convention, and
(743) to him, more than any other man, is due the credit for the reforms instituted by that body. In the struggle of the western counties for equal representation in the halls of legislation, he listened not to the dictates of sectional interests, but advocated a just consideration of the claims of the West. He was the impassioned defender of civil and religious liberty, and his great argument in behalf of religious toleration will always remain a North Carolina classic. In that speech, with simple pathos, he declares his faith:

"It will be enough for me to say, that trained from infancy to worship God according to the usages, and carefully instructed in the creed of the most ancient and numerous society of Christians in the world, after arrival at mature age I deliberately embraced, from conviction, the faith which had been early instilled into my mind by maternal piety. Without, as I trust, offensive ostentation, I have felt myself bound outwardly to profess what I inwardly believe, and am therefore an avowed, though unworthy member of the Roman Catholic Church."

I trust I may be pardoned for quoting from the same source his sublime advocacy of religious toleration:

"Religion is exclusively an affair between man and his God. If there be any subject upon which the interference of human power is more forbidden than all others, it is on religion. Born of Faith, nurtured by Hope, invigorated by Charity—looking for its rewards in the world beyond the grave—it is of Heaven, heavenly. The evidence upon which it is founded, and the sanctions by which it is upheld, are addressed solely to the understanding and the purified affections. Even He, from whom cometh every pure and perfect gift, and to whom religion is directed as its author, its end and its exceedingly great reward, imposes no coercion on His children. They believe, or doubt, or reject according to the impressions which the testimony of revealed truth makes upon their minds. He causes His sun to shine alike on the believer and the
unbeliever, and His dews to fertilize equally the soil of the ortho-
(744) dox and the heretic."

In the sacred privacy of his family he was singularly attractive, and deeply beloved by all who came within the sphere of his influence. His buoyant and almost boyish cheerfulness rendered him the life of the home circle, the unfailing delight of children, the kindly mentor of youth, the comrade and friend of older years. My grandmother from her earliest childhood, was an inmate of the family and an adopted daughter of *Chief Justice Taylor,* his brother-in-law. Much of *Judge Gaston's* time was spent at her fireside, and his last summons came to him at her house. My own boyhood was passed in the daily hearing of his name, his sayings and familiar anecdotes concerning him. To those who loved him it was not as the incorruptible statesman, the learned jurist, the honored patriot that he was chiefly remembered, but as the loving "Uncle" and faithful friend.

The name of *Gaston* is no longer borne by any lineal descendant. His only son, Alexander, who was, with him, a member of the Convention of 1835, representing Hyde County, afterwards removed to Yancey County and lived there up to the time of his death. The sons of Alexander, the last males to bear that honored name, both fell in battle, each destined by a sad coincidence to die in his first engagement. William, a graduate of West Point of unusual promise, fell in Colonel Steptoe's ill-starred Oregon campaign against the Indians in 1858. Hugh, though physically unfitted for the field, could not remain inactive in the days when North Carolina called her sons to arms, and was mortally wounded at Sharpsburg (Antietam). The daughters of *Judge Gaston* were Susan, the wife of Robert Donaldson, of New York; Eliza, the wife of Mr. Graham, of Maryland; Hannah, who married *Judge Manly,* of the Supreme Court of N. C.; and Kate, who died unmarried.

It is my pleasant mission, representing the granddaughters of the distinguished jurist, *Miss Eliza Donaldson* and her sister, *Mrs. Bronson,* to ask the Court to receive this portrait of their revered grandfather. It is a copy of Brown's painting, made by an artist who (745) was reared upon the premises where *Gaston* died.

When North Carolina, awakened at last to a sense of her duty unperformed, shall place in the National Valhalla, the Statuary Hall at Washington, the statues of her two most illustrious dead, it requires no prophet to foretell that one will bear the lofty brow and classic face of her beloved son, the patriot, the statesman, the scholar and the jurist, *William Gaston.*

Chief Justice Shepherd, responding for the Court, said:

We have listened with much pleasure to the eloquent remarks of Mr. Busbee on the life and character of one who is so justly and universally esteemed as a great and good man. The name of *Judge Gaston* excites the admiration and pride of every North Carolinian, and he is con-

stantly held up to our youth as an exemplar of all that is pure as a private citizen, able and patriotic as a statesman, and elevated and learned as a jurist. He occupies such a prominent place in the political and judicial history of this State, that it would be a work of supererogation to attempt to add anything to what has already been said. While his political services to the country were great, it is but natural that we should regard his opinions while a member of this Court as constituting his most enduring memorial. Elegant in diction, replete with learning, and characterized by great accuracy of statement and strong logical expression, they never fail to interest and instruct, as well as to inspire us, we trust, with a proper sense of the responsibility and dignity of the legal profession and of high judicial position.

We are gratified to receive the portrait of this distinguished jurist, and cheerfully direct that it be hung in an appropriate place on the walls of this chamber.

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MORTGAGE OF CHATTELS, 406.

The statute (sec. 1, ch. 91, Acts 1891) requiring the privy examination of a wife to be taken whenever her husband conveys household or kitchen furniture does not apply to an absolute sale of such property, but only to a conveyance by chattel mortgage or other way by which a lien can be imposed thereon. *Kelly v. Fleming*, 133.

(*Quere:* Whether the provisions of the act could be made to apply in case of a chattel mortgage, etc., by a husband, of his own household and kitchen furniture, at any rate, of such as was owned by him before the passage of the act.)

MORTGAGE, 349.

1. Where a husband mortgages his property for his debt, and in the same mortgage the wife conveys her own separate property as security for the same debt, her property so conveyed will be treated in all respects as a surety, and will be discharged by anything that would discharge a surety or guarantor who was personally liable. *Hinton v. Greenleaf*, 6.

2. Registration of a mortgage is not sufficient notice to prevent the operation of an estoppel *in pais*. *Morris v. Herndon*, 236.

3. Where B., the owner of a second mortgage, induced A., a first mortgagee, to take another mortgage on the same property to secure the same indebtedness, thereby giving to the second mortgage a legal priority over the new mortgage, A. having no actual notice of B's lien: *Held*, that B. was not a mere silent bystander, but a participant in the transaction, and he cannot be permitted to retain the advantage obtained under such circumstances. *Ibid.*

4. When the mortgagor of property is left in possession, he or his vendee holds it for the mortgagee, and his possession does not become adverse so as to set the statute of limitations in motion until condition broken. *Woody v. Jones*, 253.

5. Where a mortgage was duly recorded in the proper county, the fact that the mortgagor, in whose possession the property remained, took it out of the State and sold it there, does not start the running of the statute against the mortgagee or his assignee. *Ibid.*

6. A mortgage on property being duly registered, the legal title passes to the mortgagee, and a levy and sale of the property to satisfy taxes due by the mortgagor do not carry the title to the purchaser divested of the lien of the mortgage. *Ibid.*

7. A provision in a mortgage which contains no power of sale, that after default in payment of the debt the mortgagee may take possession of the land and receive the rents until the rights of the parties shall be fully adjusted "according to law," does not prevent the mortgagee from seeking a sale of the land under a decree of foreclosure. *Stewart v. Bardin*, 277.

8. Where it was stipulated in a mortgage securing a note bearing interest at six per cent per annum, that after default in payment of the note the maker should pay eight per cent per annum during the continuance of such default: *Held*, in an action to foreclose the mortgage, that the plaintiff is entitled to recover the debt, with eight per cent

MURDER—*Continued.*

3. The use of a deadly weapon is proof of malice, for which one charged with murder must show excuse or mitigation; hence, where the killing of a person was admitted or conclusively shown to have been done by the prisoner, a prayer for an instruction to the jury that if the facts of the homicide are in doubt, "and the jury are unable to say how the deceased came to his death and under what circumstances, the jury will render a verdict of 'not guilty,'" was properly refused as inapplicable to the facts. *S. v. Rollins*, 722.

4. While, if the fact of killing by one on trial for murder is in doubt, it would be proper to instruct the jury that "if there is a reasonable hypothesis, supported by the evidence, which is consistent with the prisoner's innocence, then it is the duty of the jury to acquit," yet where the killing by the prisoner is admitted or conclusively proven, such an instruction is not permissible as to matters of excuse or mitigation, the burden of proving which is upon the prisoner. *Ibid.*

NEGLIGENCE OF JAILER.

1. In the trial of an indictment against a jailer for the escape of a prisoner in his custody, it is not necessary to prove negligence on his part, since that is implied, and the burden is upon the defendant in such case to show that the escape was not with his consent or through his negligence. *S. v. Lewis*, 622.

2. Where, in the trial of a jailer indicted for the escape of a prisoner, it appeared that he had intrusted some of the keys to an assistant who, according to the testimony, connived at the escape, the trial judge properly instructed the jury that the only question was whether the defendant had exercised due care in the employment of his assistant. *Ibid.*

NEGLIGENCE.

1. Where a person is injured while walking on a railroad track by an engine that he might have seen by looking, the law, as a rule, imputes the injury to his own negligence. *Syme v. R. R.*, 558.

2. Where an engineer has no reason to think a person walking on a railroad track in front of a locomotive is other than one possessed of all the usual powers of mind and body, he is warranted in assuming that he will step off the track and avoid a collision. *Ibid.*

3. It is the duty of a railroad company to remove such growth, whether of shrubs, trees, or grain, as is calculated to obstruct the view of its engineers, to the outward bank of the side ditches of its roadbed, and when, by reason of such growth between the track and the side drain, a horse was concealed from the view of the engineer and got upon the track in front of the moving train and was killed, the railroad company was negligent and liable, although, after seeing the horse on the track, the engineer did all he could to avoid the collision. *Ward v. R. R.*, 566.

NEGRO BLOOD.

While in doubtful cases only an expert would be qualified to testify, from the appearance of a person, as to the exact proportions in which white