NORTH CAROLINA REPORTS

Vol. 64

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

JANUARY AND JUNE TERMS, 1870.

BY

S. F. PHILLIPS,

REPORTER.

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1 and 2 Martin, Taylor & Conf.	as	1	N.C.	9 Iredell Law	as	31	N.C.
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2 "	"	3	"	11 " "	"	33	"
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2 " "	"	17	"	2 " "	"	47	"
1 Dev. & Bat. Law	"	18	"	3 " "	"	48	"
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3 & 4 " "	"	20	"	5 " "	"	50	"
1 Dev. & Bat. Eq.	"	21	"	6 " "	"	51	"
2 " "	"	22	"	7 " "	"	52	"
1 Iredell Law	"	23	"	8 " "	"	53	"
2 " "	"	24	"	1 " Eq.	"	54	"
3 " "	"	25	"	2 " "	"	55	"
4 " "	"	26	"	3 " "	"	56	"
5 " "	"	27	"	4 " "	"	57	"
6 " "	"	28	"	5 " "	"	58	"
7 " "	"	29	"	6 " "	"	59	"
8 " "	"	30	"	1 and 2 Winston	"	60	"
				Phillips Law	"	61	"
				" Eq.	"	62	"

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

JUSTICES

OF THE

SUPREME COURT.

AT JANUARY AND JUNE TERMS, 1870.

CHIEF JUSTICE:

RICHMOND M. PEARSON.

ASSOCIATE JUSTICES:

EDWIN G. READE,
WILLIAM B. RODMAN,
ROBERT P. DICK,
THOMAS SETTLE.

ATTORNEY-GENERAL:

LEWIS P. OLDS.*

REPORTER:

S. F. PHILLIPS.

CLERK:

W. H. BAGLEY.

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*Appointed by Governor Holden, June 1, to succeed V. C. Barringer, who declined the appointment, tendered him upon the resignation of Mr. Coleman, May 10th, 1869.

JUDGES OF THE SUPERIOR COURTS,
SINCE JULY 1, 1868.

*First Class.**

CHARLES C. POOL	First District.
CHARLES R. THOMAS	Third District.
DANIEL L. RUSSELL	Fourth District.
RALPH P. BUXTON	Fifth District.
ALBION W. TOURGEE	Seventh District.
GEORGE W. LOGAN	Ninth District.

Second Class†

EDMUND W. JONES	Second District.
SAMUEL W. WATTS	Sixth District.
JOHN M. CLOUD‡	Eighth District.
ANDERSON MITCHELL	Tenth District.
JAMES L. HENRY	Eleventh District.
RILEY H. CANNON	Twelfth District.

SOLICITORS.

First District	J. W. ALBERTSON	Pasquotank County.
Second District	JOSEPH J. MARTIN	Martin County.
Third District	JOHN V. SHERARD	Wayne County.
Fourth District	JOHN A. RICHARDSON	Bladen County.
Fifth District	NEILL McKAY	Harnett County.
Sixth District	WILLIAM R. COX	Wake County.
Seventh District	J. R. BULLA	Randolph County.
Eighth District	A. H. JOYCE	Stokes County.
Ninth District	WILLIAM P. BYNUM	Lincoln County.
Tenth District	WALTER P. CALDWELL	Iredell County.
Eleventh District	VIRGIL S. LUSK	Buncombe County.
Twelfth District	ROBERT M. HENRY	Macon County.

*Term expires in 1872.

†Term expires in 1876.

‡Appointed by Gov. Holden, August 25, 1868, in place of D. H. Starbuck, who was elected by the people, and declined.

LICENSED ATTORNEYS.

JUNE TERM, 1870.

JOSEPH YOUNG ALLISON	Cabarrus County.
GEORGE FRANCIS BASON	Alamance County.
DANIEL BOND	Halifax County.
WILLIAM SHIPP BYNUM	Lincoln County.
BEVERLY CAMERON COBB	Lincoln County.
WILLIAM HENRY COOKE	Craven County.
ROBERT DAVIDSON GRAHAM	Orange County.
ARMISTEAD JONES	Wake County.
CHARLES FINLEY MCKESSON	Burke County.
THOMAS R. PURNELL	New Hanover County.
WILLIAM MARTIN SMITH	Cabarrus County.
WILLIAM LEWIS THORP	Nash County.
PLATT DICKENSON WALKER	New Hanover County.
JAMES P. WHEDBEE	Pasquotank County.

NOTE.—No licenses were granted at January Term, 1870, owing to the statute granting license upon proof of good moral character.

CASES REPORTED

CASES CITED

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PROCEEDINGS IN MEMORY

OF

THOMAS RUFFIN.

PROCEEDINGS OF THE SUPREME COURT OF NORTH CAROLINA, AND THE BAR IN ATTENDANCE UPON THE SAME, AND ALSO UPON THE SUPERIOR COURT OF WAKE COUNTY, IN REFERENCE TO THE DEATH OF THOMAS RUFFIN, LATE A CHIEF-JUSTICE OF THE SUPREME COURT.

Upon Monday, January 17, 1870, soon after the opening of the Court, the death of THOMAS RUFFIN, late a Chief-Justice of the Court, was announced; and it was suggested that the Bar in attendance upon the Court, and the Superior Court for Wake County, now in session, would hold a meeting this afternoon in honor of his memory; that his Honor Judge Watts, had consented to attend, and that the Bar desired the Justices of the Supreme Court also to unite with them.

The Members of the Court thereupon expressed their readiness to join their brethren of the Bar at the meeting proposed; and 3 o'clock, and the room of the Court, were named as the hour and place of assembling.

At 3 o'clock the Meeting was called to order: Present, Chief-Justice Pearson, Justices Reade, Rodman, Dick and Settle, Judges Watts and Cloud, Attorney-General Olds, Messrs. D. M. Barringer, V. C. Barringer, W. H. Battle, R. H. Battle, Jr., W. H. Bagley, J. B. Batchelor, Thomas Bragg, C. M. Busbee, W. P. Bynum, F. H. Busbee, W. R. Cox, J. H. Etheridge, D. G. Fowle, E. G. Haywood, Johnston Jones, R. W. Lassiter, A. M. Lewis, A. S. Merrimon, W. A. Moore, W. S. Mason, W. G. Morisey, S. F. Phillips, S. H. Rogers, George H. Snow and George V. Strong.

Upon motion, Chief-Justice Pearson was called to the Chair, and Mr. Phillips was appointed Secretary.

Upon motion of Mr. W. H. Battle, a committee of five was raised to report resolutions expressive of the sentiments of the Meeting in reference to the death of THOMAS RUFFIN.

The Chairman appointed, as members of this committee, Mr. W. H. Battle, Mr. Justice Reade, Mr. Bragg, Judge Watts and Mr. Merrimon.

After retirement and deliberation, the committee, through Mr. Battle, reported the following resolutions:

The members, officers and bar of the Supreme Court, and of the Superior Court of Wake County, now in session, having heard of the death of THOMAS RUFFIN, are impelled by a sense of duty to his memory to give a public expression to the feelings which the sad occasion has excited. They cannot forget, if they would, that the State has lost one of her most distinguished citizens, and the United States one of her most eminent jurists.

Strong natural talents, improved by assiduous culture, brought Mr. RUFFIN, at an early period of his life into public notice. The Speakership of the House of Commons, the election to a Judgeship of the Superior Court at two successive periods, and the Presidency of the principal Bank of the State, marked his upward career, until he reached, with general approbation, the Bench of the Supreme Court, of which he was soon after made Chief-Justice. How he demeaned himself in that high office is well known throughout the land. His judicial opinions are read with admiration by all who have occasion to consult them, and are often quoted with approbation by Judges in other States, and by the ablest law-writers of the Union.

Standing pre-eminent as a jurist he was not less distinguished in the private walks of life. As an agriculturist, he had few equals in skill; and no superior in devotedness. Living for a long period near one of the public highways, his home was the seat of unbounded hospitality. In the relations of friendship he was faithful and true; and in the sweet intercourse of domestic life, he was all that a devoted wife and affectionate children could desire. To crown all he was a Christian gentleman. Therefore, *Resolved,*

1. That the members of this meeting will wear the usual badge of mourning during the present terms of the Supreme Court and the Superior Court.

2. That a copy of these resolutions be sent to the family of the deceased by the Chairman of this meeting.

3. That a copy of the resolutions be presented to the Supreme Court and the Superior Court of the County of Wake, with a request that they be entered upon the minutes of the respective Courts.

The report was adopted unanimously, and the Chairman of the Committee instructed to present it to the Supreme and Superior Courts, upon the morrow.

Thereupon the meeting adjourned.

Upon Tuesday, the 18th, after the opening of the Court, Mr. Battle rose, and presented the resolutions that had been adopted on the 17th: introducing them with the following remarks:

May it please the Court:

I have been charged with the duty of presenting to your Honors Resolutions adopted at a meeting of the Bench and Bar upon yesterday, and to request that they be spread upon the minutes of the Court.

Before proceeding to the performance of this duty, I beg leave to remark that this sad occasion carries our thoughts back vividly to the time of the organization of this Court in the year 1819, and to the distinguished men who were then connected with it.

The Bench, at that time, was illustrated by the legal learning and fine literary taste of Chief-Justice Taylor, the genius of Judge Henderson, and the strong common sense of Judge Hall. They were aided in their decisions by the arguments of a Bar of the greatest ability. At that time, and for some years afterwards, the business of the Court was conducted by gentlemen, who were called, the Bar of the Supreme Court, and the practice was confined to them with almost as much exclusiveness, as was formerly that of the Court of Common Pleas in England, to the Sergeants-at-Law. It was a rare instance that any other member of the profession ventured to appear before the Court; for it required no little moral courage to do so. The members who then composed the Supreme Court Bar were regarded as equal, if not superior, to the members of such Bars in any other State in the Union. Your Honors will at once acknowledge the justice of this high encomium, when I recall the names of William Gaston, Thomas Ruffin, Henry Seawell, Archibald Henderson, Archibald D. Murphy, Gavin Hogg, Moses Mordecai, Joseph Wilson and James Martin.

All these men, except him to whom we now bid farewell, have long since passed away. It was the fortune of the survivor to live until he became full of years, and of honors!

On yesterday, we learn, his mortal remains were consigned to the tomb.

In a long life, THOMAS RUFFIN had greater opportunities than any of his compeers, of connecting his name indissolubly with the judicial annals of North Carolina. In 1829 he was elected a Judge of the Supreme Court of the State, and in 1833 he became its Chief-Justice. In this high office he presided nearly twenty years, and during that period he was called upon to deliver opinions in many great causes, involving important and difficult questions of Constitutional, as well as of Common and Statute law. These opinions have spread his fame beyond the limits, not only of this State, but of the United States. We are informed that great Judges in England have spoken of his judicial discussions in terms of high admiration.

As a tribute of respect to such a man, it is, that I beg leave to

move, that the resolutions be ordered by your Honors to be placed upon the records of the Court.

The resolutions having been read, Chief-Justice Pearson responded as follows:

Gentlemen of the Committee:

The Justices of the Court concur in the sentiments expressed by the Resolutions which you have presented.

To a vast fund of legal learning, and remarkable faculties of perception and of reflection, THOMAS RUFFIN united a power of application and mental endurance, by which he "built for himself a monument more lasting than brass." As long as the Reports of Devereux, Devereux & Battle and Iredell are extant, it will be known that his was a Master-mind, which made its mark upon the jurisprudence of the State.

Chief-Justice RUFFIN, during a long life time filled a large measure of usefulness, and attained a reputation as a jurist, which is justly a matter of pride to our profession.

The Clerk will record the Resolutions.

Thereupon, the Court adjourned.

THOMAS RUFFIN, the eldest child of Sterling and Alice-Roane Ruffin, was born at Newington, King & Queen County, Virginia, November 17, 1787.

He was sent to school at Warrenton, N. C., where he was taught by Mr. George, an Irishman, an excellent classical scholar, and severe disciplinarian. From thence, he went to Princeton, N. J., and was graduated there in 1805.

Returning home, he commenced the study of the law, in the office of David Robinson, at that time, an eminent lawyer of the city of Petersburg.

His Father having removed to Rockingham county, North Carolina, in 1807, Mr. Ruffin came with him, and resumed his studies, for a few months, with the late Judge Murphy, and was admitted to the bar in this State, in 1808. Early in 1809, he removed to Hillsboro', and upon the 7th of December, in that year, married Anne, eldest daughter of the late William Kirkland, Esq. For the next twenty years he continued to reside at that place, engaging in a wide circle of professional labors. In 1813, 1815 and 1816, he represented the Borough of Hillsboro', in the House of Commons, and in the latter year, was Speaker of the House.

During the same session, he was elected a Judge of the Superior Court. He remained upon the Bench for two years, when his private interests compelled him to resign.

His health breaking down in consequence of his very extended and laborious professional business, he again accepted a seat upon the Bench of the Superior Court, in 1825. At the close of 1828, he resigned this seat a second time, in consequence of an election to the Presidency of the State Bank. A year afterwards, he was elected to fill the vacancy upon the Supreme Court Bench, occasioned by the death of Chief Justice Taylor. At December Term 1833, upon the death of Chief Justice Henderson, he was chosen to succeed to his place.

Upon his election to the Supreme Court, he removed his residence to Haw River, in what is now, Alamance county. In the Fall of the year 1852, he again retired to private life, and withdrew to what he always regarded as the most worthy of human occupations, the tilling of the earth. For several years, he served his fellow-citizens as a county magistrate, and Chief Justice of the Court of Pleas and Quarter Sessions.

At the session of 1858, the General Assembly again called him to the Supreme Court Bench, and he continued to sit there for three terms, ending with June 1859.

In the Spring of 1861, he served as one of the members of what was called "The Peace Congress;" and in the same year, was elected to the State Convention of 1861.

At the close of the late war, he returned to reside in Hillsboro', and died there, on the morning of the 15th day of January 1870.

Chief Justice Ruffin, in person, was about six feet in height, and of a spare figure. His movements were nervous and rapid. The general expression of his countenance indicated great energy, resolution and power. He was neat, uniform and tasteful in regard to dress. In his latter years, his appearance was impressive, and very venerable.

His special reputation, aside from his professional position was that of a financier.

He was for many years, a communicant of the Episcopal Church, attached to its order and worship, yet liberal in his estimate of the worth and usefulness of other denominations.

He left a numerous family of children and grand-children.

He died in the full possession of his mental faculties, in charity with all men, and in the Peace of God.

CASES AT LAW

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

JANUARY TERM, 1870

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(1)

JOHN NORFLEET, ADM'R. OF DAVID COBB, DEC'D., AND OTHERS v. ELISHA CROMWELL.

Covenants creating easements, *run with the land*, even as against assignees in fee, where the intent to create them is clear, the easements themselves apparent, and the covenants consistent with public policy, and so qualifying or regulating the mode of enjoying the easements, as, that, if disregarded, the latter will be substantially different from what is intended:

Therefore, a covenant to repair a canal dug for the purpose of draining the lands of the parties to the covenant, runs with such lands, and binds a subsequent purchaser in fee.

A party thus bound, is entitled to *notice* of a call to contribute, *after the repairs have been done;* and the want of such notice, even where, *previously to the making of the repairs*, he had *disclaimed* liability therefor, is fatal to an action against him.

Covenants are the proper mode of creating such servitudes as consist in acts to be done by the owner of the servient land.

COVENANT, tried upon demurrer, by *Jones, J.*, at Spring Term 1869 of EDGECOMBE Court.

The action had been brought to Spring term 1867.

As the question involved is an important one, and the contract which gave rise to it seems to have been drawn with care, and as the record which presents it was settled by learned (2) counsel, the Reporter submits the declaration (filed, in the form of a complaint, at Spring Term 1869,) in full:

IN THE SUPERIOR COURT OF EDGECOMBE COUNTY.

John Norfleet, Administrator of David Cobb, Jesse Harrell, George Harris and William T. Cobb, Plaintiffs,

Against

Elisha Cromwell, Defendant.

The Plaintiffs above named complaining of the Defendant allege:

I. That on the 20th day of January, A.D., 1855, Eaton Cobb and the Plaintiff Jesse Harrell, were the owners or proprietors of a canal, in proportion of two-thirds to the said Eaton and one-third to the said Jesse, situate in the said County and heading or beginning on the then lands of Amariah B. Cobb, and emptying into the mill stream of Mrs. Mary Gregory, passing through the lands of David Cobb, the said Eaton Cobb and Elisha Cromwell, the Defendant; and on said day, the said Eaton Cobb, the plaintiff Jesse Harrell, David Cobb the intestate of the plaintiff John Norfleet, James Thigpen, Amariah B. Cobb, and the plaintiff Geo. Harris entered into a writing obligatory, under their hands and seals (which writing has been duly proved and registered in the Register's Office of said County) in which the said parties set forth the facts following, and made the following covenants in relation to said Canal:

1. That the said Amariah B. Cobb, David Cobb, James Thigpen and George Harris desire the use or privilege of the said canal, for the purpose of draining all or a portion of the lands of which they are respectively seized and possessed, and have applied for such use or privilege, and all the said parties have come to a full understanding and agreement, one with another, in reference to the said canal, which said understanding or agreement the said parties wish and intend shall be binding, not only upon themselves, but upon their heirs and assigns respectively, *quoad* the lands specified in said covenant.

(3)

2. That the said Eaton Cobb, his heirs and assigns, shall not use the said canal for the purpose of draining any other lands than the tract or parcel of which he was then seized or possessed, adjoining the lands of the said David Cobb and others, containing 314 acres, more or less.

3. That the said Jesse Harrell, his heirs and assigns, shall not in any event, use the said canal for the purpose of draining any other lands than the two tracts or parcels of which he was then seized and possessed, called the David Harrell land, one containing 46 acres, more or less, the other containing 126 acres, more or less.

4. That the said Amariah B. Cobb, David Cobb, James Thigpen and George Harris, their heirs and assigns respectively, shall have,

possess and enjoy the right and privilege of using the said canal, for the purpose of draining all the lands of which they were then severally seized and possessed.

5. That any one or more of the said parties, shall have the right to determine what work is necessary to be done, for the purpose of enlarging, deepening, cleaning out or repairing the said canal, or bridging the same where a public road crosses it, and he or they shall be fully empowered to do the said work, or have the same done, and the said parties shall bear and pay the reasonable expenses and the burden of said work, in the following proportions, to-wit: one-eighteenth to the said Jesse Harrell, his heirs and assigns; one-eighteenth, to the said George Harris, his heirs and assigns; one-twelfth to the said Jas. Thigpen, his heirs and assigns; one-tenth to the said Amariah Cobb, his heirs and assigns, and the balance or residue equally to the said Eaton Cobb and David Cobb, their heirs and assigns respectively.

6. That no person or persons shall be permitted to use the said canal for the purpose of draining his, her or their lands without the consent in writing of a majority of the said parties, and all moneys which may be paid for the privilege of using the said canal, shall go and belong to the said Eaton Cobb and Jesse (4) Harrell, their heirs and assigns respectively, in the proportion of two-thirds to the former, and one-third to the latter.

7. That the said David Cobb, his heirs and assigns, upon cutting a ditch into said canal which shall begin or head in, or pass through any part or portion of such part, or portion of the tract of land to be purchased of the heirs of Solomon Pender, as lies on the North side of the public road leading from Tarborough to Little Creek Meeting House, shall pay to the said Jesse Harrell, his heirs and assigns, the sum of fifty dollars.

8. That the said Jesse Harrell did not then contemplate or expect thereafter to use the said canal for the purpose of draining the larger tract of land hereinbefore mentioned as belonging to him or any part thereof, but in case that the said canal shall be so used by the said Jesse Harrell, his heirs or assigns, then from the time it shall be so used thenceforward, the proportions of the said parties in the expense and burden of the work, which may be done in and upon the said canal as hereinbefore set forth, shall cease, and they shall be as follows, viz: one-twentieth to the said Geo. Harris, his heirs and assigns; one-thirteenth to the said James Thigpen, his heirs and assigns; one-eleventh to the said Amariah B. Cobb, his heirs and assigns; one-sixth to the said Jesse Harrell, his heirs and

assigns; and the balance or residue equally to the said Eaton Cobb and David Cobb, their heirs and assigns, respectively.

II. That on the 29th day of July, A.D., 1858, the said Eaton Cobb, David Cobb, Jesse Harrell, James Thigpen and Geo. Harris, with Henry V. Lloyd, entered into a writing obligatory, under their hands and seals (which writing has been duly proved and registered in the Register's Office of said County) in which the parties set forth the following facts, and made the following covenants in relation to the said canal.

1. That with the consent of all the parties to the agree-
(5) ment or covenant dated as aforesaid on the 20th day of January, A.D., 1855, the said Henry S. Lloyd had then recently purchased of the said Eaton Cobb and Jesse Harrell, proprietors of the said canal, the right or privilege of using the said canal for the purpose of draining certain lands hereinafter mentioned, in the manner and upon the terms hereinafter set forth.

2. That David Cobb had purchased the lands of the said Amariah B. Cobb to which the said agreement applied, and thereby acquired all the rights and privileges, and became subject to all the burdens and duties of the said Amariah.

3. That the said Henry S. Lloyd, his heirs and assigns, shall have and possess the privilege and use of the said canal, for the purpose of draining the whole or any part of the piece or parcel of land known as the Newsom Cromwell tract, adjoining the lands of David M. Cobb, Jordan Knight, Elisha Cromwell, and the said David Cobb, containing about five hundred acres, also the part or portion of the Larkey Booths lands, adjoining the lands of Elisha Cromwell, which is known as the Bearskin Swash or Swamp, the quantity thereof being about fifty acres; in draining the said Bearskin Swash or Swamp, the said canal is not to be cut into or entered, at more than one point or place.

4. That all the rights, privileges and powers, and all the burdens and duties conferred and imposed in the said articles of agreement, of 20th January, 1855, (being numbered in said articles as sections 4th and 5th, but in the clauses above numbers 5 and 6) upon the parties thereto, shall be enjoyed and borne by the parties to this agreement (29th July, 1858) with the following additions and alterations, to-wit: Besides the kind of work specified in section 4 of the agreement of 20th January, 1855, that of removing the earth or dirt which has been or may thereafter be thrown out of the said canal, to a suitable and proper distance from its banks, to prevent them from caving or falling in, is provided for in addition, and the pro-
(6) portions of the work or expenses to be done and incurred by

the respective parties to this agreement, shall be as follows: one twenty-sixth part by the said Jesse Harrell, his heirs and assigns; the same by the said George Harris, his heirs and assigns; one-seventeenth by the said James Thigpen, his heirs and assigns; one-fourth by the said Eaton Cobb, his heirs and assigns; and the balance by the said David Cobb and Henry S. Lloyd, their respective heirs and assigns equally.

5. That the said Jesse Harrell, his heirs and assigns, shall be exempt from performing any labor or incurring any expense for the purpose of widening the said canal, unless he or they shall use the said canal to drain the larger tract of land mentioned in the said articles of 20th January, 1855, of which he is seized, and in case he or they shall so use the said canal, then his or their proportion of all the work to be done on the same shall be one-eighth part, and the shares of the other parties in said work shall be abated or diminished *pro rata.*

III. That on — day of February, A.D., 1860, the said Henry S. Lloyd by his last will and testament, which has been duly admitted to probate, devised his lands to Mary Louisa Caldwell, W. P. Lloyd, and David Barlow, trustee of Jas. W. Lloyd and children, who were the heirs-at-law of the said Henry S. Lloyd, and by a decree of the Court of Equity of the County aforesaid, his said lands were divided between the said devisees and his heirs-at-law; and the lands hereinbefore mentioned, called the Newsom Cromwell tract, and that known as the Bearskin Swash or Swamp, were allotted and set apart to the said Mary Louisa Caldwell, the devisee aforesaid of the said Henry S. Lloyd, and the wife of John E. Caldwell, and by the said division or partition, the said John E. Caldwell and wife Mary Louisa, became the sole owners thereof, and held the same in severalty with all the rights, privileges and powers, and all the burdens and duties conferred and imposed upon the said Henry S. Lloyd by the said agreements of 20th of January 1855, and the 29th of July 1858. (7)

IV. That on the 10th day fo December, A.D. 1860, the said John E. Caldwell and wife Mary Louisa, by their legally constituted attorney, sold and conveyed by deed to the defendant, Elisha Cromwell, the aforesaid lands so owned and held by them as aforesaid, and the said defendant accepted the said deed containing the following stipulations as to the title thus conveyed: "To have and to hold, both the said tracts or parcels of land, with all the privileges, easements, appurtenances, rights, advantages, burdens and incumbrances thereunto belonging and appertaining unto the said Elisha Cromwell, his heirs and assigns, to the only proper use

and behoof of him, the said Elisha Cromwell, his heirs and assigns, forever." And that the said defendant had notice of the said contract of July 29th 1858, in which the said Henry S. Lloyd, as the owner and proprietor of said lands had covenanted to bear and perform the said burdens and duties, which burdens and duties devolved upon the said Mary Louisa Caldwell as devisee and heir-at-law of the said Henry S. Lloyd, and which covenant of the said Henry S. Lloyd runs with the said lands, and that the defendant is bound as assignee by the said covenant of the said Henry S. Lloyd; or that the defendant contracted with notice of the burdens and duties so imposed upon the said lands, and having accepted the aforesaid deed from the said John E. Caldwell and wife Mary Louisa, with the stipulation aforesaid, is bound to perform the covenant respecting the said lands made by the said Henry S. Lloyd, as aforesaid.

V. That the plaintiff, William T. Cobb, is the heir-at-law of said Eaton Cobb, one of the parties to the said agreements or covenants, dated 20th January, 1855 and 29th July, 1858, and on the 1st day of January, 1866, was seized and possessed of the lands belonging to the said Eaton Cobb, on the day of the dates of said agreements or covenants, and thereby bound by the covenants made by
(8) the said Eaton respecting said lands.

VI. That in the year 1862, and years following to 1866, it was necessary to clear out rafts from the said canal, and in the year 1866 it was determined by the plaintiffs, Jesse Harrell, William T. Cobb, George Harris and David Cobb, the intestate of the plaintiff John Norfleet, that work was necessary to be done for the purpose of clearing out the said canal and repairing the bridge across the dam, and they applied to the defendant to perform his proportion of said work, and bear his proportion of the necessary expenses, as he was bound to do, as aforesaid, yet he refused so to do, and the said plaintiffs, Harrell, W. T. Cobb, Harris and D. Cobb, intestate of the plaintiff Norfleet, as aforesaid, in the year 1862, and years following, removed some rafts out of said canal at an expense of four dollars and fifty cents, and in the year 1866, they had the necessary work done and incurred the necessary expenses to clear out and repair the said canal and bridges, to the amount of twelve hundred and fifty-nine dollars and sixty-six cents, which is reasonable, and of which the defendant is liable, as aforesaid, for the sum of three hundred and ninety-eight dollars and eighteen cents, with interest thereon from 1st January, 1867.

VII. That no part of the same has been paid by the defendant to the said plaintiffs, Harrell, Cobb and Harris, or to David Cobb the intestate of the plaintiff Norfleet, before the death of said David,

on the — day of April, 1867, and that subsequent thereto the plaintiff Norfleet was duly appointed the Administrator of the said David Cobb, and no part of the said money, has been paid to the plaintiff Norfleet.

Wherefore, the plaintiffs demand judgment against the defendant for the sum of three hundred and ninety-eight dollars and eighteen cents with interest thereon from 1st January, 1867, together with the costs, expenses and disbursements of this action.

Moore & Biggs Attorneys for Plaintiffs.

The defendant demurred, and, the demurrer having been overruled, he appealed. (9)

No counsel for the appellant.
Moore, contra.

1. The covenants are mutual covenants, each covenantor with the other, and are entitled to the same rules of construction as when between two only.

2. The covenants are between land owners, of and concerning a matter that pertains in common to their lands respectively; of and concerning a canal, the sole property of two, and to become to a great extent, the common property of all the parties, either in absolute right of the land, or easement in common therein. It is as much appurtenant to the value of the land of each proprietor, as if it were the sole outlet of the waters of the land of each proprietor, and therefore is an inherent appurtenance. It is a most proper subject for a covenant to run with land which it so much benefits. Platt, on Cov., 3 L. Lib. 465, *et seq.* to 475—especially at 465, 6, 9 and 476.

3. The covenants being set forth and admitted, it is evident that unless they be construed to run with the land, the object of the covenantors will be wholly defeated, and cannot be effectuated by any human means; for the words used, if the purpose be allowable, are sufficient to extend the obligation of the contractors to all who may occupy after them.

If then, their object was to perpetuate the improvement of their land, and it be lawful to use the proper means by affecting, not only the present but all subsequent occupiers, and the words are properly chosen to effect such purpose, the thing is accomplished.

Angel on Water courses, 265 to 270; *Sharp v. Waterhouse,* 90 E.C.L. 816; *Jeter v. Glenn,* 9 Rich. Law (S.C.); *Thomas v. Poole,* 7 Gray, (Mass.) 83; *Duffy v. N. Y. R. R. Co.,* 2 Hylton,

(10) N.Y.C.P.; *Kellogg v. Robinson,* 6 Verm. 276; *Astor v. Hoyt,* 5 Wend. 603.

The action is properly brought by all who have sustained damage. "Who may be joined as plaintiffs, and when in an action of covenant?" see Platt. on Cov. 123 to 134, especially at 123, 130, and *James v. Emory,* 4 E.C.L. 89.

It is true that the plaintiffs recover a sum which belongs to them in unequal amount; but this is no objection proper to be made by the defendant.

1. For if the defendant stands in the shoes of Henry S. Lloyd, the defendant's contract is with all the other parties.

2. The defendant cannot be injured by the verdict. He cannot be sued again by either of the parties.

3. The action in this form avoids multiplicity of suits.

4. It is fully sustained by the case of *James v. Emory,* 4 E.C.L. 88.

RODMAN, J. Two questions are raised by the demurrer:

I. Can the plaintiffs recover without an averment that the defendant had notice that the plaintiffs had repaired the canal, and of the amount of his liability? We think not. The rule on this subject is well stated in 1 Chit. Pl. 360: "When the matter alleged in the pleading is to be considered as more properly lying in the knowledge of the plaintiff than of the defendant, then the declaration ought to state that the defendant had notice thereof; as where the defendant promised to give the plaintiff as much for a commodity as another person had given or should give him for the like; or to pay the plaintiff what damages he had sustained by a battery; or to pay the plaintiff his costs of suit. But where the matter does not lie more properly in the knowledge of the plaintiff than of the defendant, notice need not be averred." The rule is copiously exemplified in Com. Dig. Condition L. 8; and another illustration may be found in the case where one of several co-sureties pays the debt, he cannot recover of another co-surety without notice of such payment:

(11) *Sikes v. Quick,* 52 N.C. 19. The omission of an averment of notice when necessary (though it will sometimes be cured by verdict) will be fatal on demurrer, or after judgment by default: 1 Chit. Pl. 362. In this case, although it might be presumed that the defendant had notice that some work was done on the canal, yet he cannot be presumed to know by which of the contracting parties it was done, or its cost; and, consequently, the extent of his liability. Those were matters peculiarly within the knowledge of the plaintiffs. But it is urged that the disclaimer by the defendant of any lia-

bility under the covenant, before the work was done, dispensed with notice afterwards. The fact relied on as dispensing with notice is properly set forth in the complaint, and the question is as to its sufficiency. We think it is not sufficient. Notice is dispensed with where the party absconds; Viner's Abridg. Notice, A-2; and in some cases notice of the dishonor of a bill of exchange is dispensed with; Byles on Bills, 219; but none of the examples given seems analogous to this. What is it that the defendant is entitled to have notice of, and for what purpose? Of his liability, and of the amount of it, in order that he may have the choice of paying without suit. The defendant in this case had notice of the covenant; but that created only a contingent liability, which could only become absolute by some act to be done by the other parties, or some of them. Before such act, the plaintiff had no right of action, and the defendant could not pay; and it was of this act, therefore, that the defendant was entitled to notice. It was the contingent liability which the defendant disclaimed, and we think he was entitled to notice after it had become an actual and definite cause of action. Upon this point, therefore, the demurrer must be sustained.

II. As this disposes of the present action, we might decline to go further, and to express any opinion upon the question which would have been raised by the demurrer, if the complaint had contained an averment of notice. But as it is one of much interest and im-
portance, especially in the eastern part of the State, where (12)
contracts of this sort have been common, and as we have formed a decided opinion upon it, we see no good reason why it should not be stated now, rather than deferred until this case shall again come before us with a proper averment, as from its importance we may infer that it would.

This question is, whether the burden of the covenant by Lloyd to contribute to the repair of the canal, runs with the land, and binds the defendant as his assignee. The contract between the parties to the deed of July 1858, is in the form of mutual covenants, and is, in substance, that a certain canal (then existing) shall continue to run through certain lands of the parties, for their benefit respectively, and that each and his assigns, being the owners of the described lands, shall contribute in certain proportions to its repair. We think it clear that one effect of the contract, was to grant to each of the parties an easement in fee, appurtenant to their several described pieces of land, and passing both as a benefit and as a burden to subsequent assignees. The lands of each became both servient and dominant to the lands of the others, for certain purposes. The easement of the upper proprietor, was the right to the free flow of the water

from his land through the canal; that of the lower one, was not only the right to drain the water from his land through the canal, but also, that the upper proprietors should permit the water from their lands to flow through the canal, to answer in its course any lawful use to which he might be minded to put it. An easement is generally, and in general most naturally and properly, created by words of grant; but words of covenant may be equivalent to a grant if such be the clear intention: Gale and Whately, Easements, 32; Washburn Easements, 34; *Holmes v. Sellars*, 3 Lev. 305; *Brewster v. Kitchell*, 1 Salk. 198; *Hills v. Miller*, 3 Paige 254; *Watertown v. Cowen*, 4 Paige 510; *Barrow v. Richard*, 8 Paige 351; American Notes to 1 Smith, L.C. 143. Domat, §1017, copying from the Institutes,
(13) says, that "services are most commonly settled by covenants." Indeed, it is difficult to conceive how, otherwise than by covenants, a servitude consisting in an act to be done by the owner of the servient land, can be created: *e. g.* the payment of a rent, or, as in this case, a contribution to repairs: *Blount v. Harvey*, 51 N.C. 186, is not opposed to this principle. All that was there held was, that, considering the nature of the matter contracted for, the parties intended only a personal covenant, and not the grant of an easement.

In the case now before us, we think there can be no room for a doubt as to the intention of the parties. The rights and obligations which they created, were to be permanently attached to their respective lands; and to be of any value, they must be. Their purposes would be defeated by holding that the obligations rested only in personal covenant, and were subject to be practically extinguished by a sale, or the death of any of the parties.

It may be admitted, however, that the contract operated as a grant, and created mutual easements and servitudes; but this admission would not cover the whole ground, and would still leave it to be determined whether the contract to contribute to the repairs, was a part of the servitude capable of being enforced against an assignee. This is, in fact, the main question; for, although it were held that an upper proprietor has, by the contract, the easement of drainage through the lower lands, and a lower one the right to enjoy that drainage, yet, if neither can be compelled to contribute rateably to the repairs of the canal, which must thus be left to depend on the casual and uncertain exigencies of each beneficiary, without any provision for an equitable adjustment of the burden between them, it must be manifest that the intentions of the parties, as well as the useful results of their agreement, will be mainly defeated.

With a bare reference to the authorities collected in the notes to

Spencer's case, 1 Smith L. C., it may be assumed, that in England a covenant like this, made by a lessee to a lessor, (14) would run with the lands, and bind the assigns of the lessee; and, although we are not aware of any English case precisely deciding that, in case it were made by a grantee or owner in fee, it would not do so, yet the high authority of Mr. Smith, and of his American editors, and of other recent expressions of judicial opinions, is in that direction. If, however, instead of submitting implicitly to what seems the weight of opinion, we venture to inquire why such a covenant should be valid in the case of a lessee, and not in that of an owner in fee, we think it will be found either that the reasons have no weight, or are inapplicable to a case like this. In the first place, it is said that the covenant binds the assigns of a lessee, because there is a privity of estate between them and the lessor, who is the covenantee, and none in the other cases. But this, we submit, is not giving a reason for the difference, but only stating the rule in other terms: That where there is a reversion, the covenant will run, and where there is none, it will not. In Pennsylvania, (where it is said that the statute *quia emptores,* forbidding subinfendation, has never been in force, and where consequently on every grant in fee there is a possibility of reverter by escheat,) on that ground covenants by owners in fee run with the land, as they do when by lessees: Am. notes to *Spencer's* case, *ubi sup.* This shows that the reason for the rule which founds it on privity of estate, is arbitrary, and not a rule of reason, and may be dismissed as insufficient.

In Mr. Smith's note to *Spencer's* case, 1 Smith L. C. 31 a. 35, 38, the rule is defended on the ground of the inconvenience which would result to the assignee, who might find himself liable for the execution of covenants of whose existence he was ignorant: and Lord Chancellor Brougham, in *Keppel v. Bailey,* 2 Myl. and K. 517, (8 Cond. Eng. Ch. Rep. 111), while he refutes the idea that such a covenant is illegal because it tends to create a perpetuity, thinks that "great detriment would arise and much confusion of rights, if parties were allowed to invent new modes of holding and (15) enjoying real property, and to impress upon their lands and tenements a peculiar character which should follow them into all hands, however remote. Every close, every messuage, might thus be held in a several fashion, and it would hardly be possible to know what rights the acquisition of any parcel conferred, or what obligations it imposed. The right of way or of common is of a public, as well as of a simple nature, and no one who sees the premises can be ignorant of what all the vicinage knows. But if one man may bind his messuage and land to take lime from a particular kiln, another

may bind his to take coals from a certain pit, while a third may load his property with further obligations to employ one blacksmith's forge, etc., etc."

It must be admitted that there is some weight both in the reason of Mr. Smith, and in those of the Chancellor. Mr. Smith's, however, has less weight in this State, where all deeds affecting real property are required to be registered, than in England. In this case, also, the nature of the covenant is such as almost to imply notice to an assignee of the lands: the easement is apparent and might not unfairly be held to put an assignee on inquiry as to the covenant which qualifies and regulates it. It is not easy to see why both the objections are not as applicable to a covenant by a lessee as by the owner of a fee. It is not anywhere said that the covenant of a lessee must necessarily be contained in the lease, and if it were in a separate instrument, it might be as much unknown to an assignee of the lease, as a covenant by an owner in fee might be to his assignee. In either case, and equally in one as in the other, the benefit of the covenant could be released, and the land set free. The inconvenient conditions which the Lord Chancellor supposes might be attached to lands, all materially differ from this, in that they do not arise out of the land burdened, or qualify any apparent easements, but are collateral in their nature.

(16) In this case the easements and servitudes created by the contract are of a character whose utility has long been recognized by the law. Roads and Aqueducts are the two sorts of rural services mentioned in the Digest.

The Revised Code, ch. 40, provides that the owners of upper lying lands may procure, through the Courts, the easement of drainage: it left, however, the whole burden of construction and repair on the upper proprietor. The act of 1868-'69 endeavors to remedy this omission, and provides how these burdens may be adjusted among the parties interested. The end sought to be attained by this contract, is in harmony with the policy of our legislation, and is necessary for the improvement of the level parts of the State. We think that the stipulation respecting repairs, is an essential part of the easement and servitude which the defendant acquired both as a benefit and a burden appurtenant to his lands, and which cannot be separated from it without injustice, and that therefore the covenant runs with the land and binds the defendant. The canal has been cut; the defendant cannot, in the nature of things, release the benefits which he acquired; the land cannot be returned to its former condition, and the maxim applies *qui sentit commodum, debet sentire et onus.* This is illustrated by *Rex v. Inhab. Kent,* 13 East 220, where a corporation, which had been allowed to cut a canal across a highway, was

held bound to the repair of a bridge over it; and our legislation, by which owners of land cutting ditches through a highway, are bound to maintain bridges over them, is analogous: Rev. Code, ch. 101, § 24.

It seems to me that these observations furnish an answer to the reasons alleged as preventing an owner in fee from subjecting his land to a burden *of this sort.* I also venture to differ from Mr. Smith as to the construction of the cases of *Brewster v. Kitchell,* 12 Mod. 166, *Holmes v. Buckley,* 1 Eq. Ab. 27, cited by him: to these may be added *Barclay v. Raine,* 1 S. and Stu. 449. These cases, it seems to me, support the argument for the plaintiffs in the present case, and by properly distinguishing the sorts of servitudes, may be (17) reconciled with the reasoning of the Chnacellor in *Keppel v. Bailey.*

This decision is limited to cases in principle like this: where the intent to create an easement is clear, where the easement is apparent, and where the covenant is consistent with public policy, and so qualifies or regulates the mode of enjoying the easement, that if it be disregarded, the easement created will be substantially different from that intended. How it would be in a different case, we do not undertake to say.

Demurrer sustained. Judgment for defendant.

Per curiam.

Judgment reversed.

Cited: Parham v. Green, 64 N.C. 438; *School Comm. v. Kesler,* 67 N.C. 447; *Sc.,* 70 N.C. 634; *Busbee v. Comrs.,* 93 N.C. 147; *Puitt v. Comrs.,* 94 N.C. 717; *Herring v. Lumber Co.,* 163 N.C. 486; *Parrott v. R. R.,* 165 N.C. 300, 316; *Ring v. Mayberry,* 168 N.C. 565; *Davis v. Robinson,* 189 N.C. 600; *Brick Co. v. Hodgin,* 190 N.C. 585; *Walker v. Phelps,* 202 N.C. 349; *Waldrop v. Brevard,* 233 N.C. 30; *Borders v. Yarborough,* 237 N.C. 542; *Stephens Co. v. Lisk,* 240 N.C. 292.

E. RANSOM v. W. & N. McCLEES, AND OTHERS.

A creditor of one deceased, by note, (there being no other debt of equal or higher dignity) became purchaser at a sale by the administratrix, and gave bond on that account (in an amount less than that of his claim), and this bond constituted the whole assets of the estate; after the bond became due, the administratrix, who, with her sureties, was then insolvent, assigned it by endorsment, for value, to one who was to a small amount, creditor of the estate by account. *Held*, that the creditor by note was entitled to bring in his debt, by a counterclaim, against an action upon his bond, whether by the administratrix or her assignee.

Arguendo: It seems that, under the present Code, his right would be the same, even if the administratrix had not been insolvent.

Under the present Code, if a demurrer by the defendant be overruled, judgment is to be given as if no defence had been made (§§ 217 and 243), unless the defendant obtain leave to plead over (§ 131).

If a party answer and also demur *to the same cause of action*, the answer overrules the demurrer; but pleadings in which a party *answers to some and demurs to others of the allegations made in support of any one cause of action*, are erroneous: Section 96 of the Code applies only where a complaint or answer contains several causes of action or grounds of defence.

A parol agreement by an administrator, that if a certain creditor will pay costs, etc., the former will allow his claim as a set-off against a debt due to the administrator upon a purchase of the assets after the death of the deceased, is void under the Statute of Frauds.

A verdict "that one note shall off-set the other," where the defendant's note is the larger, is a verdict for the defendant.

A Judge is not bound to take for granted (at the suggestion of counsel, based upon the form of the verdict) that the jury did not understand his instructions, and therefore to repeat them.

ACTION for money, and Counterclaim by defendant, tried
(18) before *Jones, J.*, at Fall Term 1869, of TYRRELL Court.

The plaintiff, as assignee, held a note executed by the defendants. This action is upon such note. The defendants, W. and N. McClees, held a note on one William T. Dillin, as endorser, which note, with interest, exceeded the amount of the note sued on. Dillin died intestate in 1865, and his widow, Mary Dillin, another defendant, is his administratrix. After exhausting the personal estate, the administratrix obtained an order to sell the interest of her intestate in a tract of land. At the sale, the defendants, W. & N. McClees, became the purchasers, and executed the note sued on, for the price, with the other defendant as surety. The note held by the defendants is the only debt of the intestate having priority over debts by open account. The plaintiff was a creditor on open account for $90, and

took the assignment of the administratrix, for valuable consideration, some time after the note was due. The administratrix and her sureties are insolvent. The defendants made their note the subject of a *Counterclaim;* and to various parts of this, the plaintiff either answered or demurred.

The plaintiff excepted to the following passages in the charge of the Judge, viz:

1. "That the claim set up by the defendant, was not a set-off at law, but that if the Administratrix, after the maturity of the note sued upon, agreed with the defendants that the two bonds should be discharged, each by the other, then, in equity, the defendant's right attached and followed the bond sued upon, into (19) the hands of any subsequent holder."

2. "That if the plaintiff's claim upon the estate, was *an account,* and he knew (1) that the bond now sued upon was all of the assets of the estate, (2) that the bond due to the defendants was in existence, and (3) that the administratrix and her sureties were insolvent; and thereupon bought of the administratrix the bond now sued upon in payment of his account, he became privy to the misapplication of assets made by the administratrix, and the transfer of the bond was void as to the defendants."

He also excepted, because that, after the jury came in and rendered a verdict, "That one bond should off-set the other," the Judge declined to repeat his instructions to them, although the plaintiff's counsel had suggested that the form of their verdict showed that they had mistaken their province—which was, *the facts,* and not *the law,* of the case, and had no clear idea of what they were to find; and that the Judge had told the jury, thereupon, that they must find for the plaintiff or for the defendant.

Verdict and judgment for the defendant, and appeal by the plaintiff.

Collins for the appellant.
W. A. Moore contra.

PEARSON, C.J. (After stating the facts as above.) Relieving the case from the many useless allegations with which it is encumbered, and the intricacies of pleading, and "obscurity and confusion" caused by argumentative pleading, and by an attempt to follow the "new mode of procedure," with which neither the Judges nor the members of the bar have as yet become familiar, and putting it solely on its merits, it amounts to what is stated above.

The question is, ought the note of the intestate to be allowed as

an equitable set-off, or counterclaim, so as to satisfy the note
(20) sued on? Under the ruling of his Honor, the jury found for the defendant.

The note was assigned to the plaintiff after maturity, so he is fixed with notice, and took it subject to any set-off or other drawback the defendants were entitled to as against the assignor. In other words, he stands in the shoes of Mary Dillin. The note in the hands of Mary Dillin, was assets, and ought, in the due course of administration, to have been applied by her to the discharge of the note held by the defendants. According to the old mode of procedure, the defendants could have made no defence to the action, but could have maintained an action against her on the note of the intestate, fixed her with assets by reason of the note sued on, and taken judgment. Her insolvency and the insolvency of her sureties, raised an equity, and without suing at law (for that doctrine is confined to equitable *fi. fas.)* the defendants could have confessed judgment in her action, and maintained a bill, to have the judgment satisfied by the note of the intestate, and in the meantime for an injunction, on the ground, that their remedy at law was inadequate by reason of the insolvency, and should she force the money out of the defendants the injury would be irreparable.

The new mode of procedure dispenses with this circuity of action, and allows the equity to be set up against Mary Dillin, or her assignee with notice, as a bar to the action, without going into another court for relief. So, upon the merits, we are satisfied that the defendants were entitled to judgment.

It remains to enquire, is there any error on the record which entitles the plaintiff to a *venire de novo,* although the Court and jury arrived at a correct conclusion. His Honor very properly omitted to notice the several allegations of the defendants touching the irregularity of the order of sale, etc., and also the several demurrers put in by the plaintiff. A defendant is to answer or demur; if he answers,
the plaintiff is to reply or demur, but is not at liberty to do
(21) both at the same time: C.C.P. § 94. The effect of thus pleading, is that the answer or reply waives the demurrer, and the case stands open to no objection, except for the want of jurisdiction, or that "the complaint does not state facts sufficient to constitute a cause of action:" § 99. The effect of a demurrer at law under the old mode of pleading, is to admit the facts *for the purposes of the case,* so that if the demurrer be overruled, there is judgment for the opposite party. In equity practice the effect of a demurrer, is to admit the facts *for the purpose of the argument,* and if the demurrer be overruled, the defendant, as of course, puts in an answer. As the

Code of Civil Procedure rejects pleadings at law, and adopts those in equity, by demurrer and answer, we were at first inclined to think that after a demurrer is overruled, the party may of course answer or reply; but we find, on examination, that if a demurrer be overruled the case is open for judgment, as if the party had made no defence, unless he obtains leave to amend his pleadings by putting in an answer or reply: C.C.P. § 131. "After the decision of a demurrer, the Judge may, in his discretion, if it appear that the demurrer was interposed in good faith, allow the party to plead over, upon such terms as may be just."

In our case, beside the objection that the plaintiff was not at liberty both to demur and reply, there is the further objection, that he replies to many of the allegations, and demurs to others, all of the allegations being set out in support of the same counter-claim, there being but one. Section 96, C.C.P., relied on by plaintiff's counsel for this mode of pleading, does not sustain it: "It may be taken to the whole complaint, or to any of the alleged causes of action stated therein." This clearly refers to a complaint containing several causes of action, or an answer taking two distinct grounds.

His Honor might also have omitted to notice the allegations and evidence, in regard to the arrangement proposed by the defendants to the administratrix before she had assigned the (22) note, viz: that they would pay the costs of the petition to sell the land, provided she would allow the one note to satisfy the other; for, the arrangement not being in writing, did not bind her, and the true and only question was, whether the defendants could support the counterclaim, in spite of her, against an assignee with notice, without reference to this arrangement. So the error in regard to it was immaterial and beside the merits of the case.

This disposes of article of Appeal, No. 1.

The plaintiff has no ground to complain of the charge set out in article of Appeal, No. 2. On the contrary, the defendant had ground to complain, for we have seen that to make out his equity, it was not necessary to fix the plaintiff with knowledge that the bond sued on, was all of the assets of the estate, or with knowledge that the administratrix and her sureties were insolvent. It was enough if in fact there were no other assets, and in fact there was this insolvency; for the plaintiff stood in the shoes of Mary Dillin and took the note subject to the rights of the defendants against her.

It would seem under the new mode of procedure an averment of insolvency is not necessary, that averment in a bill in equity, being made to induce the Court to take jurisdiction, on the ground that the remedy at law is inadequate. But whether an administrator be in-

solvent or solvent, he ought not to force a man to pay money, if it will be the duty of the administrator to pay it back the instant he receives it. This "right may be enforced" as a counterclaim, which is a beneficial extension of the principle of set-off.

It may appear, at first blush, to be hard measure to put the plaintiff in the shoes of his assignor; but the note being over due, was enough to put him on inquiry. By calling on the defendants before he bought the note, he would have been informed of their gorund for not paying it, if, in fact, he did not know it before. So, carrying out the principle, the plaintiff would have been entitled to judgment for the amount, if any, that the administratrix was entitled to retain for costs and charges of administration, had he made the necessary averment to raise the point; but he chose to go for the whole or nothing, and must abide by his election.

(23)

There is no ground to support article of Appeal, No. 3. When the jury announced that they found that "one note should off-set the other," it was in substance a verdict for the defendant, and his Honor might well have instructed the Clerk so to enter it.

And, secondly, the Judge was not bound to take it for granted, that the jury did not understand him, and for that reason, repeat his instructions.

There is no error.

Per curiam.

Judgment affirmed.

Cited: Love v. Comrs., 64 N.C. 708; *Merwin v. Ballard*, 65 N.C. 170; *McLean v. Leach*, 68 N.C. 98; *Pegram v. Armstrong*, 82 N.C. 332; *Currie v. McNeill*, 83 N.C. 179; *Finch v. Baskerville*, 85 N.C. 207; *Barbee v. Green*, 86 N.C. 162; *Poston v. Rose*, 87 N.C. 283; *Young v. Kennedy*, 95 N.C. 269; *Speights v. Jenkins*, 99 N.C. 144; *Coward v. Meyers*, 99 N.C. 200; *Conant v. Barnard*, 103 N.C. 320; *Moseley v. Johnson*, 144 N.C. 273; *Rosenbacher v. Martin*, 170 N.C. 237; *Goldsboro v. Supply Co.*, 200 N.C. 407; *Schnibben v. Ballard & Ballard Co.*, 210 N.C. 193; *In re Miller*, 217 N.C. 137; *Duke v. Campbell*, 233 N.C. 265.

THE STATE v. CHARLES NEWBY.

A special verdict in an indictment for Malicious mischief, which omits to find that the act was done *with malice towards the owner* of the property injured, is equivalent to an acquittal.

MALICIOUS Mischief, tried before *Pool, J.*, at Spring Term 1869, of PERQUIMANS Court.

A special verdict found that the *ox* in question, was killed by the defendant in December 1866, in a field belonging to the defendant, within which no crop was growing; that the cattle of the plaintiff were frequently in such field, and plaintiff had been previously notified by the defendant of that fact; that the fence was not a *lawful* one; that the defendant fired upon the ox from the door of his own house, and as soon as he saw it; and that after killing it (24) he sent word to its owner, the prosecutor.

In regard to the point of *malice*, the solicitor submitted to the Court that, as the killing was in the winter, when there was no crop upon the ground, the law implied malice.

His Honor, however, directed a verdict of Not guilty to be entered, and the Solicitor appealed.

Attorney-General for the State.

Absence of a reasonable influential and apparent motive at the time, implies malice. The principle governing cases of homicide without legal justification, seems applicable. See *State v. Landreth,* 2nd Law Repos. 446; *State v. Robinson,* 20 N.C. 130.

F. H. Busbee contra.

The ruling below is correct. 4 Bl. Com. 343; *State v. Robinson,* 20 N.C. 130; Wheaton's Cr. Law, § 2011; *State v. Latham,* 35 N.C. 33; *Kirkpatrick v. The People,* 5 Denio 277; *State v. Jackson,* 34 N.C. 329.

READE, J. In the spoilation or destruction of property, malice towards the owner, must be the inducement, in order to constitute the crime of malicious mischief at common law.

This was not controverted by the Attorney-general, but he insisted that the fact of killing the ox being found, malice must be inferred, just as in homicide. The difference is that homicide is a crime *per se*, and excuse or justification must come from the defence, or appear in the cause; but to kill an ox is not so; and there-

fore malice toward the owner must be found. It was not found in this case, and therefore the defendant was entitled to an ac-
(25) quittal. *State v. Jackson,* 34 N.C. 329; *State v. Latham,* 35 N.C. 33.

There is no error. Let this be certified.

Per curiam.

No error.

A. A. McKEITHAN v. H. G. TERRY.

Specific liens previously obtained (as, *here,* by levy) are not divested by the provision for a Homestead in the Constitution:

Therefore, where a levy upon land was made in December 1867, and, upon a *Ven. Ex.,* issued in 1869, the Sheriff returned "no goods, chattels, lands or tenements, to be found in my County, over the Homestead."

Held, that he was liable to be amerced for an insufficient return.

MOTION to amerce a Sheriff, made before *Buxton, J.,* at Spring Term 1869, of CUMBERLAND Court.

The facts were, that the plaintiff at Spring Term 1867, had obtained judgment against one McLeod, and that a *fi. fa,* issuing thereupon, had, on the 27th day of December 1867, been duly levied by the Sheriff of Richmond upon certain lands. In February 1869, a *ven. ex.* issued, to sell the land, and upon it the Sheriff returned, "no goods, chattels, lands or tenements to be found in my County, over the Homestead."

His Honor declined to grant the order, and the plaintiff appealed.

Hinsdale for the appellant.

1. The Homestead provision cannot affect a specific lien, which constitutes a vested right. *Hawthorne v. Calef,* 2 Wall 10;
(26) *Bronson v. Kinzie,* 1 How. 311; 8 Sm. and Mars. 9.

2. The *return* here, therefore, is within the provisions of Rev. Code, c. 105, § 17. *Lindsay v. Rowland,* 27 N.C. 385; *Buckley v. Hampton,* 23 N.C. 322.

W. McL. McKay contra.

READE, J. The State Constitution provides for the exemption of a Homestead worth $1,000, and of personal property worth $500, from execution sale for debt. We have decided that this exemption applies to debts existing before the adoption of the Constitution. *Hill v. Kessler,* 63 N.C. 437.

But in the case under consideration the execution was levied before the adoption of the Constitution: there was, therefore, a specific lien, a vested right, which it was not the purpose of the Constitution to destroy, if indeed it had the power. Mere indebtedness is not a lien upon any property, nor does the homestead destroy the creditor's property in the claim, and therefore does not *necessarily* impair the obligation of the contract. But it is otherwise where the creditor has acquired a specific lien, as in the case under consideration. It was the duty of the Sheriff, under the *ven. ex.* in his hands, to sell the land which had been levied on, and return the money into Court; and his return of "no goods and chattels, etc., over the homestead" was not a "due return," and he was therefore liable to amercement.

It was error in His Honor to refuse the rule moved for by the plaintiff.

This will be certified.

Per curiam.

Judgment reversed.

Cited: Thompson v. Berry, 64 N.C. 80; *Sluder v. Rogers,* 64 N.C. 290; *Horton v. McCall,* 66 N.C. 163; *Garrett v. Chesire,* 69 N.C. 400; *Keener v. Finger,* 70 N.C. 45; *Martin v. Meredith,* 71 N.C. 215; *Wilson v. Sparks,* 72 N.C. 212; *Edwards v. Kearsey,* 74 N.C. 243; *Pemberton v. McRae,* 75 N.C. 501; *Maynard v. Moore,* 76 N.C. 162; *James v. West,* 76 N.C. 291; *Watkins v. Overby,* 83 N.C. 167; *Jones v. Britton,* 102 N.C. 192; *Stern v. Lee,* 115 N.C. 433; *Cowen v. Withrow,* 116 N.C. 781.

(27)

ALEXANDER JOHNSON v. EDWARD L. WINSLOW.

The first Section of the Act of 1868-'69, c. 86, (March 22d 1869,) requiring writs of summons before Magistrates upon contracts entered into before May 1st 1865, to be returnable at the end of ninety days, is unconstitutional and void, as plainly intending to hinder a certain class of creditors, and therefore, impairing the obligation of a class of contracts.

JOHNSON *v.* WINSLOW.

ACTION for money, begun before a magistrate, and tried by *Buxton, J.*, upon appeal, at Spring Term 1869, of CUMBERLAND Court.

The note upon which the action was founded, was given February 4th 1860. The summons was issued May 15th 1869, returnable on the 29th of the same month; on the last mentioned day the defendant moved to amend the writ so as to make it returnable (in accordance with the recent act of March 22d 1869, in relation to Proceedings before Magistrates) at the end of ninety days from the day on which it was issued. The Magistrate made an order accordingly, and the plaintiff appealed to the Superior Court.

It was agreed by the parties that if his Honor should affirm the judgment below, judgment should be given as of non-suit; and if otherwise, judgment should be entered for the debt.

Therefore his Honor, considering the provision of the act of 22d March 1869, to be unconstitutional, gave judgment in favor of the plaintiff for the debt, and costs.

The defendant appealed to the Supreme Court.

McRae for the appellant.

Hinsdale, contra, cited *Sturges v. Crowninshield,* 4 Wheat. 206; *Green v. Biddle,* 8 *Ib.* 1; *Mason v. Hale,* 12 *Ib.* 370; *Ogden v. Saunders, Ib.* 233; *Bronson v. Kinzie,* 1 How. 311; *McCracken v. Hayward,* 2 *Ib.* 608; *Planters' Bank v. Sharp,* 6 *Ib.* 328;
(28) *Curran v. Arkansas,* 15 *Ib.* 319, *Quackenbush v. Dank,* 1 Coms. (N.Y.) 129, Story, Const. § 1379; *Jones v. Crittenden,* 4 N.C. 385; *Barnes v. Barnes,* 53 N.C. 366; *Jacobs v. Smallwood,* 63 N.C. 112.

READE, J. A contract without a remedy in the Courts to enforce it, amounts to nothing; and therefore the law must furnish a remedy. But it need not furnish any *particular* remedy. The remedy may be changed from time to time for the convenience of the courts, and for the purposes of justice, and such change does not impair the obligation of contracts. A change of remedy, however, not for those purposes but for the favor of one party at the expense of the other, and which does in fact, materially and injuriously affect the rights of a party, impairs the obligation of the contract and is void. From the absence of all reason for the change in time of the return of the summons, from the unusually long time allowed for the return, and from the discrimination in the class of debts to which the change is allowed, it is apparent that the purpose here was, unnecessarily to delay the plaintiff in the prosecution of his right, and the effect is to impair the obligation of the contract; and therefore the first sec-

tion of the eighty-sixth chapter of the Acts of (March 22nd) 1869, is void: *Jacobs v. Smallwood,* 63 N.C. 112.

There is no error.

RODMAN, J. I should dissent from the opinion of the Court in this case, upon the reasoning which I endeavored to maintain in *Jacobs v. Smallwood,* as I think the control over the remedy belongs exclusively to the State; but I yield to the authority of the decision in that case.

Per Curiam.

Judgment affirmed.

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(29)

NANCY J. ALSPAUGH, GUARD'N v. L. H. JONES AND OTHERS.

Whether one who has assumed to act as Attorney for another, was authorized to do so, is, under proper instructions from the Court, *a question of fact* for the jury.

Where a party filled up a writ for himself in his character as guardian, as plaintiff, and handed it to an officer to be served, but, before it was executed, procured another person to be substituted in his place as guardian, and endorsed the note in question to him:

Held, that an Attorney, who usually had *taken judgments* for the former guardian, and for that reason, after the writ had been executed, and before it had been returned (July 1862,) *instructed the Sheriff to receive Confederate and other currency in payment of the amount specified upon its face,* was not authorized so to do.

DEBT, tried before *Mitchell, J.,* at Fall Term 1869, of ALEXANDER Court.

The plaintiff declared upon a note payable by the defendants, originally to one Carson, and by him endorsed to one Marshall, and by the latter to the plaintiff—all as guardians of the minor heirs of one Emily Alspaugh, deceased, being for $226.90.

The defendants relied upon the plea of *payment,* and in support of it showed the following facts:

Previously to the first Monday of March 1862, Carson was guardian of the minor heirs aforesaid, and on the 15th of February 1862, he filled up and handed to the Sheriff a writ for the same cause of action as that in the present suit, returnable to Fall Term 1862, of Alexander Superior Court.

On the 19th of July, the said officer executed said writ. Immediately, one of the defendants insisted on paying the principal, interest and cost, as demanded by the writ, in currency, a considerable amount of which consisted of N. C. Bank notes but a greater amount was in Confederate currency. The officer doubted his authority to receive payment. Thereupon they called on an Attorney residing in Taylorsville, for his opinion whether the officer had authority to collect, and give a discharge for money demanded by the writ; he instructed them that he had the power and authority
(30) to do so, and directed the officer to receive it, which he did in such currency as above mentioned, and the only evidence as to the value of such currency at that time, was that it was received by some, and by others was refused. The Sheriff, after receiving the amount of principal, interest and costs in the said currency, endorsed for his return on writ, as follows: "July 19 1862, satisfied in full," etc. The Attorney in question had usually prosecuted suits brought by Mr. Carson to collect the moneys of his wards. In doing this, the only service required of him was to take judgments. The collections were actually made under the directions of Mr. Carson, and the money received by him. In regard to the writ issued by Carson, February 1862, he at first declined to prosecute it, but afterwards, and before the writ was issued, he undertook to attend to it, as to other suits of like nature. When the payment was made to the officer, the Attorney was present. The initials of his name made by himself, were endorsed on the writ, before the payment was made; but he had no recollection that he had ever before seen the writ. The note was not present, but he forthwith received from the officer, and paid into the Clerk's office, the currency received, and it remained there uncalled for, as far as he knows or believes, for two years, when he withdrew a part of it for his own use, and the remainder suffered the fate of all Confederate currency. The Clerk mentioned to some of the parties interested, that those notes were thus deposited, but does not recollect when, or to whom.

It was further shown in the case, that on the first Monday of March 1862, Mr. Carson procured the appointment of G. Marshall, uncle of his wards, to their guardianship, and at that time he endorsed over and assigned the said note, and all notes of his wards, to said Marshall, and delivered them over to him. He never afterwards had possession of any of them, and had no longer the management of the suit brought on said note, or any right to collect it. Marshall was informed he had issued a writ for its collection, but it did
(31) not appear that he, Marshall, knew that any counsel had been retained to prosecute it. At the time of the alleged payment,

the said note was in the possession of Marshall, at his residence, a considerable distance from the town of Taylorsville, and there was no proof tending to show when he received notice of the alleged payment.

The counsel for plaintiff requested the Court to instruct the jury, that the evidence did not show that the Attorney was an attorney and agent of the plaintiff, with such authority and power as to ratify by his direction or assent, the collection of the money demanded by the writ.

The Court refused the instructions called for; but instructed the jury, that the collection and receipt of the notes and currency by the officer, under the instructions as set forth in the evidence, was a discharge of the note, and the defendants were entitled to their verdict.

The plaintiff excepted; Verdict for the defendants; Rule, etc.; Judgment, and Appeal by the plaintiff.

W. P. Caldwell for the appellant.
Boyden & Bailey contra.

SETTLE, J. Two questions are presented for our consideration.

1. Was the attorney ever empowered to act as attorney in the suit brought by Carson, and if he was, how far did his authority extend?

It was contended upon the argument that the effect of the initials of the attorney's name being marked on the back of the writ as attorney, amount in law to instructions to him to receive the money demanded by the writ. His Honor seems to have adopted this view, for he instructed the jury "that the collection and receipt of the notes and currency by the officer, under the instruction of the attorney, as set forth in the evidence, was a discharge of the note." The case states that "the attorney had usually prose- (32) cuted suits, brought by Mr. Carson to collect the moneys of his wards. In doing this, the only service required of him, was to take judgments. The collections were actually made under the directions of Mr. Carson, and the money received by him."

His Honor should have left it to the jury to say, whether or not he was the attorney of the plaintiff. And if he was, it was for them to find how far his authority extended; whether to sue for demand and receive the money sought to be recovered by the suit, or only to take judgment, leaving the business of collecting to Carson.

2. Conceding that he had been fully empowered by Carson to

sue for, demand and receive whatever might be due on the note in question, had that power been revoked?

On the 15th day of February 1862, Carson, who then held the note as guardian, filled up and handed the writ to the Deputy sheriff. Afterwards, to-wit, on the first Monday in March 1862, he procured the appointment of one Marshall, uncle of his wards, to be their guardian, and at that time endorsed and assigned the said note and all notes of his wards to said Marshall, and delivered them to him. The writ was not executed upon the defendants until the 19th day of July following, and then for the first time the attorney marked the initials of his name upon the writ, and assumed, contrary to the scope of the authority theretofore exercised by him in the management of Carson's business, to direct and superintend the collection of this debt, and in doing so, took in payment thereof depreciated currency.

Even the power of Carson (upon which the authority in question is said to rest) to direct and control this debt had ceased, having passed to Marshall, months before the receipt by the Deputy Sheriff.

There was therefore no privity between the attorney and Marshall, who then held the note as guardian, and was many miles
(33) away in total ignorance of all that was passing to his prejudice.

Let it be certified that there is error.

Per curiam.

Venire de novo.

Cited: Bank v. McEwen, 160 N.C. 422.

JANE D. HOUSTON v. JOHN M. POTTS.

The plaintiff, a resident of this State, holding a note as guardian, against a person living in South Carolina, went to the house of her debtor in 1861, to collect the money, but whilst there was induced by this debtor to take a new note, upon which he promised that the defendant, his brother, who resided in North Carolina, would become surety; and it was also agreed that South Carolina interest (7 per cent.) should be paid. Afterwards, in pursuance of this agreement, the debtor executed a note in the ordinary form, without express stipulation for interest, and the defendant also executed it as surety, in this State; upon its being presented by the debtor to the plaintiff, in this State, she reminded him of his agreement as to interest, whereupon, in order to give effect to that, he prefixed to the note,

"Pleasant Valley, S. C.:" Suit having been brought against the surety, he pleaded *Usury:*

Held, that as the contract had been made in South Carolina, the stipulation for *seven* per cent. interest was not unlawful.

Also, that the prefixing of the words "Pleasant Valley, S. C.," did not materially alter the note.

DEBT upon a bond, tried before *Logan, J.*, at the January Special Term 1870, of MECKLENBURG Court.

The defendant pleaded, General issue, Usury, and That the agreement between the principal in the bond and the plaintiff was a fraud upon himself as surety.

Plaintiff introduced the bond as follows:

$900. PLEASANT VALLEY, S. C.

One day after date we or either of us promise to pay to Jane D. Houston or order, nine hundred dollars, for value received, as witness our hands and seals. (34)

R. C. POTTS [SEAL.]

JOHN M. POTTS [SEAL.]

The execution of the same by John M. Potts was also proved.

Jane D. Houston, the plaintiff, testified that she was the guardian of her two infant children, Abner and Mary J. Houston; and in that capacity held a note on R. C. Potts, the principal in the present bond; that she resided in Union county, near the South Carolina line, and said R. C. Potts resided between two or three miles from her, in Lancaster district, S. C.; that shortly before the present bond was given, she went to the house of said R. C. Potts, and requested payment of the note. He replied that if he could make collections he would come over and settle in a few days; but if he could not, he would give her a new note, with his brother, the present defendant, as surety. To this plaintiff assented, upon the agreement between them, that said R. C. Potts would secure to her South Carolina interest. In a few days thereafter, R. C. Potts brought to her, at her house in Union county, the note in suit, except that the words, "Pleasant Valley, S. C.," were not upon it; that when the note was presented to her, she stated that it was all right, except she was to have South Carolina interest, and that should be specified in the note. R. C. Potts said it was not too late yet to make it so, and took up the pen and wrote at the top of the note, and as a part of it, the heading, "Pleasant Valley, S. C." She thereupon took the bond, and gave a credit on the guardian note for $900—it being agreed that the small balance should be settled by an account due from plaintiff to said R. C. Potts.

The defendant introduced the Statute of South Carolina, fixing the rate of interest in that State as seven per cent.

R. C. Potts, the principal in the bond, testified that plaintiff called upon him for a settlement of the note due to her as guardian,
(35) but whether it was at his house or hers, he did not now recollect; that he promised to pay if he could make collections to do so; but if not, as his father was dead, he would give her a new note, with his brother John as surety. To which plaintiff replied, "But Robert, if I do that you must allow me South Carolina interest." To which witness agreed; that witness, a few days after, came up to Mecklenburg County, N. C., where the defendant, John M. Potts, then resided, and still resides, and got his signature to the bond as it was then drawn, without the heading, "Pleasant Valley, S. C.;" that he did not mention anything to him about the 7 per cent. interest, or in any way allude to it; that he took the bond thus signed by himself and defendant, to plaintiff, who, upon looking at it, remarked, "Robert you promised me South Carolina interest," and thereupon witness wrote the caption upon the note, to effectuate that purpose. Witness further testified that he had no authority from the defendant to add the heading to the bond, nor did he communicate to him that he had so added it, until a short time before this suit was instituted; witness could not recollect whether he wrote the body of the present bond, or signed it, in South or North Carolina, and it did not enter his mind, nor did he suppost it entered the mind of the plaintiff, to evade the usury laws.

John M. Potts, the defendant, testified that his brother brought the note to him, in Mecklenburg County, N. C., where he resided, and that he signed it; that he cannot state from his own recollection, that the words "Pleasant Valley, S. C.," were or were not upon it at the time; but that he had no idea he was signing a 7 per cent. note; that he was a magistrate at the time, and does not believe he would have signed it, especially as his brother as well as himself, at that time, were men of large means, and the money could have been borrowed without difficulty, in this county at six per cent.; he would not have hesitated to sign a bond much larger than this for
(36) his brother at that time. He also testified that he had no idea that any alterations or addition had been made upon the bond, until shortly before this suit was brought, and his brother, R. C. Potts, then told him about it.

In obedience to an intimation from the Court, the plaintiff submitted to a non-suit, and appealed.

Wilson and Dowd for the appellant.
R. Barringer contra.

Where a bill is accepted generally, and the *drawer,* without the consent of acceptor, adds words making it payable, at a *particular place,* this is a *material* alteration and discharges acceptor. *Cowie v. Halsall,* 3 Eng. Com. Law 584, 3 Starkie 36, 4 B. & Ald. 197. Adding rate of interest in the margin, is a material alteration, and avoids note. *Warrington v. Early,* 75 Eng. C.L. 763, 2 E. & B. 763. Smith's Leading Cases, 1 vol. 489 *Master v. Miller,* and notes. The present case is directly the reverse of the case *Arrington v. Gee,* 27 N.C. 591, and the principle in that case, makes the present contract usurious. The money had previously been borrowed in this State, and the contract between the parties, was only for a renewal of the security, and to substitute a new note in the place of the old one. Also see Broom's Comment, 376.

SETTLE, J. The plaintiff, Jane D. Houston, went to the house of the principal, R. C. Potts, who resided in the State of South Carolina, for the purpose of collecting money then due from him to her wards. The said principal being unprepared to pay the money at that time, proposed to execute his bond to the plaintiff, with his brother J. M. Potts, who resided in North Carolina, as surety. To this the plaintiff assented, upon the agreement between them that the said R. C. Potts would secure to her South Carolina interest, to-
wit,: 7 per cent., which was the legal rate of interest in that (37)
State. In pursuance of this agreement, R. C. Potts came to Mecklenburg County, North Carolina, and obtained the signature of his brother to the bond in question, and offered it to the plaintiff, who reminded him that she was to have "South Carolina interest;" thereupon R. C. Potts wrote the words "Pleasant Valley, So. Ca." at the head of the note, in order to carry out the contract made several days before in South Carolina.

The principal, R. C. Potts, testifies that "it did not enter his mind, nor did he suppose that it entered the mind of the plaintiff, to evade the usury laws." Indeed *he* does not pretend that there was anything in the contract, or conduct of the plaintiff, to warrant the suggestion of fraud. It is evident, from his own testimony, that the other defendant J. M. Potts, signed the bonds as surety for his brother, without regard to the defence which he now attempts to set up, for he cannot state whether the words "Pleasant Valley, So. Ca." were or were not upon the bond at the time he signed it. He states that he and his brother were both men of large means, and that he would not have hesitated to sign a much larger bond for his brother at that time, etc., but that he had no idea he was signing a seven per cent. note, because he was a magistrate and also a man of means,

and could have borrowed money at six per cent. in Mecklenburg.

This reference is made to the testimony of this defendant in order to show its unsatisfactory character, for taking all that he says to be true, it amounts to no defence in this action. He signed as surety for his brother who resided in South Carolina, and it mattered but little with him whether the bond bore 6 or 7 per cent., for he did not expect to pay either amount, as his brother was a man of "large means at that time." But the evidence shows this contract, to which he became surety, to have been made in South Carolina, and in the absence of any stipulations to the contrary, it must be gov-
(38) erned by the *lex loci contractus*, in respect to interest and its other incidents. The addition of the words "Pleasant Valley, So. Ca." in this instance did not vary the terms of the contract. They amount to nothing more than was already implied by law.

Take it that this contract, which had been made before in South Carolina with the express understanding that it was to be governed by the laws of that State, had never been reduced to writing until the day on which it was delivered to the plaintiff in North Carolina, still that circumstance would not change the law, or defeat the recovery in this case. So far then as R. C. Potts is concerned, he is clearly bound for South Carolina interest, and when J. M. Potts became his surety in North Carolina, it did not alter the locality of the contract with regard to interest.

The defendant contends that this case is to be distinguished from *Arrington v. Gee*, 27 N.C. 590, as here the money had been previously borrowed in this State, and the contract between the parties was only for a renewal of the security. But it must be borne in mind that the plaintiff went to the domicil of the principal, R. C. Potts, not to renew a debt, but to collect money then due her wards, and while in another State, was induced by that person to enter into a new contract, in which it was stipulated that it was to be governed in respect to interest by the laws of his domicil, thus making assurance doubly sure, by expressly contracting to do what the law already implied.

We consider the case of *Arrington v. Gee, supra*, directly in point, and as the learning on this subject is there collected, we deem it unnecessary to do more than refer to that case, and the authorities upon which it is based.

In this view of the case we have not thought it proper to decide a very interesting question which was pressed upon the argument, to-wit: the effect of our recent statute repealing the usury laws.

His Honor having intimated that he should instruct the jury upon the facts proved (and there appears to be no dispute about

the facts which control this action) that the plaintiff could (39) not recover, she submitted to a non-suit and appealed to this court.

We are of opinion that there is error in the ruling of his Honor. Let this be certified, etc.

Per curiam.

Error.

Cited: Bundy v. Commercial Credit Co., 200 N.C. 517.

LEWIS T. TEAGUE v. JOHN W. PERRY.

A note, given subsequently, in purchase of a Magistrate's judgment which had been won at cards by the payee from the maker, is not void under the statute against *gaming.*

The statute (Rev. Code, c. 51, sec. 2,) which avoids all *judgments, etc.,* for and on account of any money, or property, or thing in action wagered, bet, etc., does not include judgments taken *in invitum,* but only such as are confessed, or taken by consent.

ACTION, for an injunction to stay proceedings, tried by *Tourgee, J.,* at Fall Term 1869, of CHATHAM Court.

The facts were, that in 1860 the defendant, as endorsee of one Dorsett, had recovered judgment before a Magistrate upon a certain note given by the plaintiff to Dorsett; that the plaintiff had appealed from that judgment to the Superior Court of Chatham, and that at Spring Term 1867, no pleas having been entered in the Superior Court, judgment was again given against the plaintiff and one Paggy Teague, his surety for the appeal, and that execution had been taken out, and levied, etc.; also that the note in question had been given by the plaintiff to Dorsett in payment for a magistrate's judgment once in the hands of the plaintiff as constable, which some days before, had been *won at cards* of him by Dorsett.

His Honor having ordered the injunction to be perpetuated, the defendant appealed. (40)

Manning for the appellant.

1. The *judgment* was the thing won, and when delivered it could not have been recovered by Teague, therefore the note he gave in

purchase of it, is binding, and not affected by the statute against *gaming. Hudspeth v. Wilson,* 13 N.C. 372.

2. There is no *equity* here for the plaintiff; his defence against the case at law, was not *equitable,* nor was he deprived of that which he had, by fraud, accident or surprise.

3. The word *judgments,* in the statute against gaming, does not include judgments taken in suits regularly constituted, and in due course of the Court.

He cited also *Stowell v. Guthrie,* 3 N.C. 297; *Hodges v. Pitman,* 4 N.C. 276; *Wood v. Wood,* 7 N.C. 17; *Forest v. Hart, Ib.* 458; *Turner v. Peacock,* 13 N.C. 303; *Webb v. Fulchire,* 25 N.C. 485; *Jones v. Jones,* 4 N.C. 110.

Phillips & Merrimon contra.

The word *judgments* was inserted in the statute against gaming, in 1856, and therefore previous decisions do not affect our position. The policy is that the *infection* of gaming pursues the transaction and all substitutes for it, to the last moment at which it is necessary to resort to the law for aid.

PEARSON, C.J. We do not concur in the view of the case taken by His Honor.

1. Suppose, for the sake of argument, that the note was given to secure the payment of money won at cards, a judgment *"in invitum"* was taken against L. T. Teague, before a Justice of
(41) the Peace in 1860, from which judgment he appealed, and Peggy Teague, the other plaintiff, became his surety. At Spring Term 1867, judgment was entered against both of them. This put an end to the controversy; and the parties are estopped by record, from now setting up any matter of which they might have taken benefit by way of defence to that action. *"Interest reipublicæ ut sit finis litium"* is a maxim in every system of law. In pleadings by the course of the common law, Lord Coke says, "good matter must be pleaded in due form, apt time and proper order." After judgment the question touching a gaming consideration, was *res adjudicata,* and could not be again presented, except of writ of error.

2. But the note was not given to secure the payment of money won at cards, it was given to secure the price for a judgment on one Emerson. It is true that this judgment had been won at cards, but it had passed to, and became the property of one Dorsett, just as if a horse had been won instead of the judgment. It is settled that money, or a horse, or a judgment, won at cards and actually paid and de-

livered, cannot be recovered back, the game being fairly played. *Hudspeth v. Wilson,* 13 N.C. 372; *Warden v. Plummer,* 49 N.C. 524, takes this as settled, and is put on the ground that the party was *cheated* in the play.

3. Mr. Phillips properly yielded these points, and rested his case on the word "judgment" in the statute, Rev. Code, ch. 51, sec. 2: "All contracts, judgments, conveyances and assurances for and on account of any money, or property, or thing in action, so wagered, bet or staked, shall be void;" insisting that the effect of this provision is to make void *any judgment* rendered on a gaming consideration, and to take it out of the maxim and rule referred to above in reference to *res adjudicata.*

It will be observed that the judgment taken by Perry against the plaintiffs, was not on a note given for a gaming consideration, but for the price of a judgment; so the point does not hit our case. But suppose it does: a construction of the statute by (42) which to give to the introduction of the word "judgments" in connection with the words "contracts, conveyances, and assurances," the effect of making an exception to a settled rule of law, is inadmissible. Had it been the intention to make this exception, and allow solemn judgments of the Courts to be avoided by matter which could have been relied on as a defence to the action, plain and direct words were called for, and would have been used; especially as full operation can be given to the word, by treating it as used in the sense of a judgment confessed, or allowed by consent, in order to secure the payment of money won at cards; like a mortgage, deed of trust or other assurance given for that purpose. The use of the word "judgment" in the sense of a *security given for money,* in the next preceding chapter, ch. 50, sec. 1, in connection with the same words, furnishes a conclusive analogy: "Every gift and conveyance of land, goods, etc., and every bond, suit, *judgment* and *execution* made with intent to defraud creditors shall be void," etc. Here, "judgment" is evidently used in the sense of a judgment confessed, with intent to defraud creditors. There, it is used in the sense of a judgment confessed with intent to secure money won at cards. There is no reason to infer that the word was used in either statute for the purpose of abrogating a well settled and highly beneficial principle of law, by which an end is put to litigation.

There is error.

Per curiam.

Error.

Cited: Farrar v. Staton, 101 N.C. 85.

(43)

R. J. WEST v. J. W. HALL AND OTHERS.

A bond given for the price of a slave sold in 1859, is valid, notwithstanding the public events which have happened since; nor is it affected by the fact that the slave was warranted such *for life.*

DEBT, tried before *Cloud, J.,* at Fall Term 1869, of ROWAN Court.

The plaintiff declared upon a bond for money, in the ordinary form, dated January 31, 1859. The defendant relied upon the pleas of General issue, and Illegal consideration.

Evidence was offered by the defendants, to show that the bond was given in payment of the price of a slave, and that the bill of sale received by the defendant, J. W. Hall, contained a warranty that the slave was such *for life.*

This was excluded by the Court, and the defendant excepted.

Verdict for the plaintiff; Rule, etc.; Judgment, and Appeal by the defendants.

R. A. Caldwell for the appellants.
B. Craige contra.

PEARSON, C.J. There is no error.

It is settled that a contract for the purchase of a slave is not illegal, even when made after the Proclamation of the President, the slave not being under the control of the military forces of the United States: *Harrell v. Watson,* 63 N.C. 454.

In our case the contract, was made in 1859, so the matter is too plain for discussion.

The evidence in regard to the warranty of title, was properly rejected. It did not tend to support any of the pleas. Indeed there was no breach of the warranty. The negro was a "slave for life," and the contract could not, in any way be affected by the event
(44) of the late war, and the abolition of the institution of slavery.

Per curiam.

Judgment affirmed.

NOTE.—In another case at this term, between the same parties, in which N. F. Hall was the principal defendant, the facts and questions were the same; and the same judgment was rendered.

H. C. BOST v. JOSEPH MINGUES.

A person is not justified in killing the hog of another because it has repeatedly broken through his fences, and when killed was within his enclosed premises, into which it had broken immediately before, on being driven out of his corn field.

ACTION, tried before *Cloud, J.*, at Fall Term 1869, of ROWAN Court.

The following is the *case* sent up from below:

The plaintiff sued for the killing of a boar by the defendant.

It was in evidence that plaintiff was the owner of an unmarked, white Chester boar; that about the 1st of Oct. 1868, the boar was missing, and has not been since seen by plaintiff. It was further in evidence that he was seen in defendant's pasture field on Wednesday, the day before he was killed; the next day after, plaintiff went to defendant's in search of the boar. It was proved that the boar was valuable as a stock-hog. It was in evidence on part of defendant, that a white, unmarked boar came to his premises shortly after October 1st; that the boar broke through a set of draw-bars, made of sound split white oak bars, 5 to 6 inches broad, an inch and a fourth thick, and five feet high; that the draw-bars furnished communication with defendant's corn field, where his corn was then growing; that the boar was driven out of the corn field, and the break in the draw-bars was repaired and (45) made good; that the boar again broke through into the corn field, and let in with him a number of defendant's hogs; that the boar was turned out, the break was a third time repaired by the insertion of a quantity of rails and other obstructions, but the boar broke through again, letting into the corn field a number of hogs; that the boar and other hogs destroyed seventy-five bushels of corn, then growing and standing in said corn field. It was further in evidence that the defendant made repeated inquiries to ascertain the owner of the boar, but did not succeed; that he then ordered his hands to drive him off; that in attempting to drive him off with men and dogs, the boar turned upon the hands and the dogs they used for that purpose, and put them to flight on two several occasions, and after driving back the hands and dogs the second time, the boar reared up against the fence around the pasture, where it was 10 or 12 rails, and over five feet high, and pushed the fence down by main force and entered the pasture; that immediately thereupon the defendant caused the boar to be shot.

It was in evidence on the part of the plaintiff, and also on the part of the defendant, that the fence around the pasture field in which the hog was killed, was in some places as low as three feet. It was also in evidence on the part of the defendant, that his fence was generally a five foot fence, and that around the pasture was a new fence, made of new and sound old rails, and then in some places not more than

three and a half feet, and on part of the plaintiff, that in some places around the corn field, which was a large field, the fence measured from 4 feet 1 inch to 4 feet 10 inches, by actual measurement; and some panels of the pasture fence were as low as three feet; that the panels by the side of the draw-bars, where the boar broke through, were not higher than four feet, and that there was one place in the fence around which witness said he could have kicked through with his foot;
(46) —the plaintiff measured only the lowest parts.

The defendant requested His Honor in writing, to instruct the jury, if they were satisfied from the evidence that the hog became a nuisance, by breaking into and over the defendant's fence, that the defendant had a right (it being admitted that he was an unmarked hog), after endeavoring to find the owner, to kill the hog when he had just pushed down a good five foot fence. His Honor declined to give the instruction, for the reason that no ground was laid for the instruction asked, and instructed the jury that a lawful fence must be five feet high at all points, and that if the jury found, from the evidence, that the fence was not five feet high at all points, and that the hog was the property of the plaintiff, the defendant had no right to kill the boar, and it would be their duty to find for the plaintiff. The defendant excepted. Under the charge of His Honor the plaintiff had a verdict, and the defendant appealed.

Boyden & Bailey for the appellant, in the course of their argument, relied upon *Morse v. Nixon,* 51 N.C. 35, *Wadhurst v. James,* Cro. Jac. 45, *Leonard v. Wilkins,* 9 John 232.

B. Craige contra.

READE, J. The defendant had no right to kill the hog for what he had already done: that were to take vengeance. Nor had he the right to kill him to prevent an anticipated mischief; for that might never happen. Nor had he the right to kill him for breaking over the fence, to get away from the dogs; for that was the instinct of self-preservation, incited by the violence of the pursuit.

It is the custom of the country that stock shall run at large; and because of the unnecessary expense, every owner of stock does not keep a bull or a boar. A few in each neighborhood are sufficient. They are regarded as public conveniences, and are indulged to considerable latitude, in "the freedom of the neighborhood."

The hog in question seems to have been improved stock, a
(47) Chester boar, worth $50. From the fact that he was not marked, and was allowed the range, he seems to have been devoted to the service of the public by his liberal owner, and was in

no sense a nuisance. To kill such a hog, was an injury to the plaintiff and a loss to the public, and would have been bad neighborship in the defendant, if it were not apparent that the killing was done under considerable provocation, and under the impulse of the moment.

It was plausibly urged for the defendant that, inasmuch as the hog was not marked, and the owner was unknown, he could have no redress for the depredations upon his crop; but that is not so, for the Stray-law gave an ample remedy. To this suggestion it was objected by the defendant, that he could not catch him. It seems that with dogs he could not, but milder means would doubtless have been effective, and they were not tried. His Honor's instructions that the defendant had no right to kill the hog unless his fence were five feet high "all around," did the defendant no injustice, and was more favorable for him than the law allows; for he had no right to kill under the circumstances, if his fence had been five feet all around: *Morse v. Nixon,* 51 N.C. 293.

There is no error.

Per curiam.

Judgment affirmed.

Cited: S. v. Neal, 120 N.C. 619.

ALEXANDER McKAY v. NOAH SMITHERMAN.

A Sheriff who had been instructed by the plaintiff to receive upon an execution "cash in bank bills of the State, or specie," received upon it its amount in Confederate currency, and endorsed "*satisfied;*" upon returning it to the Clerk his attention was drawn to the instructions upon the writ, and thereupon he withdrew it, erased "satisfied," and entered "Received, August 30th, 1864, the amount of this execution in Confederate currency notes, which plaintiff refused to accept:" *Held,* that the judgment was not discharged; and therefore, that the defendant had no right at a subsequent term to move that alias writs of execution which had been issued, should be set aside.

An execution can be satisfied only by a seizure and sale of property; or by payment in coin, or in such currency as the plaintiff gives the officer express or implied authority to receive.

MOTION to set aside an execution returnable to that Term of the court, made before *Buxton, J.,* at Fall Term, 1869, of (48) MONTGOMERY Court.

Judgment in the case had been rendered at Fall Term, 1862.

A *fieri facias* was issued, and was returned, levied on land, to Fall Term, 1863.

A *venditioni exponas* (with *fi. fa.* clause) issued returnable to Fall Term, 1864, directing on its face the receipt by the Sheriff of "cash in bank bills of this State, or specie." There was also a memorandum on the execution docket, entered by the Clerk at the time he issued the execution, in these words: "Issue *vendi.*, to be collected in bank bills or specie, issued 19th July 1864."

The Sheriff who had made the levy, on the 30th August 1864 received the amount without sale, of Alexander McKay, one of the defendants in the execution, but received it *in Confederate currency*, endorsed the execution "satisfied," brought it into the Clerk's office, and laid it on the table, remarking that he had collected the money. Thereupon the Clerk made an entry on the execution docket, of the word *"satisfied,"* but on looking at the money, and discovering its character, said to the Sheriff "That will not do," erased the word *"satisfied"* which he had just entered, refused to receive the money, and pointed the Sheriff to the direction in the execution, and on the docket, as to the character of the money required."

The Sheriff then carried off the execution, and the Confed-
(49) erate money.

This execution afterwards was filed among the papers, no one knows how. The word *"satisfied,"* first endorsed thereon and signed by Sheriff Sanders, was erased, and the following words appeared:

Received, August 30th 1864, the amount of this execution in Confederate currency notes which plaintiff refused to receive.

A. H. SANDERS, Sh'ff.

The Sheriff at the time he collected the Confederate money of McKay, gave him no receipt, but remarked to him that he would write the word *"satisfied"* on the writ of execution. He afterwards informed McKay that the money was rejected, and tendered it back to him, but not until it was entirely worthless, and then McKay refused to take it back, and the Sheriff has it yet.

Sanders went out of office in October 1864. No further proceedings were had upon the levy already made, but successive writs of *fieri facias* were issued from court to court, and came into the hands of his successor in office, under one of which a new levy was made upon the land of the said McKay. Upon this levy a *ven. ex.* (with *fi. fa.* clause) issued, returnable to the present term of the court, and this execution Alexander McKay moved to set aside, upon the ground that so far as he was concerned, the judgment upon which it issued was satisfied and discharged, by the proceedings in regard

to the execution in the hands of Sheriff Sanders, above recited. His Honor refused to set aside the execution, and McKay appealed.

Ashe, and Battle & Sons for the appellant.
No counsel contra.

DICK, J. An execution can be satisfied only by payment, or by a seizure and sale of a defendant's property.

In the case before us there was no seizure and sale of property, and the question to be determined is, Did the payment (50) by McKay, of Confederate notes to the Sheriff, discharge the execution?

On the face of the execution there were instructions to the Sheriff, to receive in payment "cash in bank bills of this State, or specie." The plaintiff in the execution, had a right to give these instructions, *Atkin v. Mooney,* 61 N.C. 31—and they were mandatory to the Sheriff. The law recognizes nothing in the payment of debts but money; *i. e.,* coin or currency which is declared to be a legal tender. If any other kind of currency is received by a Sheriff in payment of an execution, with the express or implied consent of a plaintiff, it will discharge the debt. In our case the Sheriff was acting under special instructions, and his failure in the performance of his duty rendered his action illegal and void.

The execution was not returned "satisfied," and the special return of payment in "Confederate currency notes," did not discharge the judgment. *Taylor v. Kelly,* 51 N.C. 324; *Griffin v. Thompson,* 2 How. U.S. 244.

There is no error.

Per curiam.

Judgment affirmed.

Cited: Utley v. Young, 68 N.C. 392.

GASTON H. WILDER v. A. G. LEE.

That the party failed to establish a defence in the previous action, through the unexpected absence of the nominal plaintiff, in the case, whom he had not summoned as a witness, is no ground for an injunction against the judgment in such action.

ACTION, for an injunction, before *Watts, J.*, at Fall Term 1869, of WAKE Court, upon a motion to vacate the order previously obtained.

The complaint, filed July 3rd 1869, alleged that the de-
(51) fendant resided in the county of Johnston, and the plaintiff in Wake; and that they had no other domicils; that the defendant, in order to procure an early judgment upon a bond held by him against the plaintiff, (dated October 2nd 1862,) assigned the same by endorsement to one Mebane, of Alamance county, in order to defraud the counties of Wake and Johnston of their proper jurisdiction, and to give Alamance county jurisdiction; that this assignment was made without consideration, and under color and pretence merely to give jurisdiction as above; that suit was accordingly brought in Alamance court, in the name of Mebane, and the present plaintiff, pleaded in abatement to the jurisdiction, and issue was joined thereupon; that by the absence of Mebane, plaintiff upon the trial was unable to show the fraud as above, and the verdict was against him; also that the bond was subject to *scale,* under the act of Assembly; that by surprise, accident and inadvertence arising from the absence of him who was plaintiff in such action, whom the present plaintiff expected to use as a witness, etc., the verdict and judgment was given as above, for $2006.40, etc.

The plaintiff prayed for an injunction against so much thereof as exceeded $1003.20, the amount due by *the scale,* etc.

The answer admitted the endorsement, and the proceedings in Alamance Court; denied the alleged fraud, or that the bond was liable to scale (having been given for property worth the amount in par funds under a contract entered before the currency had depreciated;) also that the defendant knew nothing of Mebane's absence, or the reason for it, but understands it was for want of having been summoned.

At Fall Term of Wake Court, the defendant moved to vacate the injunction theretofore obtained. This was overruled by His Honor, and the defendant appealed.

Phillips & Battle for the appellant, cited *McLean v. McDugald,* 53 N.C. 383; *Stockton v. Briggs,* 58 N.C. 309; *Houston v.*
(52) *Smith,* 41 N.C. 264; *Powell v. Watson, Ib.* 94; *Wilson v. Leigh,* 41 N.C. 94.

Graham and Lewis contra.

READE, J. All the questions in this case are *res adjudicatæ* between the same parties, as appears from the complaint itself. There

would be no end to litigation, if when the plaintiff recovers of the defendant without fraud, surprise or accident, the defendant could turn around and sue the plaintiff, with the view to make the same issues, and try them again. There is nothing set forth in the complaint that amounts to fraud, surprise or accident; and if the defendant has suffered, it was on account of his own laches. The plea to the jurisdiction was put in by him, and found against him, and his failure to claim the scale of depreciation, if he was entitled to it, was his own negligence. The alleged absence of testimony, when he had not summoned the witness, can not avail him.

The supposed equity in the complaint, is fully denied by the answer.

The injunction ought to have been vacated. The continuing it was error. This will be certified, etc.

Per curiam.

Order accordingly.

Cited: Walker v. Gurley, 83 N.C. 433.

WILLIAM SMITHDEAL AND WIFE v. ROBERT H. SMITH.

Land cannot pass by a *nuncupative* will.

PARTITION of land, before *Cloud, J.*, at Fall term 1869, of ROWAN Court.

The plaintiffs alleged that they were tenants in common with the defendant, of the land in question, and asked judgment for a partition. (53)

The defendant answered, admitting a tenancy in common in which he was entitled to two-thirds, and the *feme* plaintiff to one-third only: claiming that heretofore a third person was entitled in equal proportions with the *feme* plaintiff and himself, and that upon such person's death, he left his share, by will, to the defendant.

The plaintiffs replied, claiming an *equal* share with the defendant, and alleging that the will in question was nuncupative, and therefore could not convey land.

Upon the trial of this issue before the Clerk, he gave judgment for the plaintiff, and this, upon appeal, was affirmed by the Judge of the District, whereupon the defendants appealed to this court.

Blackmer & McCorkle for the appellants.
B. Craige and R. A. Caldwell contra.

PEARSON, C.J. The position that land can pass by a nuncupative will, cannot be supported.

At common law, land could not be devised. Statute 32 Hen. VIII, allows any person having land held by military tenure, to devise two-thirds thereof, and any person having land held by *socage* tenure, to devise the whole, provided the devise be made in writing, signed by the testator. By statute 12 Car. II, all land held by military tenure, is converted into land held by free and common *socage*, and the legal effect is to make all land, except copy-hold, devisable by will in writing, *signed* by the testator. Soon after the passage of the statute of decises, the word "signed" was held by judicial construction to mean, the writing of his name by the testator in any part of the instrument. To prevent fraud, it is provided by 29 Car. II, that wills to be valid to pass land, must be *subscribed* by three or more credible witnesses in the presence of the testator.

(54) This reference to the statutes on the subject, is made for the purpose of showing that the use of the word "estate" in the act in regard to nuncupative wills, Rev. Code, ch. 119, § 11, cannot be allowed the effect of embracing land; for although the word in its general sense is broad enough to include land, yet it is obviously not used here in so broad a sense. If the purpose had been to make an entire change in the law, and to depart from the policy of the statutes 32 Hen. VIII, and 29 Car. II, plain and positive words were called for; and so great an effect cannot be allowed the incidental use of a single word, upon any sound principle of construction.

Per curiam.

Judgment affirmed.

THE STATE v. J. M. MOONEY.

Where two are indicted for a battery, the one for the act, and the other for using encouraging language at the time, the wife of the one who encouraged the beating is a competent witness for the other party.

The *legal effect* of an acquittal of the other, is not an acquittal of her husband.

STATE *v.* MOONEY.

ASSAULT and Battery, tried before *Tourgee, J.,* at Fall Term 1869, of GUILFORD Court.

The defendants (two) were father and son. The evidence showed that the son, J. M. Mooney, struck the prosecutor with a hammer, the father taking no other part than by words of encouragement to his son.

For the defence it was proposed to introduce the mother of J. M. Mooney, to testify in his behalf. His Honor being of opinion that under the facts of this case an acquittal of the son, would necessarily be an acquittal of the father, excluded the wit- (55) ness.

Verdict, *Guilty;* Rule etc.; Judgment, and Appeal.

No counsel for the appellant.
Attorney-General contra.

SETTLE, J. There are no accessories in treason, or in offences below the degree of felony, but all who are concerned are principals; the one on account of the high, the other on account of the low grade of the offence. While under our statute an accessory before the fact may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, yet it is determined beyond doubt that the acquittal of the principal is the acquittal of the accessory.

In the case before us, though a misdemeanor, it is conceded that, if the *legal effect* of a verdict of acquittal of the son, would be to acquit the father also, then the wife of the father would not be a competent witness for the son, for she would be testifying in behalf of her husband.

His Honor was of the opinion that as the husband of the witness was implicated in the crime only by the encouraging language which he addressed to the son, the actual perpetrator, during the commission of the offence, the acquittal of the son, the actor, was of necessity the acquittal of the father, the abettor. In this there was error. Suppose the wife had testified to the insanity of the son, or that he was of young and tender years, not being *capax doli,* and that the father had used him merely as an instrument to carry out his purposes; can it be contended that the acquittal of the son, would in *legal effect* be the acquittal of the father? Certainly not. Perhaps the case may be placed in a stronger light by supposing the witness testifying to the insanity of the son, to be some one other than the wife. It is at once seen that the same testimony (56) which acquits the son, convicts the father, under aggravating

circumstances. In *State v. Rose, et al.*, 61 N.C. 406, it is said that "a distinction is to be taken between those offences, where the acquittal of one is in *legal effect* the acquittal of the other, as in case of principal and accessory before the fact, conspiracy, fornication and adultery, and those offences where one may be innocent and the other guilty."

The learning on this subject, may be found in the case just cited, and also in the case of the *State v. Ludwick,* 61 N.C. 401.

Per curiam.

Venire de novo.

Cited: S. v. Parrott, 79 N.C. 618; *Powell v. Strickland,* 163 N.C. 399; *S. v. Butler,* 185 N.C. 626.

THE STATE v. JACK JOSEY.

In an indictment for crime, the defendant, *ordinarily,* is entitled to have the whole case left to the jury upon the evidence *on both sides,* and if, upon a consideration of *all* such evidence, every reasonable doubt be not removed, the jury should acquit.

Therefore, in a case of larceny, an instruction to the jury "that the burden of proof to show the guilt of the prisoner, is upon the State; but that when the State has made out a *prima facie* case, and the prisoner attempts to set up an *alibi,* the burden of proof is shifted, and if the defence fail to establish the *alibi* to the satisfaction of the jury, they must find the prisoner guilty," is erroneous.

The rule is otherwise where the question is as to malice in cases of homicide; and also, generally, where the defendant relies upon some distinct ground of defence not necessarily connected with the transaction on which the indictment is founded, *ex. gr.* insanity; and it may be so as to matters of defence peculiarly within the knowledge of the defendant.

LARCENY, tried before *Watts, J.,* at Fall term 1869, of HALIFAX Court.

The defence was an *alibi,* sought to be set up through two (57) witnesses.

His Honor instructed the jury that the burden of proof to show the guilt of the prisoner, was upon the State. But, when the State had made out a *prima facie* case, and the prisoner attempted to set up an *alibi,* the burden of proof was shifted, and if the de-

fence failed to establish the *alibi* to the satisfaction of the jury, they must find the prisoner guilty.

Verdict, Guilty; Rule, etc.; Judgment, and appeal.

Walter Clark for the appellant.

In a criminal case, the establishment of a *prima facie* case only, does not take away the presumption of the defendant's innocence, or shift the burden of proof; *The Commonwealth v. Kimball,* 24 Pick. 366; *Ogletree v. The State,* 28 Ala. 693; *People v. Wingate,* 5 Cal. 127.

Attorney-General contra.

Although in criminal cases the establishment of a *prima facie* case only, does not take away the presumption of innocence, or shift the burden of proof; yet upon principle, there is a peculiar effect to be attributed to an attempt to defend by showing an *alibi,* which warrants the ruling of the Court below.

SETTLE, J. "His Honor charged the jury that the burden of proof to show the guilt of the prisoner was upon the State; but that when the State had made out a *prima facie* case, and the prisoner attempted to set up an *alibi,* the burden of proof was shifted, and that if the defence failed to establish the *alibi* to the satisfaction of the jury, they must find the prisoner guilty."

This is the entire charge, as contained in the record sent to this Court. There is nothing by which the Court can see how a case of any sort was made out, and the charge is so worded as (58) completely to break down the presumption of innocence which exists in every case, and shift the burden of proof to the defendant.

But taking it that a *prima facie* case had been established by some kind of evidence, direct or circumstantial, we are of the opinion that the law does not warrant the charge. The defendant was entitled to have the whole case left to the jury upon the evidence on both sides, and although he may have failed in fully satisfying the jury as to the truth of his defence, still any doubt that his evidence may have raised in their minds, might assist other circumstances in removing the *prima facie* case. Indeed a slight doubt raised by his evidence, may have been sufficient before the jury, aided by the legal presumption of innocence, to rebut the *prima facie* case; for a jury is bound to acquit, unless from *all* the evidence every reasonable doubt is removed. What was the defendant required to do

by this charge!—to establish as a fact, by evidence, to the satisfaction of the jury, that he was in another place at the time the offence was committed, and therefore not guilty.

Evidence that would raise a doubt, or even render it probable that he was not guilty, would not suffice, for he must prove it to the satisfaction of the jury. Had he shown that another person, with the inclination to steal, had also had the opportunity, he would not have met the requirements of the charge, for it would not prove that he was innocent, although the jury might think that it was highly probable that the other person had committed the offence.

Best, in his treatise on presumptions, 47 Law Lib. 160, in commenting on the rule that "the onus of providing everything essential to the establishment of the charge against the accused, lies on the prosecutor," says that "it is in general, sufficient to prove a *prima facie* case;" but we are not to understand from this, that the making out of a *prima facie* case necessarily or ordinarily changes the
(59) burden of proof. This is not like a charge of murder, in which, says Foster, "the fact of killing being first proved, all the circumstances of accident, necessity or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, until the contrary appeareth."

In cases where the defendant relies upon some distinct ground of defence not necessarily connected with the transaction on which the indictment is founded, such for instance, as insanity, the burden of proof as to the insanity, is shifted upon the defendant. And so it may be in cases where the defendant relies upon some fact peculiarly within his own knowledge; but the general rule is otherwise.

"An unsuccessful attempt to establish an *alibi,*" says Wills, Cir. Ev., 41 Law Lib. 51, "is always a circumstance of great weight against a prisoner, etc.," but this is stated as a fact which we all know to be true, and not as a rule of law to be charged by a Court. The party accused need not establish his innocence; it is for the State to prove his guilt, before it is entitled to a verdict.

Per curiam.

Venire de novo.

Cited: Shepard v. Tel. Co., 143 N.C. 246; *Page v. Mfg. Co.,* 180 N.C. 332; *S. v. Falkner,* 182 N.C. 798; *Speas v. Bank,* 188 N.C. 527; *S. v. Beard,* 207 N.C. 684; *S. v. Bridgers,* 233 N.C. 580; *S. v. Allison,* 256 N.C. 242.

MIRA HAYS, ET AL v. JOHN HAYS, ADM'R, ETC.

A cause in equity being before a court upon exceptions to a report, made under an order for an account therein:

Held, that it was erroneous for the Judge, upon sustaining the exceptions, to proceed to dismiss the bill.

BILL in equity, before *Mitchell, J.*, upon exceptions to a report made in the course of the cause, at Fall Term 1869, of CALDWELL Court.

An order for an account having been made, upon the report coming in the defendant filed exceptions, which on consid- (60) eration, were sustained by the court, the report set aside, and the bill dismissed. Thereupon the plaintiff appealed.

Folk for the appellant.
Malone contra.

READE, J. When the defendant's exceptions to the report were sustained, it was the privilege of the plaintiff to appeal from the ruling of his Honor, and present the whole case to this court: but the plaintiff was deprived of that privilege by the order dismissing the bill. We consider the case before us not upon the merits, but upon the appeal from the order dismissing it. That was clearly erroneous.

This will be certified, etc.

Per curiam.

Order reversed.

C. C. KESSLER v. J. W. HALL.

A note given by an executor to an attorney for counsel in his office as executor, is payable by the maker personally, and not, *as executor*.

Parol evidence of an understanding that it was to be paid out of the testator's assets only, is not admissible.

DEBT, tried before *Cloud, J.*, at Fall Term 1869, ROWAN court.

The note upon which the action was brought was as follows:

"Six months after date, with interest from date, we promise to pay James E. Kerr, or order, twelve hundred and fifty (61)

dollars, for value received, witness our hands and seals, Nov. 27 1860."

This was signed and sealed by the defendant; and the plaintiff was endorsee and purchaser for value.

The defendant offered to prove that the note was given for professional services rendered to defendant as executor of Solomon Hall deceased, and was due from him as executor, and not in his individual capacity, and that the understanding was that said note was to be paid out of the assets of said estate.

This evidence was rejected by the court. Verdict and judgment for the plaintiff: Appeal by the defendant.

B. Craige and R. A. Caldwell for the appellant.
Blackmer & McCorkle contra.

SETTLE, J. The defence attempted to be set up, discloses the fact that the bond upon which this action is brought, was executed by the defendant to an attorney for advice and assistance in managing the estate of defendant's testator. Of course then, it is the individual debt of the defendant, and the action is properly brought; had it been brought against him as executor, it could not have been maintained.

It is said in *Hailey v. Wheeler,* 49 N.C. 159, "it is not possible to conceive how a debt of the testator can be created by matter occurring wholly in the executor's time. If an executor makes an express contract in reference to the property of the estate, as if he employ one to cry the sale of the property, as auctioneer, this is not a debt of the testator." The same point is ruled in *McKay & Devane v. Royal and wife,* 52 N.C. 426, which, like this, was an action to recover for the professional services of the plaintiffs, who, as attorneys, had advised and counselled the executrix.

In a still later case, *Beaty v. Gingles, et al. Ex'rs,* 53 N.C. 302, the cases just cited are quoted with approbation, and they fully
(62) establish the doctrine that the defendant is personally liable on a contract like the one before us. The evidence offered by the defendant was properly rejected by his Honor. It is a general rule that parol evidence is inadmissable to contradict or vary the terms of a written contract; and while the ordinance of Oct. 18th 1865, and the acts of 1866, ch. 38 and 39 have changed this rule of evidence in certain cases, they have no application to the case before us.

Per curiam.

Judgment affirmed.

Cited: Hall v. Craige, 65 N.C. 53; *Hall v. Craige,* 68 N.C. 307; *Kerchner v. McRae,* 80 N.C. 223; *Tyson v. Walston,* 83 N.C. 95; *Martin v. McNeely,* 101 N.C. 639; *Banking Co. v. Morehead,* 122 N.C. 323; *Lindsay v. Darden,* 124 N.C. 309; *LeRoy v. Jacobosky,* 136 N.C. 450; *Hall v. R. R.,* 146 N.C. 347; *Snipes v. Monds,* 190 N.C. 192.

THOMAS GIFFORD v. C. BETTS.

A party who purchases and pays for a number of barrels of flour, warrented as "extra and superfine," having, upon their receipt, notified the vendor that a portion of them were of an inferior quality: *Held,* that as the vendor did not come forward and remove them, and pay back the purchase money, the purchaser had a right to sell them within a reasonable time, and recover from the vendor, any loss upon resale, together with all proper expenses: such as would reimburse him for his money expended, but not for any loss of a good bargain.

ASSUMPSIT, tried before *Logan, J.,* at January Special Term 1870, of MECKLENBURG Court.

The plaintiff showed that in March 1863, he had bought of the defendant 345 barrels of flour, 200 of which were then present; and that the defendant stipulated that the whole should be of the quality known to merchants as *extra* and *superfine;* that the price, $40 per bbl., was paid down, and defendant was to ship the flour to the plaintiff as fast as possible; that this was done, but that 66 bbls. of it proved to be *fine* only, and *shorts;* that he wrote to the defendant giving him notice thereof, and on receiving no answer sent an agent to him with samples of the flour, and demanded back (63) his money; that he notified the defendant that if his demands were not complied with, he would sell the flour at auction, and require of him the difference; that he did so, and the flour brought $20 per bbl.; that he credited the defendant with this amount, deducting freight, storage, drayage, auctioneer's charges, etc.

This suit was for the balance.

There was no evidence of fraud upon the part of the defendant.

The defendant's counsel asked his Honor to charge that inasmuch as the plaintiff had accepted the flour after inspection, and ascertainment of its quality, he could not recover upon the special contract, as he had not declared upon any warranty, and no question of warranty had been submitted to the jury; also, that the plaintiff

could not recover for freight, storage and other expenses attending the sale of the flour, which he had made his own by accepting, etc.

These instructions were refused.

Verdict for the plaintiff for $787.30. Rule for a new trial, etc. Appeal.

Dowd for the appellant.
Wilson contra.

DICK, J. The plaintiff purchased, and paid for, three hundred and forty-five barrels of flour, which were to be delivered to him by the defendant, at Charlotte. At the time of the sale the defendant expressly "stipulated that the whole of the flour should be of the quality known to merchants as extra, and superfine." This stipulation amounted to an express warranty of the quality of the flour. The whole quantity reached Charlotte in due time, but upon inspection, sixty-six barrels proved to be of inferior quality.
(64) The plaintiff might have brought an action at once, founded upon this breach of warranty, without an offer to return the goods to the defendant, or giving him notice of his breach of warranty. Chit. on Con. 458; 2 Saund. Pl. & Ev. 916.

The plaintiff, however, preferred to notify the defendant immediately that the inferior flour was not accepted in discharge of the contract. As the defendant declined to remove the goods which were not of the quality warranted, and pay back the purchase money, the plaintiff had a right to sell them in a reasonable time, and recover from the defendant on the special contract, the loss upon the re-sale and all proper expenses, so as fully to reimburse himself for money expended, but not for the loss of a good bargain. 1 Pars. Cont. 475.

Per curiam.

Judgment affirmed.

JOHN HORTON v. ELIJAH GREEN.

A person, tendered as a witness to express an opinion whether the symptoms attending a diseased mule were of recent or of long standing, upon preliminary examination, stated that he was a physician of eleven years standing, and that although he had no particular knowledge of the diseases of stock, yet from his books, observation and general knowledge of diseases of the human family, he could tell whether certain symptoms indicate that the disease is of recent or longstanding: and although he never saw a case

of glanders (unless the one in question were such) yet he was able to form an opinion whether the symptoms of the mule, indicated a disease of recent or of long standing: *Held*, that he was a competent witness for the purpose indicated.

ACTION for False warranty and Deceit, in the sale of a mule, tried before *Mitchell, J.*, at Fall Term, 1869, of CALDWELL Court. (65)

It was alleged by the plaintiff that the mule had *glanders*, when sold; and among other witnesses introduced was Dr. Rivers, a physician of eleven years standing, who being asked by the plaintiff whether from his general knowledge of diseases he could tell whether the symptoms in this case indicated that the disease was of recent standing or not; answered: that he had no particular acquaintance with diseases of stock, but from his books, observation and general knowledge of diseases of the human family, he could tell whether certain symptoms indicate that a disease is of recent or of long standing; that he did not know that he had ever seen a case of glanders, unless this was one. The plaintiff then asked, whether the symptoms of the mule in question indicated disease of recent or of long standing?

The defendant objected to the question, and the Court excluded it, upon the ground that the witness had not qualified himself to answer as an expert.

The plaintiff excepted.

Verdict for the defendant, etc. Appeal by the plaintiff.

Folk for the appellant.

There was error in excluding the evidence of the physician. All men of science are *experts* in the legal sense of the word. *Foulks v. Chadd*, 3 Doug. 157. When the question so far partakes of the nature of science, as to require a course of study or habit, in order to the attainment of knowledge of it, the person so qualified may testify. 1 Smith's L.C. 286. A physician may testify as an expert, although he has never practiced his profession at all. 1 Green. Ev. 555.

He also relied upon *State v. Clark*, 34 N.C. 151.

Malone contra.

To be competent as an expert, the witness must have such knowledge and skill in the science, practice, or avocation in- (66) volved, as to be able to assist the jury in a special manner. 1 Green. Ev., § 400; *State v. Clarke*, 34 N.C. 151; *Lush v. McDaniel*,

35 N.C. 487; *Carter v. Boehm,* 1 Smith L. C.; *Blarmourges v. Clark,* 9 Iowa 1.

PEARSON, C.J. If the subject had been a man, instead of a mule, without doubt the opinion of Dr. Rivers as to whether a disease, the symptoms of which he had observed, was of recent or of long standing, would have been competent evidence. *State v. Clark,* 34 N.C. 151. Our question is, does the fact that the subject was a mule, make this rule of evidence inapplicable. Recurrence to the principles on which the rule rests, will show that it applies to the one case as well as to the other, and that there is no distinction in regard to the *competency* of the evidence, though it may be that in the consideration of a jury the opinion of the witness in respect to the mule, would not be entitled to as much weight as it would be in regard to a man.

The general rule is that the opinion of a witness is not competent evidence; he must state facts, and let the jury form the opinion. For instance, a witness says, "a wound upon a man or a mule, was bleeding," or "had a scab over it;" "a place was swollen and inflamed," or "was discharging matter;" from these facts, the jury can say whether the wound or sore was of recent or of long standing. But there are some things of which a witness can not give such a description as will enable a jury to form an opinion. In regard to these the law makes exceptions, and allows the opinion of a witness to be competent evidence. Handwriting cannot be so described as to enable the jury to form an opinion; hence, if the witness swears that he has an opinion, and had the means of forming it, by having seen the man write, or seen writing which is proved to be his, *ante litem motam,* his opinion is competent. So, if a witness swears that he has an opinion as to the general character of a man, and had the
(67) means of forming it, by an acquaintance with him and living in the same neighborhood, the opinion is competent. So, in regard to diseases and matters of that kind, the law calls in the aid of science, and if it appears that the witness has had peculiar means of forming an opinion by reading, reflection and observation in the pursuit of a particular science, and that he is a physician of many years standing, and he will swear that in this way he has formed an opinion, it is competent evidence. In *State v. Clark, supra,* it is said: "When professors of the science swear they can thus distinguish, it would be taking too much on themselves for persons, who like Judges are not adepts, to say the witness cannot thus distinguish, and on that ground, refuse to hear his opinion at all. By such a course the Judge would undertake, of his own sufficiency, to determine how far a particular science, not possessed by him, can carry human knowl-

edge, and to determine it in opposition to the professors of that science. That course would subvert the principle upon which the rule of evidence is founded, and exclude the evidence in all cases."

In our case Dr. Rivers is a physician of eleven years standing, and had observed the symptoms of the diseased animal. He swears that although he has no particular knowledge of the diseases of stock, yet from his books, observation and general knowledge of diseases of the human family, he can tell whether certain symptoms indicate that the disease is of recent or of long standing; and although he never saw a case of glanders, unless this is one, yet he was able to form an opinion as to whether the symptoms of this mule indicated a disease of recent or of long standing. This is assumed by the objection to the question which was ruled out by the Court, "on the ground that the witness had not qualified himself *as an expert.*" We are to take it, that he was about to swear that he had formed an opinion. So, in this particular, the cases of the man and the mule are the same.

But it is said that the witness, although an expert in regard to the diseases of the human family, had no particular (68) acquaintance with the diseases of stock, and that in this lies the distinction. We do not think the distinction well taken, to the extent of making the opinion *incompetent,* however much it might have been matter of comment before the jury. Stock, and the human family, are animals with many similitudes and some variance. The circulation of the blood, the respiration, and the laws of nervous and muscular action in a mule, are similar to those in a man. In the organs of digestion and other functions there are variances, owing to the differences of food, etc.; so that, although it be admitted, that one acquainted with the mode of treating diseases of the human family, should not be relied on to select from the *materia medica* substances apt for the treatment of the diseases of stock (for *non constat* that a medicine which will produce a given effect administered to a man, will have the like effect administered to a mule), still we think it clear that one having a scientific knowledge of the diseases of men, must be presumed to have so much knowledge of the diseases of a mule, as to enable him to determine whether a disease, with which the animal is affected, be of a recent or of long standing; and that this knowledge gives to his opinion, when he has had the opportunity of observing the symptoms, a peculiar weight which does not belong to the opinions of those who have not devoted themselves to the study of diseases as a science.

The law will not reject the aid in the investigation of truth, to be derived from science, merely because the witness has confined his

observation and practice to one branch of it. In other words, an expert in the diseases of man, is necessarily an expert, to some extent, in the diseases of animals, so as to make his opinion competent evidence upon a matter in reference to which he will swear that his scientific knowledge has enabled him to form an opinion.

For further illustration: it becomes material to prove that a colt was dead when foaled. A physician swears that he made a
(69) *post mortem* examination, and has formed an opinion, by means of his knowledge of physics, that the lungs of a child, if it ever breathed, can be easily distinguished from the lungs of one still-born, and that in that respect, the colt and the child are the same: Shall his opinion be held incompetent, and the light of science be excluded, because the witness has no particular acquaintance with the diseases of such animals, and has never dissected a colt, except on the one occasion?

There is error.

Per curiam.

Venire de novo.

Cited: Yates v. Yates, 76 N.C. 149; *S. v. Sheets,* 89 N.C. 549; *S. v. Boyle,* 104 N.C. 831; *Marshall v. Tel. Co.,* 181 N.C. 294.

R. W. FOARD AND OTHERS v. J. N. ALEXANDER, ADM'R, ETC.

An action is inadmissible as a mode of obtaining relief against an execution for *irregularity:* the proper relief is, as formerly, by motion to set it aside: *notice* of the order *nisi* made thereunder, operating in the meantime, as an injunction against the process.

Where *an action* had been resorted to: *Held,* that it could not be treated as a motion in the original cause; 1st, because not so entitled; 2d, because the only relief prayed for therein, was, a perpetual injunction.

An order to stay proceedings, made, without notice, by a Judge out of court, for a longer time than twenty days, is irregular (C.C.P. § 345 (5)), and a demurrer to the complaint in the action in which such order was made, may be treated as a motion to vacate.

ACTION to set aside an execution and vacate a judgment for irregularity, tried before *Logan, J.,* on demurrer, at Spring
(70) Term 1869 of CABARRUS Court.

This proceeding began in April 1869, by a petition to the Judge of the Ninth District. The plaintiffs allege that the de-

fendants brought suit against them to April Term 1861, of Cabarrus county court; that the case was thence transferred, under an act of Assembly, to the Superior Court of Law for that county; that at Fall Term 1862, there was an entry on the docket, "judgment by default," and that said judgment (if the said entry is to be deemed one) became dormant; that an execution for a sum certain has issued upon it; and they pray that the execution may be set aside, and the judgment vacated, etc. The Judge thereupon (April 21st 1869) ordered an injunction to issue, and also a summons, both returnable to the next term of Cabarrus Superior Court (May 31st 1869). The defendant, upon appearing, demurred generally.

The Judge overruled the demurrer, but gave no judgment, and the defendant appealed.

Wilson for the appellant.
Blackmer & McCorkle, R. Barringer, and Montgomery contra.

RODMAN, J. (After stating the facts as above.) Whether the judgment was irregular (assuming the facts stated to be true) may be doubtful: *Davis v. Shaver,* 61 N.C. 18; *Moore v. Mitchell, Ib.* 304; but the execution issuing on the judgment after it became dormant, as is alleged, was: *Simpson v. Sutton,* 61 N.C. 112.

The first question however, is whether the plaintiffs have taken the proper course to obtain the relief desired, and to which it is assumed they are entitled. Under our former practice the remedy against an irregular judgment or execution, was by an *audita querela,* or by, what was a substitute for it, a motion in the cause: *Moore v. Mitchell, ub. sup.; Mason v. Miles,* 63 N.C. 564; 1 Tidd. Pr. 212. A court of equity never had jurisdiction to set aside the (71) irregular judgment of a court of law, because the remedy at law was adequate, or was assumed to be so. Whether under our former system a Judge could have given relief out of term time, it is not necessary to inquire. Since the adoption of the Constitution of 1868, there can be no doubt in cases coming within its operation, for Art. IV, sec. 28 requires the Superior Courts to be always open for the transaction of all business, except trials by jury. Section 25 of Article IV, provides that suits pending at the adoption of the Code of Civil Procedure shall be determined according to the practice then in use, "unless otherwise provided for by the Code." The Code does not change the mode of setting aside an irregular execution; it must still be done by a motion in the cause; and an injunction against proceeding under it, if ever necessary, must be obtained in like manner. Indeed, an injunction in form against an irregular execu-

tion can hardly ever be necessary, as the granting of an order *nisi* to set it aside, operates as soon as the parties have notice of it, to stay all proceedings: McNamara on Nullities. Such an order would be governed by subdivision 5, sect. 345, C.C.P. On the final determination of the question of irregularity, an absolute order setting the judgment or process aside, and superseding it, when served on the parties and the officers, answers every purpose and is the proper remedy: See sections 188 to 191 and Sect. 345 C.C.P.

Can the present proceeding be regarded as a motion in the cause, or is it in the nature of a bill in equity for an injunction? With every disposition to view liberally all proceedings begun when the practice was uncertain, we cannot regard this as a motion in the cause, which we have seen is the only regular way of proceeding: *Mason v. Miles, ub. sup.* We do not attach any weight to its being in the shape of a complaint or petition—that is properly enough the form of a motion; but it is not *entitled* in the original action. But however this
(72) may be, the interlocutory order for an injunction was certainly irregular, as contrary to subdivision 5 of sec. 345 C.C.P.; and regarding the demurrer as a motion to vacate the injunction, it should have been allowed. We think also, for the above reasons, that the petition should have been dismissed. The plaintiffs have still a remedy (if they are entitled to any, and have not waived it by delay,) by a motion in the cause, on proper notice. Let this opinion be certified.

Per curiam.

Order accordingly.

Cited: Williams v. Rockwell, 64 N.C. 327; *Henderson v. Moore,* 125 N.C. 384; *Williams v. Dunn,* 158 N.C. 401; *Banks v. Lane,* 171 N.C. 510; *Weir v. Weir,* 196 N.C. 269; *Scott Register Co. v. Holton,* 200 N.C. 480; *Finance Co. v. Trust Co.,* 213 N.C. 372; *Davis v. Land Bank,* 217 N.C. 150.

DANIEL McARTHUR AND OTHERS v. JOHN C. McEACHIN AND OTHERS.

An injunction granted before the issuing of a summons in the action, is premature and irregular.

Writs of summons in civil actions must (by the act of 1868-9, c. 76) be issued by a Clerk, and made returnable in Term time.

MCARTHUR *v.* MCEACHIN.

A *prosecution bond* executed where no summons is issued, is inoperative, and therefore if an *injunction bond* have been executed in such case, judgment for the costs of the defendant, may well be given against the parties thereto.

ACTION for an injunction, against opening a public road, before *Russell, J.*, at Chambers, for ROBESON County, September 23d 1869, on a motion to continue a previous *order.*

The complaint had been filed in the office of the Clerk of Robeson County, September 3d 1869. Having been exhibited to *Russell, J.*, at Chambers in Elizabethtown, on the 8th of September, he granted an order of restraint, coupled with an order to the Clerk of Robeson County to issue copies of the order of restraint and complaint, and also a summons to the defendants, to appear before him at Whiteville in Columbus County, and show cause why an injunction should not be granted, etc. (73)

A prosecution bond was executed, and filed September 1st 1869, and an injunction bond, September 9th 1869.

The defendants appeared in accordance with the order, and showed for cause:

1. That they had not been made parties to the action in which the injunction is prayed, and no such summons as is required, had been served upon them.

2. That no case for an injunction, appeared on the face of the complaint, etc.

Thereupon his Honor declined to order an injunction, and gave judgment against the parties to the injunction bond for costs.

The plaintiff appealed.

No counsel for the appellant.
W. L. McKay and N. A. McLean contra.

DICK, J. The proceedings in this case were not properly commenced by the issue of a summons, and the injunction was premature and irregular, and was properly vacated: *Patrick v. Joyner,* 63 N.C. 573. The summons which his Honor ordered to be issued returnable before him in Columbus County, was not sufficient to constitute the leading process in the action. The summons to commence a civil action, must be issued by a Clerk of a Superior Court at the request of the plaintiff, returnable to the next term of the proper court: Acts 1868-9, ch. 76. His Honor acted properly in giving judgment for costs upon the injunction bond, as the costs were incurred in that proceeding, and are provided for in the condition of said bond.

A prosecution bond is required to be given by the plaintiff upon the issuing of a summons, and its purpose is to secure to the defendant all such costs as he shall recover of the plaintiff in the action: C.C.P. sec. 71.

As no summons was issued proper to commence an action
(74) in this case, the filing of the prosecution bond was premature and inoperative, and no judgment can be given upon it.

There is no error, and the judgment in the court below is affirmed, with costs. Let this be certified.

Per curiam.

Judgment affirmed.

Cited: Hirsh v. Whitehead, 65 N.C. 517; *Trexler v. Newsom,* 88 N.C. 14; *Grant v. Edwards,* 90 N.C. 32; *Fleming v. Patterson,* 99 N.C. 405; *Armstrong v. Kinsell,* 164 N.C. 127.

THE STATE v. JOHN W. THOMAS.

In all criminal prosecutions every man has a right to *confront* the accusers and witnesses with other witnesses; *Therefore,*

Entries in the course of business, upon the books of a Railroad Company, by one, at the time an agent of the Company, and still living, but absent from the State, are not competent evidence of the facts therein set forth, upon the trial of a third person for crime.

PERJURY, tried before *Tourgee, J.,* at Fall Term 1869, of GUILFORD Court.

In the course of the trial, the State offered in evidence the books of the North Carolina Railroad Company, at Thomasville station, in order to show that certain cotton, in regard to which it was alleged that the perjury had been committed, had been received by the defendant. It was shown that the entries were in the hand of one Lea, a former agent of the Company at that Station, and were in reference to the ordinary business transactions of the corporation to which they belong. The death of Lea was not shown, but that he was living a short time previously in the State of Missouri.

The defendant objected to their introduction. The objection was overruled, and the defendant excepted.

Verdict, *Guilty;* Rule for a new trial, etc.; Judgment, and Appeal.

(75) *Gorrell for the appellant.*

STATE *v.* THOMAS.

In order that entries in books, whether *in the course of the business,* or *against the interest* of the party making them, shall be competent evidence, such party must be *dead: Price v. Earl Torrington,* Salk. 690; *Doe v. Turford,* 3 Barn. & Ad. 890; *Poole v. Dicas,* 1 Bing. N.C. 649; *Welch v. Barrett,* 15 Mass. 380; *Brewster v. Doon,* 2 Hill (N.Y.) 537; *Moore v. Andrews,* 5 Porter (Ala.) 107; *Kennedy v. Fairman,* 2 N.C. 458; *Higham v. Ridgeway,* 10 E. 109, (Smith, L. C. 2d, 183); *Whitemarsh v. Gifford,* 8 Barn. & Cress. 556; *Speers v. Morris,* 9 Bing. 687; *Meddleton v. Milton,* 10 Barn. & Cres. 299; *Peck v. Gilmer,* 20 N.C. 249.

Attorney-General, McCorkle and Scott contra.

PEARSON, C.J. For the purpose of showing that the cotton, in regard to which the perjury is charged to have been committed, was received by the defendant, the books of the North Carolina Rail Road Company at Thomasville station were offered in evidence. It was shown that the entries were in the handwriting of one Lea, a former agent of the company at said station, and were in reference to the ordinary business transactions of the corporation.

"The death of Lea was not shown; but that he was living a short time previous in the State of Missouri." The evidence was objected to by the defendant; objection overruled; and the defendant excepted. We must assume that the entries furnished material evidence, and that Lea was living and was absent from the State. We take occasion to say that it was the duty of his Honor to pass upon this fact, and to set it out *as a fact,* and the recital of the evidence from which he made the inference a fact, is superfluous and irregular.

It is a cherished rule of the common law, that in trials by jury the witnesses shall be openly examined and cross-examined, in the presence of the parties and of the jury. An exception is made (76) in regard to dying declarations, but this exception is restricted to indictments for homicide against the party who caused the death, and is based on the maxim, "no man shall take advantage of his own wrong." A relaxation of the rule is also made, so as to admit in evidence what a witness *who is dead* swore on a former trial before a jury, or a committing magistrate; upon the ground that the accused had the benefit of *confronting* the witness, and of a cross-examination, and is only deprived of one test of truth, the presence of the witness before the jury, which loss was caused by the act of God: *State v. Valentine,* 29 N.C. 225.

In the case before us, it was material on the part of the State to prove the delivery of the cotton to the defendant, at Thomasville. To make this proof, the presence of the witness was necessary, (1) that

he might be put under the obligation of an oath, (2) that the jury might note his looks and demeanor, (3) that the defendant might confront him with other witnesses, and (4) that the defendant might cross-examine him. Constitution, Art. I sec 11: "In all criminal prosecutions every man has a right to be informed of the accusation against him, and to confront the accusers and witnesses with other witnesses." We take it that the word *confront* does not simply secure to the accused the privilege of examining witnesses in his behalf, but is in affirmance of the rule of the common law, that in trials by jury, the witness must be present before the jury and accused, so that he may be confronted, that is, put *face to face.*

Upon the trial, it being proved that Lea was absent and not within reach of the process of the Court, all of these safeguards which the law has provided for the purpose of excluding falsehood, in favor of one charged with an infamous crime, are by the ruling of his Honor, put out of the way; and entries made by Lea, in the books of the Railroad Company are admitted to prove the delivery of the cotton in the stead of—the solemn oath of Lea subjected to
(77) the tests of truth ordained by the law of the land.

Whether the entries would be admissible as evidence, on proof of the death of Lea, is a question not now presented. We are satisfied that the entries were not admissible, on proof of Lea's absence from the State. If such was the law, it would be infinitely better for persons accused of crime to consent to have the depositions of witnesses who are absent from the State, read in evidence; for they would thus secure the safeguards of an oath, and of a cross-examination, and be deprived only of the safeguard of confronting the witness in the presence of the jury. And yet, neither the Chancellor, according to the practice in England of issuing commissions to take depositions of witnesses residing abroad, nor the Legislature, in passing statutes for the same purpose, have ever supposed that they had the power to deprive the accused of his right to confront his accusers and their witnesses, before the jury.

As the trial was conducted, the defendant has, in this point, been deprived of the safeguards provided by law in favor of life and liberty, and therefore has not been convicted according to law. There is error.

This will be certified, to the end, etc.

Per curiam.

Venire de novo.

Cited: S. v. Behrman, 114 N.C. 805; *S. v. Staton,* 114 N.C. 815; *S. v. Mitchell,* 119 N.C. 786; *S. v. Harris,* 181 N.C. 617; *S. v. May-*

nard, 184 N.C. 656; *S. v. Dixon,* 185 N.C. 730; *S. v. Hightower,* 187 N.C. 311; *S. v. Hartsfield,* 188 N.C. 36; *S. v. Perry,* 210 N.C. 797.

THOMAS G. WALTON, EX'R., ETC. v. WILLIAM F. McKESSON AND OTHERS.

In an action upon a former judgment, the record of the judgment is the proper evidence thereof; and its production cannot be dispensed with, or supplied by any other evidence.

Where the record of a judgment has been destroyed, the first step towards obtaining a remedy, is by proceeding in the Court where it was given, to the end that the record may be supplied.

ACTION for money due by judgment, tried upon demurrer to the complaint, by *Mitchell, J.,* at Fall Term 1869 of BURKE (78) Court.

The complaint alleged that a judgment had been obtained by the plaintiff against the defendants, at August Term 1861 of Burke County Court; that the record thereof was destroyed by the Federal forces under General Stoneman in the Spring of 1865, but that the plaintiff had a "certified memorandum of said judgment under the hand of the Clerk, dated March 29th 1865, showing the date and amount of the judgment, etc., which he stands ready to produce, together with other proof, if necessary, as evidence of his debt."

The defendant demurred, and assigned as cause, that it appeared by the complaint that there is no record of the said supposed recovery, etc.

The demurrer was overruled, and the defendant appealed.

Folk for the appellant.
Furches contra.

READE, J. In an action on a former judgment, the record of the judgment is the proper evidence thereof. Its production can not be dispensed with, or supplied by any other evidence. The reason is, that upon plea of *nul tiel record,* the court decides upon the *inspection* of the record itself.

The plaintiff's remedy in this case, was, upon notice to the defendants, a motion in the original suit, to have a record made of the judgment, in place of that which was destroyed; and then to offer the record in evidence in this suit. It was neither necessary nor proper

to make profert of the judgment, but to refer to it as of record, *prout patet per recordum;* but instead of such reference, it is stated in the complaint as an excuse for not making profert, that the record had been destroyed.

It is not desirable that the merits of a cause should be prej-
(79) udiced by technicalities, and the courts are liberal in allowing amendments to reach substantial justice. If upon the coming in of the demurrer, the plaintiff had obtained leave to amend his complaint, so as to refer to the judgment as "remaining of record," and upon motion in the original cause had made a record, it might have been offered on the trial, but as the plaintiff joined in the demurrer, we are obliged to say that it ought to have been sustained. There is error.

Per curiam.

Judgment reversed.

D. C. THOMPSON v. B. A. BERRY.

The proper method of enforcing judgments *nisi*, is by action, or special proceeding commenced by summons; and this rule is not affected, in cases of Sheriffs, by § 263 of C.C.P.

SCIRE FACIAS to enforce a judgment *nisi*, tried before *Buxton, J.*, at the Special Term of IREDELL Court, July 1869.

At February Term 1868 of the County Court of Iredell county, the plaintiff recovered judgment against Avery and Tate; a *fi. fa.* tested of that term was issued to the defendant, who was Sheriff of Burke, and by him was levied on certain lands and returned. At May Term 1868, a *vend. exp.* issued to the defendant, upon which he returned, that it came to hand too late to be executed. In June 1868, the County Courts were abolished by the adoption of the Constitution of that year, and this *vend. exp.* was filed in the Superior Court of Iredell, where, at Fall Term 1868, a judgment *nisi* for $100 was entered against the defendant Berry. A *scire facias*, in the
(80) form heretofore usual in such cases, was issued, returnable to Spring Term 1869, and to this the defendant demurred, on the ground that the court did not have jurisdiction, in that form of proceeding.

In the court below the Judge dismissed the proceeding and the plaintiff appealed.

Boyden & Bailey for the appellant.
W. P. Caldwell contra.

RODMAN, J. It was not contended, and we think cannot be, that so much of section 17 of chap. 10, Rev. Code, as authorizes the amercement of Sheriffs for failing to make due return of process, has been repealed. Section 263 C.C.P. expressly continues in force previous laws respecting the duties and liabilities of Sheriffs on executions, and the proceedings to enforce them, when not inconsistent with the Code, as also does section 854. See *McKeithan v. Terry, ante* 25.

The Superior Court of Iredell therefore had jurisdiction to give the judgment *nisi* on motion: Whether sufficient ground existed for it, is a different question which we do not consider. The only question is, whether the proceeding adopted for enforcing it, is a permissible one. With every disposition to judge liberally of proceedings commenced when the law regulating the practice of the courts, could scarcely be known even to the most thoughtful and industrious attorneys, we think that the proceeding adopted cannot be sustained. Section 362 C.C.P. abolishes writs of *scire facias,* and substitutes the proceedings given by the Code; and this case is not within any of the exceptions in that section. Section 70 requires all civil actions to be commenced by summons, and the act of 1868-'69, ch. 93, p. 205, requires all special proceedings between adverse parties, to be commenced in like manner. It was urged that this mode of proceeding was saved in this particular case by section 263 (81) C.C.P., which continues existing laws, not in conflict with *that chapter,* respecting the duties of sheriffs on executions, and "the proceedings to enforce them"; but the object of that was only to save some remedy in a possible case where none might be found given by the Code, and not to make an unnecessary exception to the rule of commencing all actions by summons. We think a proceeding to make a judgment *nisi* absolute, must be commenced by summons. But it was contended that this *sci. fa.* was in substance a summons, and we might perhaps so regard it; but that could not help the plaintiff, as it would still be irregular by reason of its being returnable before the court in term time, and not as prescribed by the Code: *Johnson v. Judd,* 63 N.C. 498. Nor is the irregularity cured by the act of 1868-'69, ch. 103, p. 226, which was ratified April 1st 1869, for that statute is retrospective only. We think the Judge below properly dismissed the *sci. fa.* as irregular.

Per curiam.

Judgment affirmed.

D. C. THOMPSON v. B. A. BERRY.

Where a *scire facias, tested at May Term* 1868, had been issued, to enforce a judgment *nisi* at that Term, against a Sheriff, for not making due return of process: *Held,* to have been the appropriate remedy.

SCIRE FACIAS, tried upon demurrer, by *Buxton, J.,* at July Special Term 1869, of IREDELL Court.

At February Term 1868, of the County Court of Iredell, the plaintiff recovered judgment against Avery and another, and a *fieri facias,* returnable to May Term 1868, thereupon issued to the
(82) defendant in this action, who was Sheriff of Burke, which he returned levied, etc. At said Term (May 1868) the plaintiff, on motion, recovered a judgment *nisi* against the defendant for $100, for want of a proper return on said execution; and thereupon a *scire facias* in the usual form, tested of May 1868, issued, addressed to the Coroner of Burke, which was never returned. An *alias sci. fa.,* issued from the Superior Court of Iredell, tested of Fall Term 1868, which was returned to Spring Term 1869, when the defendant demurred.

The Judge sustained the demurrer, and the plaintiff appealed.

Boyden & Bailey for the appellant.
W. P. Caldwell contra.

RODMAN, J. (After stating the facts as above.) This case differs from the other case between the same parties, decided at this term, in this: in that, the amercement was for not making due return upon a *venditionas exponas,* issued after the return of the *fi. fa.,* and was made in the Superior Court at Fall Term 1868, which was subsequent to the ratification of the Code of Civil Procedure; in this, the amercement and the *teste* of the original *sci. fa.* was in May 1868, and before the ratification of the Code, which was in August 1868. Section 400, C.C.P. authorizes the transfer of all suits pending at its ratification, to the proper Superior Courts; section 402 says they shall be proceeded in and tried under the existing laws and rules applicable thereto; and section 362, which abolishes the writ of *scire facias,* says that any proceedings theretofore commenced shall not be affected by such abolition. The *sci. fa.* tested of May Term 1868, was the commencement of this action, and it was consequently governed by the existing rules of practice and procedure. *Teague v. James,* 63 N.C. 91.

The judgment below must be reversed, and the demurrer
(83) overruled, and the defendant ordered to answer over. Let this opinion be certified.

Per curiam.

Judgment reversed.

W. DEVRIES & CO. v. MOSES HAYWOOD.

Whatever be the form of a transaction, or the words of the parties, there can be no contract *(here,* of sale) *without an intention* that there shall be one.

Whether or not a contract was intended in any particular case, is a question for the jury, upon all the facts and circumstances.

A false representation not acted upon by him to whom it is made, does not estop.

The maxim *ex turpi causa non oritur actio,* does not apply to prevent a party to a statement from maintaining an action in which it becomes necessary for him to show such statements to be false.

INTERPLEA, in attachment levied on goods, tried before *Buxton, J.,* at Fall Term 1869 of CUMBERLAND Court.

The following is the *case* sent up:

The plaintiffs had *attached* on the 3d Dec. 1866; the interpleader claimed the property by virtue of a bill of sale from Phillips, dated 19th Nov. 1866; the attaching creditors resisted the claim on two grounds: 1. That the bill of sale was fraudulent. 2. That if the bill of sale were not fraudulent, and Haywood had acquired a valid title under it, yet that he had, prior to 3d Dec. 1866, the date of the attachment, parted with his title to one Forney Jernigan by a valid sale and delivery of the goods.

R. W. Hardie, late Sheriff of Cumberland, testified for the plaintiffs that: "While Sheriff of the county, on Saturday 1st Dec. 1866, having in my hands an attachment in favor of one Sowder against E. L. Phillips, I went to the store on Hay Street, in Fayetteville, lately occupied by Phillips, for the purpose of making a (84) levy. It was about 11 o'clock in the morning; the front door was closed; I entered at the back door, and found in the store Moses Haywood, Forney Jernigan, Duncan McLaurin and Wetmore Holmes. On making known my business, Haywood said to me: *"You can's levy on these goods; I have sold them to Forney Jernigan."* Jernigan said, *"Yes, they are mine, I have bought them."* I replied, *"I must levy, or have a bail bond."* Haywood, Jernigan and McLaurin then retired into the shed part of the store, had a consultation, and returned. Haywood inquired if I had any other papers against Phillips besides the Sowder attachment, and on my answering *no,* he said he would sign the bond.

The parties were packing up the goods in boxes at the time I entered the store, and while I was there, the goods were being removed, Jernigan superintending the removal.

On the night of the same Saturday I saw the same goods at the

auction store of John H. Cook. By this time the Devries attachment had been placed in my hands. I informed Cook of the fact, and placed the goods in charge of his son, on the Monday following, 3d Dec. 1866. I endorsed the levy on the Devries attachment. After doing so, I met Haywood, who said to me: *"I suppose you have levied on those goods."* I replied, *"Yes, I am in a hurry now; come to the Court House, and I will furnish you a replevy bond."* His answer was *"I won't replevy."* I remarked, *"Then you will have to interplead."* He answered, *"I can't interplead; I have sold the goods to Jernigan."* He did not tell me then that they were his goods, and I have no recollection that he did so at any time."

John H. Cook testified: "I rented a room of my auction store to Forney Jernigan to place goods in, and on Saturday, 1st Dec. 1866, about noon, the goods were brought there on drays and taken in at the front door—these were the same goods afterwards levied on by Sheriff Hardie. That same day, about sundown, while Jernigan
(85) and myself were in the store, where the woods were, Haywood came, and in his presence Jernigan stated that those were his goods, and he was going to take some of them home with him, and I did see him take off with him in his hands two or three pieces, a dress for his wife and a coat. Haywood and myself had but little to say—Jernigan did most of the talking. He and Haywood went off together about dark. About an hour later Sheriff Hardie levied the Devries attachment.

Duncan McLaurin testified: That he had been clerk of Phillips for two months, when Haywood took possession of the goods under the bill of sale, and continued the witness as clerk for himself. Forney Jernigan and Wetmore Holmes were also employed as clerks for him along with witness. That a short time before the levy of these attachments, not exceeding a day or two, the witness was informed by Haywood and Jernigan, that Haywood had sold out the goods to Jernigan. That during this time Jernigan was busy disposing of the goods, and claiming them as his own, with the assent of Haywood. Both parties assisted in the packing of the goods and sending them off to the auction room, and both manifested an interest in them. That Haywood told him he had disposed of the goods to Jernigan. That Haywood paid the witness for services as clerk of the store.

Evidence upon the second point.

Moses Haywood, the party interpleading, testified: "The goods never were sold by me to Jernigan; he never paid a cent for them."

The plaintiffs objected to the witness making this statement, and asked his Honor to rule it out; and upon his declining to do so, the plaintiff excepted.

The witness resumed: "I have no recollection of ever telling Sheriff Hardie that the goods were Jernigan's, and don't know that I ever said so in the presence of McLaurin. I may have said so for the purpose of saving the goods; I reckon I might have said so; and Jernigan might have said the same. If Jernigan sold (86) any of his goods as his own before they were levied on, it was contrary to my orders. I sent him as a clerk to engage a room at Mr. Cook's auction store. The first day I took possession, I sold Jernigan six suits of cheap clothes, and those were the bundles he took off from Cook's, and they were never paid for. If he took off other clothes, besides these, from Cook's, I don't know of it. I have no recollection of saying to Sheriff Hardie: *"I can't interplead, I have sold the goods to Jernigan."* I told him, on meeting him Monday morning, that they were my goods, and he replied "It is just as I expected." I sent the goods to Cook's because I got his room cheaper than that where they were. The Phillips store I had rented for the balance of the year to Jackson and Pearce.

Upon the second point in the case, that is, the alleged sale by Haywood to Jernigan, his Honor charged the jury:

Whether a real sale or a sham sale was intended, is a question for the jury. If you shall find that it was a sham sale, then no property passed to Jernigan — as such a contrivance intended to deceive the Sheriff would not work a change of property, so as to render what really was the property of Haywood, subject to attachment for debts of Phillips.

The plaintiff excepted, and asked the following special instruction: That if the contract between Haywood was as stated in the testimony of McLaurin, Hardie and Cook, there was a sale of the goods to Jernigan, and the title passed to him.

His Honor declined to give the instruction as asked, but qualified it thus to the jury:

If you shall find that a real sale was intended to Jernigan, and the contract between Haywood and Jernigan was as stated in the testimony of McLaurin, Hardie and Cook, there was a sale of the goods to Jernigan and the title passed to him. If you shall find that a *real sale was intended,* then every thing which was necessary to be done to make a sale was done — and the plaintiffs are entitled (87) to your verdict.

The plaintiff excepted. Verdict for the party interpleading; Rule discharged, and Appeal by the plaintiff.

B. Fuller and Merrimon for the appellant, cited *McLean v. Douglass,* 28 N.C. 233; *Cameron v. Big Marcellus,* 48 N.C. 83; *Broom's*

Maxims, ex dolo malo, etc.; Blossom v. VanAmringe, 62 N.C. 138; *Broom's Maxims, in pari dedicto, etc.; Bird v. Benton,* 13 N.C. 179; *Sasser v. Jones,* 38 N.C. 19; *Jones v. Sasser,* 18 N.C. 402; *West v. Tilghman,* 31 N.C. 163.

The rule is not, that an estate is transferred, or property changed, but that a right is lost or forfeited so that a court of justice will not aid in its enforcement.

Massey v. Belleisle, 24 N.C. 176; *Fesperman v. Parker,* 32 N.C. 474; *Bessent v. Harris,* 61 N.C. 542; *Smith v. Sasser,* 50 N.C. 391; *Marshall v. Flinn,* 49 N.C. 203; *State v. Brantley,* 63 N.C. 519; 2 Pars. Cont. 500; *Gainey v. Hays,* 63 N.C. 497.

N. McKay and Phillips contra.

READE, J. The objection to the ruling of his Honor in regard to the testimony of the witness Haywood, was abandoned in this court.

It is not controverted that the goods levied on as the property of the debtor, Phillips, were his property a short time before the levy: nor is it controverted that, before the levy, Phillips had sold the goods to the party interpleading, Haywood: nor that Haywood had the right to interplead, provided the property in the goods remained in him. But the plaintiff alleges that Haywood had sold the goods to one Jernigan, and thereby lost his right to be heard. If this were the state of facts, the present is a fruitless controversy; for whoever succeeds, the property will remain Jernigan's, and the costs
(88) are the only matter of interest. The question is, did Haywood sell to Jernigan; and in this issue the burden of proof is on the plaintiff.

The plaintiff offered evidence tending to show a sale from Haywood to Jernigan, *i. e.,* that Haywood said *he* had sold them, and Jernigan said *he* had bought them; and there was evidence tending to show a delivery. Haywood offered evidence tending to show that there was no sale, and that whatever was said or done which had the appearance of a sale, was a mere contrivance between himself and Jernigan to "save the goods," and to keep the Sheriff from seizing his goods as the property of Phillips. Under this conflicting evidence, his Honor left it with the jury to say what was the true character of the transaction between Haywood and Jernigan;—explaining to them that if the parties *intended* a sale, it was a sale, and passed the title to Jernigan; but if it was only a sham or contrivance to deceive the Sheriff, and prevent him from taking Haywood's property for Phillips' debt, it could not be a sale. We think that instruction was right.

The plaintiff then asked for special instructions to the effect that if the testimony of the plaintiff's witnesses was believed, there was a sale from Haywood to Jernigan, without regard to the *intention* of the parties. His Honor gave the instructions with the qualification, that the facts were sufficient in *form* to constitute a sale, if it was the *intention* of the parties that they should; otherwise, there was no sale. The question intended to be presented is, whether, when the words and acts of parties are sufficient in form to make a contract, if so intended, the intention can be shown to be *variant from the ordinary meaning of the words and acts.* A contract is the agreement of two minds: the understanding and intention of the parties are the very gist of the matter. What was the agreement, the understanding, the intention, is always a question for the jury—whilst the legal effect of the agreement, is a question for the court. In other words, the terms must be agreed upon by the parties or found by the jury, and then they are to be construed by the court. In our (89) case the terms were not agreed upon; (indeed, it was not agreed that there was *any* contract at all); and therefore it was properly left to the jury. This would be true even if Jernigan were attempting to set up the contract. But he is not. The plaintiff is in the predicament of trying to set up a contract between other parties, when both parties deny that there was any contract between them.

It was also contended by the plaintiff, that inasmuch as Haywood had told the sheriff that he had sold the goods to Jernigan, and had deceived the sheriff, he was now estopped to deny it. It may be that if Haywood had told the Sheriff that the goods were the property of Phillips, and the Sheriff had been deceived thereby, and levied on them as the property of Phillips, Haywood would have been estopped to deny the title of Phillips, to the injury of the Sheriff or the plaintiff, whom he had deceived. But the Sheriff was pursuing the goods as the property of Phillips, and was not prevented or deceived by Haywood in that regard; and the fact that he told a falsehood, if he did, in regard to his transaction with Jernigan, in no way affected the Sheriff or the plaintiff: *Wallis v. Truesdell,* 6 Pick. 455.

Again, it was insisted by the plaintiff, that Haywood could not claim the property, because, according to his own showing, the transaction between him and Jernigan was a sham, a fraud, and that the maxim applies, *ex turpi causa non oritur actio.*

The answer is that Haywood claims nothing under that transaction, but claims against it, whatever it was, and under his purchase from the debtor Phillips, which was found to be fair.

Again, it was contended by the plaintiff, that the effect of the fraudulent transaction between Haywood and Jernigan was to pass

the title to Jernigan as against Haywood, whatever might have been its effect as to others. Waiving whatever objection there may
(90) be to the right of the plaintiff to avail himself of a transaction like the one in question, in which he has no interest, when neither of the parties seeks to set it up,—the answer is that the jury have found that there was *no transaction*, fraudulent or other, by which the parties intended to pass the title out of Haywood to Jernigan. If so, of course, there was no sale, as there can be no contract against the intention of the parties. The admission of evidence to show this, does not contravene the rule that words and acts, nothing else appearing, are to be understood in their ordinary acceptation, or the rule that when the terms are ascertained, the legal effect is a question for the Court.

There is no error.

Per curiam.

Judgment affirmed.

MARY A. MOORE, EX PARTE.

A creditor of the deceased had a right, under the former practice, to come in and be made a party defendant, for the purpose of excepting to an admeasurement of dower, in the course of a petition by the widow.

Arguendo: This is so still, under the act regulating *Special proceedings.*

DOWER, before *Tourgee, J.*, under an interlocutory application by a creditor of the deceased, at Fall Term 1869 of ROCKINGHAM Court.

The facts are stated in the opinion of the Court.

His Honor having refused the application, the creditor appealed.

(91) *Battle & Sons for the appellant.*

Phillips & Merrimon, contra, cited *Ramsour v. Ramsour,* 63 N.C. 231.

RODMAN, J. This is a petition for dower, and the petitioner is the widow, the executrix and the sole devisee of the testator. After the judgment for dower, and after the return of the inquisition assigning dower, Mary Bethel, a creditor of the testator, applied to become a party defendant, and to except to the admeasurement of dower as excessive. This was objected to and refused, and the only question is whether she should have been allowed to do so. We think

she should have been. Whether, in case she had applied before the judgment for dower, to be made a party, in order that she might oppose that judgment, she ought to have been allowed to do so, is a matter upon which we express no opinion. In *Stiner v. Cawthorne,* 20 N.C. 501, it is said: "The act of 1784 has not indicated the remedy for an illegal or excessive allotment of dower, but the usages of our Courts have defined it, to-wit: that when the report of the jury is returned, exceptions may be thereunto taken by any one aggrieved, and the Court will set aside the allotment, and order a new allotment, if sufficient cause be shown." Is a creditor "one aggrieved" by an excessive allotment, or must the phrase be confined to those who are necessarily parties to the suit, such as the heirs or devisees, and to such others as the petitioner may choose to make parties. The petition in this case was filed in December 1868, after the Code of Civil Procedure was adopted, but before the Act of 1868-'69, ch. 93, respecting special proceedings. Of course, therefore, no argument can be founded on this latter act; but we do not think it would affect the conclusion if it could be considered. Section 61 C.C.P., declares who *may* be made defendants to an action, and mentions among them "any person who has an interest in the controversy adverse to the plaintiff." We think that all persons who might legally be made defendants, are entitled, upon their application made in (92) due time, to come in as parties and assert their claims. How far they may be bound to do, or what might be the consequences of their failure to do so, if they had notice of the suit, we do not say. In an estate entirely insolvent, where the whole property of the deceased will not pay, or will not more than pay the rightful claims against it, the only persons interested in the real estate are the widow as dowress, and the creditors. If the estate be not manifestly insolvent, and there be a possibility that after the allotment of dower and the payment of the debts, something may be left for the heirs or devisees, even in that case it can scarcely be said that the interests of the heirs or devisees is so identical with that of the creditors as to entitle the heirs, etc., solely to represent the creditors, and to exclude them from a direct participation in the controversy. Still less can that be said in a case like this, where the dowress is the sole devisee. In such a case she cannot be considered as a fair representation of the creditors, to whom her interest would in reality be directly opposed, and they ought to be allowed to come in themselves and dispute the admeasurement of her dower. In *Cox v. Brown,* 27 N.C. 194, on a petition for a widow's year's provision, the creditors of the intestate were allowed to intervent without objection. As the question of their right to do so was not raised, the case is not cited as an au-

thority, but only to show the opinion of the counsel engaged, at that day.

If a creditor is not allowed to intervent, according to the application in this case, the final judgment in favor of the petitioner will be conclusive, so far that it cannot be impeached collaterally; but it would be unjust to hold that it could not be impeached in any way by one, who, not being, and not capable of becoming, a party, was still prejudiced by it, as a creditor obviously might be. If a creditor must then have a right to some proper proceedings to impeach the judgment after it is rendered, convenience requires that he should
(93) be allowed to become a party to the proceeding, and to resist its rendition. *Lowery v. Lowery, post* 110, has no bearing on this case: the point there decided being that the appeal by Goins did not carry up the judgment for dower.

Judgment reversed. Let this opinion be certified.

Per curiam.

Judgment reversed.

JOHN H. GARRETT v. W. H. SMITH.

The plaintiff, in 1864, at Elizabeth City, within the Federal lines, as subagent for the State, purchased hats to be conveyed to the defendant (his principal,) in Halifax County, within the Confederate lines, for the use of the State troops. The hats were transported into Halifax County to the residence of the defendant, but were not sold to the State on account of their high price, and thereupon the defendant purchased them, agreeing to give for each, thirty pounds of lint cotton. Subsequently the defendant refused to pay for them, *Held:*

1. That the contract of sale between the parties was not against the policy of the Government of the United States.

2. That the Ordinance and Act establishing a *scale* of values, had no application; and that the plaintiff's measure of damages, was the value of *the cotton in gold* at the time and place of the contract, adding, for Treasury notes, the premium on gold at the time of the verdict.

ASSUMPSIT, tried before *Pool, J.*, at Fall Term 1869, of CHOWAN Court.

The facts were: That in 1864, and up to the close of the late war, the defendant was an agent of the State to procure supplies of provisions and clothing, for the use of its troops, from places east of the Chowan river, and the plaintiff was a subordinate agent, un-
(94) der the defendant, for the same purpose. Accordingly, on the

1st of December 1864, the plaintiff purchased certain hats on private account, and transported them to the residence of the defendant, in Halifax County, his usual place of rendezvous. He paid for them in notes of North Carolina banks. As the schedule price allowed for hats by the State was not high enough, the plaintiff refused to let the State have them, and thereupon sold them to the defendant upon private account, for thirty pounds of *lint* cotton *per* hat. At that time the Chowan River was the boundary between the Federal and the Confederate lines.

It was in evidence that North Carolina bank-notes at the time that the hats were bought, were worth fifty cents in the dollar in the National Paper-currency. Upon the defendant's proposing to show the value of this currency at that time in gold, the plaintiff objected, and the Court excluded the evidence. To this the defendant excepted.

The defendant submitted also, that the contract was illegal.

The Court instructed the jury that the contract was not illegal, and that the measure of damages was the value of the hats at the time and place of sale to the defendant.

Verdict for the plaintiff; Rule, etc.; Judgment, and Appeal by the defendant.

Smith for the appellant.
W. A. Moore contra.

DICK, J. The ordinance of Oct. 18th 1865, and the acts of 1866, chs. 38 and 39, relate only to the following contracts made during the late war:

1. Executory contracts solvable in money.
2. "Debts contracted, in which the nature of the obligation is not set forth, nor the value of the property for which such debts were created, is stated."

The rules of construction laid down in *Robeson v. Brown*, 63 N.C. 554, are only applicable to such contracts. (95)

The case before us presents a different kind of contract, *i.e.*, a contract of exchange, or barter, of property. The plaintiff, under an express agreement, delivered to the defendant a number of hats, and was to receive in exchange thirty pounds of lint cotton for each hat. The defendant failed to perform his part of the contract, and this suit was brought to recover damages for such non-performance. The true measure of damages is the value of *the cotton* at the time and place of the contract. As United States Treasury notes were not used as a medium of exchange within the limits of the insurrectionary States, in contracts made during the war, gold must be adopted as a

standard value. Where the gold value of the contract is ascertained by evidence, the jury, in adding the depreciation of treasury notes, should be governed by the market value of such currency at the time of the verdict, and judgment should be rendered for amount: *Mitchell v. Henderson,* 63 N.C. 643.

The defendant in his pleadings insisted that this contract was void for illegality, as it was in violation of the act of Congress of July 13th 1861, 12 U.S. Stat. at large, 257. That act interdicted all commercial intercourse between citizens of the United States, and citizens of the insurrectionary States, but did not prohibit contracts between citizens of the same section. This contract was made within the limits of an insurrectionary State, between citizens of said State, and the goods were exchanged on private account, and with no intent to aid the rebellion.

The plaintiff violated the law when he purchased the hats in Elizabeth City, and they became liable to forfeiture; but they were safely transported within the Confederate lines, and changed in the course of domestic trade, and such contract is in no way tainted with illegality: *Phillips v. Hooker,* 62 N.C. 193.

There was error in the ruling of his Honor in the court be-
(96) low, as to estimating the value of the plaintiffs' contract, and there must be a *venire de novo.*

Let this be certified.

Per curiam.

Venire de novo.

JOSEPH S. SOWERS v. R. T. EARNHART.

A bond was given for $1,000, dated Nov. 18th 1862, and payable "one day after date," the consideration being a tract of land:

Held, to be competent for the plaintiff to rebut the *presumption* as to the currency in which it was solvable under the ordinance of 1866, by proving that it was expressly agreed by the parties at the time, that it was to be paid "in good money after the war," as such expression referred to the currency in which, and not to the time at which it was payable, and was equivalent to, "in money good after the war."

ACTION for money, tried before *Cloud, J.,* at Fall Term 1869, of DAVIDSON Court.

The plaintiff declared upon and offered in evidence a bond executed by the defendant, of which the following is a copy:
"$1000.00.

One day after date we or either of us do promise to pay Joseph S. Sowers one thousand dollars, for value received, this November 18th 1862."

He also introduced evidence that it was given in payment of the price of a tract of land which was worth the amount, in the present paper currency of the United States; also that at the time when it was executed, it was expressly agreed between the parties, that it was to be paid in good money after the war.

The defendant objected to the latter evidence, but it was admitted. He therefore offered evidence to rebut it, and also to show that the land was not worth so much. (97)

His Honor instructed the jury:

1. That if they should believe that the agreement as to the currency in which the bond was to be paid, was as shown by the evidence for the plaintiff, they should find a verdict for the full amount of the note, and that it made no difference that such agreement was not inserted in the bond:

2. That if they believed that the land was worth the amount agreed to be paid by the bond, they would, even if there were no agreement as above, find to the same effect.

Verdict for the full amount. Judgment accordingly, and Appeal by the defendant.

W. M. Robbins for the appellant.
T. J. Wilson and Clement contra.

DICK, J. By presumption of law, this note was solvable in Confederate money: *Robeson v. Brown,* 63 N.C. 554. By way of rebutting this presumption, the plaintiff offered evidence to show that there was an express agreement between the parties at the time of the execution of said note, that it was to be paid "in good money after the war." There was opposing evidence introduced by the defendant, and this question of fact was fairly submitted by His Honor to the jury, and they gave a verdict for the plaintiff, for the amount specified in the note: See *Garrett v. Smith, ante* 93.

The defendant's counsel insisted in this Court, that the evidence of the collateral contract offered by the plaintiff tended to vary the terms of the written contract as to the time of payment, and for that reason was inadmissible. This construction of the words proved cannot be adopted, as it contradicts the express agreement set forth in

the note to pay "one day after date," and takes it out of the operation of the remedial statutes referred to in the cases above cited.

The fair and reasonable construction of the collateral contract
(98) is to make the words, "good money after the war," refer to the kind of money in which the note was to be solvable, and not to the time at which the note was payable.

This construction does not vary the written contract, but explains it in the manner provided for by said remedial statutes.

We think that where words taken in one sense will materially change the contract, and defeat the object of a remedial statute, while they are susceptible of another construction which will give substantial effect to the agreement of the parties, and to a beneficial statute, the latter construction ought to be preferred.

The ruling of His Honor upon the second point in the case was also correct; but it was immaterial, if the evidence satisfied the jury that the parties, by a collateral parol agreement, intended that the note should be solvable in *money, good after the war.*

There is no error. Let this be certified.

Per curiam.

Order reversed.

T. J. MAXWELL, ADM'R. v. ROBERT HIPP, AND ANOTHER.

A bond for money for the hire of a slave for 1865, given January 2d 1865, is subject to be *scaled* according to the value of the hire for a year, in lawful money, and not according to the legislative table of the values of Confederate currency (acts of 1865-'66, c. 39.)

DEBT, tried before *Logan, J.*, at January Special Term 1870, of MECKLENBURG Court.

The plaintiff declared upon a bond of the defendant's for
(99) $1010, payable to the plaintiff, and dated January 2d 1865.

The plaintiff offered to prove that said bond was given for the hire of a negro man belonging to his intestate, for the year 1865, and that his hire was worth $50.

His Honor excluded the testimony.

Verdict for $7.70, of which $6.21 is principal money, etc., Rule, etc., Judgment, and Appeal by the plaintiff.

Wilson for the appellant.

No counsel contra.

DICK, J. The bond declared on was executed during the late war, and there is a legal presumption that it was solvable in Confederate money.

The consideration of this bond was the services of a slave, which belonged to the estate of plaintiff's intestate. The plaintiff ought to have been permitted to introduce evidence as to the value of such consideration, as that was the amount which he was entitled to recover. The legislative scale does not apply to this contract, as the consideration was not Confederate money: *Robeson v. Brown,* 63 N.C. 554; *Garrett v. Smith, ante* 93.

There was error in the ruling of his Honor.

Let this be certified.

Per curiam.

Venire de novo.

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(100)

WILLIAM LAWS, ADM'R., ETC. v. R. F. RYCROFT, AND OTHERS.

The presumption, under the ordinance of 1865, that a note given for purchases at an administrator's sale in March 1864, payable at twelve months, is solvable in money of the value of Confederate currency, is not rebutted by evidence that at such sale the administrator gave notice that he would receive in payment only such currency as would pay the debts of his intestate, coupled with other evidence, that the creditors would not receive Confederate currency, and that the estate was largely insolvent. In such case the plaintiff is entitled to recover the value of the articles sold.

DEBT, tried before *Watts, J.,* at January Special Term 1870, of WAKE Court.

The plaintiff declared upon a bond in the ordinary form, given by the defendants for purchases made at a sale by him as administrator, in March 1864, upon a credit of twelve months. It was shown upon the trial, that the plaintiff gave notice, at the sale, that he would receive in payment of the notes only such currency as would pay the debts of his intestate; also that the creditors would not receive Confederate currency, and that the estate was largely insolvent.

The defendants submitted, that they were entitled to show the value in good money, of the articles by them purchased at such sale, and that the plaintiff could recover no more.

His Honor being of this opinion, evidence was introduced to show what that value was.

The plaintiff excepted.

Verdict for the value of the articles; Rule for a new trial, etc.; Judgment, and Appeal by the plaintiff.

Rogers & Batchelor for the appellant.
Phillips & Battle contra.

DICK, J. Experience has shown that statutes changing the well established rules of the common law, give rise to many new and difficult questions. But there are often circumstances which re-
(101) quire such changes, and remedial statutes ought to be liberally construed, so as to effect the purposes for which they were designed.

The contracts and other transactions between our people during the late war, could not be construed and adjusted upon fair and equitable principles, under the strict rules of the common law; and the Convention and Legislature, for the purpose of affording just remedies in such cases, wisely enacted the ordinance of October 18th 1865, and the acts of 1866, chs. 38 and 39.

The contract before us comes fully within the policy established by these remedial statutes. The property sold by the plaintiff brought extravagant prices, and he ought to be satisfied with their value in present currency. By presumption of law, the note sued on was solvable in Confederate currency, and the evidence introduced by the plaintiff did not rebut that presumption. The collateral contract which he seeks to enforce, was not sufficiently definite to take the note out of the operation of said statutes. By the terms of the sale, Confederate of State Treasury notes, or bank bills, would have discharged the note, if the creditors of the estate of the intestate would have taken them in the payment of debts.

In the case of *Sowers v. Earnhart, ante* 96, there was an express collateral contract, certain in its terms, *i.e.* "to be paid in good money after the war." The note in this case was payable in *currency*, and this word must be interpreted according to the state of facts, and the popular understanding of the term at the time the note was given.

As the presumption created by the statutes was not rebutted by the evidence of the plaintiff, his Honor was right in holding that the value of the property must be estimated by the jury: *Garrett v. Smith, ante* 96. The judgment in the Court below is affirmed, but the plaintiff must pay the costs of this Court, as he appealed from a judgment in his own favor, of which he had no just right to complain.

Per curiam.

Judgment affirmed.

(102)

W. W. DANCEY v. THOMAS P. AND CALLY S. BRASWELL.

Where a bond was given upon the 1st day of January 1863, for the hire of slaves for the year 1863; *Held*, that the plaintiff had a right to show to the jury the value of such slaves at that place and for that year, as a guide to them in making up a verdict.

COVENANT, tried before *Jones, J.*, at Fall Term 1869, of EDGECOMBE Court.

The plaintiff declared upon a bond in the usual form executed by the defendants "for the sum of $179.00, it being for the hire of negroes," etc. It was shown by the plaintiff that nothing was said at the time of the hiring as to the currency in which the bond was to be paid; and he offered further to show the value of the slaves in that locality and for that year. This was excluded by the Court, and the plaintiff excepted.

Verdict for the plaintiff, in accordance with the instructions of the Court, "for $99.00, of which $72.22 is principal money;" Rule, etc.; Judgment and Appeal by the plaintiff.

Battle & Sons for the appellant.
Phillips & Merrimon contra.

DICK, J. His Honor erred in not allowing the plaintiff to introduce evidence to show the value of the consideration of the contract declared on:—See *Maxwell v. Hipps, ante* 98.

Let this be certified.

Per curiam.

Venire de novo.

(103)

WILLIAM R. CHERRY, ADM'R. v. L. L. SAVAGE.

In an action upon a bond in the usual form, given at an administrator's sale in January 1865, proof that at the sale proclamation was made that "Confederate notes will not be taken," rebuts the *presumption* made by the Ordinance of 1865 as to the currency in which notes, etc., are *solvable;* and the fact that on the same occasion, before sale made, the administrator, upon further enquiry by the bystanders, added "that if he had to collect the notes he would collect gold and silver, that if he could pay the notes over to the heirs, etc., *they* could make any arrangement they were willing to, as to payment," is immaterial.

CHERRY *v.* SAVAGE.

DEBT, tried before *Jones, J.*, at January Special Term 1870, of EDGECOMBE Court.

The plaintiff declared upon a bond for money, in the usual form, payable to himself as administrator, etc., at six months, by the defendant, and executed January 18th 1865, and proved that it was given at a sale made by him, and that before the sale, proclamation was made of the terms, by reading aloud a written statement (amongst other things) that "Confederate notes will not be taken"; also that after these terms were read, and before the sale, as they did not state what sort of money *would be* received, the plaintiff added, "that if *he* had to collect the notes he would collect gold and silver; that if he could pay the notes over to the heirs, etc., *they* could make any arrangement with them they were willing to, in regard to their payment."

The defendant excepted to the admission of other testimony as to the terms, than what was written.

Verdict for the plaintiff, for the *face* of the note, etc. Rule, etc., Judgment, and Appeal by the defendant.

Bragg for appellant.
Battle & Sons contra.

DICK, J. It appears from the evidence introduced by the plaintiff, that the note sued on was given on the 18th day of Jan-
(104) uary 1865, for property purchased at an administrator's sale.

Before the sale was made, it was distinctly announced by the auctioneer, as one of the terms of sale, that Confederate money would not be received in payment, from the purchasers. This evidence fully rebutted the presumption created by the Ordinance of Oct. 18th 1865, and the Acts of 1866, chapters 38 and 39.

In the case of *Laws, Adm'r. v. Rycroft, ante* 100, the collateral contract was not sufficiently definite to prevent the operation of said statutes.

There is no error.

Per curiam.

Judgment affirmed.

ARCHIBALD McINTYRE, ADM'R. ETC. v. G. B. GUTHRIE.

There is nothing in either General Sickles' Order, No. 10, or in the Acts of 1865-'6, ch. 50, and 1866-'7, ch. 17, to prevent a decree for money made at the Superior Court of Chatham Spring Term 1866, (3d Monday of March,) from becoming dormant before the 13th day of July 1868; *Therefore*, an execution which issued at the latter date upon such decree is *irregular*, and should be set aside.

MOTION by the defendant, to set aside an *alias* execution, and also a *Ven. Ex.*, made before *Tourgee, J.*, as Spring Term 1869 of CHATHAM Court.

At Spring Term (3d Monday in March) 1866, of the Court of Equity for Chatham, a decree had been made in the case, that the defendant should pay to the plaintiff $407.00, etc.

If any execution had issued thereupon (there was some evidence of one, *from* the above Term,) it appeared that none had come into the hands of the Sheriff, until the one in question, styled an *alias,* which issued July 13th 1868, tested of Spring Term (105) 1868, and was levied, and returned to Fall Term. From Fall Term 1868, a writ of *Ven. Ex.* issued, returnable to Spring Term 1869.

Upon due notice, a motion was made to set aside these last named writs.

His Honor granted the order, and the defendant appealed.

Manning for the appellant.

The decree was not dormant when the *alias fi. fa.* issued.

The act (Rev. Code, c. 31, § 109) which requires executions to issue within a year and a day, is a Statute of Limitations, and therefore was suspended when this decree was made, and has been so ever since, by the concurrent effect of the acts of 1866-'67, c. 17, and 1865-66, c. 50; and the *Order,* No. 10, of General Sickles, then commanding this *Department.**

*For convenience to the Profession, so much of Order No. 10 as affected *civil* proceedings is here inserted; giving the whole of such of the Paragraphs as are cited.

HEADQUARTERS, SECOND MILITARY DISTRICT,
CHARLESTON, S. C., April 11th, 1867.

GENERAL ORDERS
No. 10

* * * * * * * * * * *

I. Imprisonment for debt is prohibited; unless the defendant in execution shall be convicted of a fraudulent concealment or disposition of his property,

He cited and relied upon *Oliver v. Perry,* 61 N.C. 581; *Hin-*
(106) *ton v. Hinton, Ib.* 410; *Morris v. Avery, Ib.* 238; *Den v. Love, Ib.* 435; *Mardre v. Felton, Ib.* 279; *Blankinship v. McMahon,* 63 N.C. 180; and submitted, that *this* case was distinguishable from those of *Simpson v. Sutton,* 61 N.C. 112; *Griffis v. McNeill,*
(107) *Ib.* 175; *Neely v. Craige, Ib.* 187, and *Jacobs v. Burgwyn,* 63 N.C. 193.

Phillips & Merrimon contra, relied upon *Neely v. Craige,* 61 N.C. 187, as to dormancy of the decree; and *Palmer v. Clark,* 13 N.C. 354, to show that an execution is not to be reckoned as *issued,* for

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with intent to hinder, delay and prevent the creditor in the recovery of his debt or demand. And the proceedings now established in North and South Carolina, respectively, for the trial and determination of such questions may be adopted.

II. Judgments or decrees, for the payment of money, on causes of action arising between the 19th of December 1860, and the 15th of May 1865, shall not be enforced by execution against the property or the person of the defendant. Proceedings in such causes of action, now pending, shall be stayed; and no suit or process shall be hereafter instituted or commenced, for any such causes of action.

III. Sheriffs, Coroners, and Constables, are hereby directed to suspend for twelve calendar months the sale of all property upon execution or process, on liabilities contracted prior to the 19th of December, 1860, unless upon the written consent of the defendants, except in cases where the plaintiff, or in his absence, his agent or attorney, shall upon oath, with corroborative testimony, allege and prove that the defendant is removing, or intends fraudulently to remove, his property beyond the territorial jurisdiction of the court. The sale of real or personal property by foreclosure of mortgage, is likewise suspended for twelve calendar months, except in cases where the payment of interest money, accruing since the 15th day of May 1865, shall not have been made before the day of sale.

IV. Judgments or decrees entered or enrolled, on causes of action arising subsequent to the 15th of May 1865, may be enforced by execution against the property of the defendant; and in the application of the money arising under such executions regard shall be had to the priority of liens, unless in cases where the good faith of any lien shall be drawn in question. In such cases the usual mode of proceeding adopted in North and South Carolina, respectively, to determine that question, shall be adopted.

V. All proceedings for the recovery of money under contracts, whether under seal or by parole, the consideration for which was the purchase of negroes, are suspended. Judgments or decrees entered or enrolled for such causes of action, shall not be enforced.

VI. All advances of moneys, subsistence, implements and fertilizers loaned, used, employed or required for the purpose of aiding the agricultural pursuits of the people, shall be protected. And the existing laws which have provided the most efficient remedies in such cases for the lender, will be supported and enforced. Wages for labor performed in the production of the crop shall be a lien on the crop, and payment of the amount due for such wages shall be enforced

the purpose of preventing subsequent process from becom- (108) ing irregular, unless it go into the hands of the officer who is to enforce it.

READE, J. The decree was entered at Spring Term 1866, and the *Fi. Fa.* before us, issued July 13th 1868. This was more than a year and a day after the rendition of the decree.

General Sickles' Order, No. 10, (April 11th 1867,) which was cited by the plaintiff, did not prevent the lapse of time from rendering the decree dormant, if for no other reason, because this effect had already been produced when the Order was issued.

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by the like remedies provided to secure advances of money and other means for the cultivation of the soil.

VII. In all sales of property under execution or by order of any court, there shall be reserved out of the property of any defendant, who has a family dependant upon his or her labor, a dwelling house and appurtenances and twenty acres of land, for the use and occupation of the family of the defendant; and necessary articles of furniture, apparel, subsistence, implements of trade, husbandry or other employment, of the value of five hundred dollars. The homestead exemption shall inure only to the benefit of families—that is to say, to parent or parents and child or children. In other cases, the exemption shall extend only to clothing, implements of trade or other employment usually followed by the defendant, of the value of one hundred dollars. The exemption hereby made shall not be waived or defeated by the act of the defendant. The exempted property of the defendant shall be ascertained by the Sheriff, or other officer enforcing the execution, who shall specifically describe the same, and make a report thereof in each case to the court.

VIII. The currency of the United States, declared by the Congress of the United States to be a legal tender in the payment of all debts, dues and demands, shall be so recognized in North and South Carolina. And all cases in which the same shall be tendered in payment, and refused by any public officer, will be at once reported to these Headquarters or to the Commanding Officer of the Post within which such officer resides.

IX. Property of an absent debtor, or one charged as such, without fraud, whether consisting of money advanced for the purposes of agriculture, or appliances for the cultivation of the soil, shall not be taken under the process known as "Foreign Attachment;" but the lien created by any existing law shall not be disturbed, nor shall the possession or the use of the same be in any wise interfered with, except in the execution of a judgment or final decree, in cases where they are authorized to be enforced.

X. In suits brought to recover ordinary debts, known as actions *ex contractu*, bail as heretofore authorized, shall not be demanded by the suitor, or taken by the Sheriff or other officer serving the process. In suits for trespass, libel, wrongful conversion of property, and other cases known as actions *ex delicto*, bail as heretofore authorized, may be demanded, and taken. The prohibition of bail in cases *ex contractu*, shall not extend to parties about to leave the State; but the fact of intention must be clearly established by proof.

The case of *Neely v. Craige*, 61 N.C. 187, is an authority to show the Acts of 1865-'66, c. 50, and 1866-'67, c. 17, do not prevent decrees from becoming dormant, and, for the reasons there assigned, we affirm the order of the Court below.

Per curiam.

Order accordingly.

GASHINE, EMORY & CO. v. BAER & EPPLER.

An affidavit which alleges, as grounds for an attachment, that the affiant "believes that the defendants have disposed of their property and are still doing so, with the intent to defraud their creditors"; also, that "the defendants being largely indebted, if not insolvent, have sold and are selling their large stock of goods, at less than the cost of the same in the city of New York, and have disposed of other valuable property for cash," is not only sufficient, but very full and explicit.

MOTION to set aside a warrant of attachment, made before *Thomas, J.*, at January Special Term 1870, of CRAVEN Court.

The motion was based upon the alleged insufficiency of the (109) affidavit, which, in the part impeached, was: "4th, That affiant has reason to believe, and that he does believe, that the defendants have disposed of their property, and are still doing so, with the intent to defraud their creditors; 5th, That the grounds of his belief are, that the defendants being largely indebted, if not insolvent, have sold and are rapidly selling, their large stock of goods at less than the cost of the same in the city of New York, and have disposed of other valuable property recently for cash."

His Honor refused to make the order applied for, and the defendants appealed.

Manly & Haughton for the appellants.
Green and Mason contra.

SETTLE, J. The defendants objected to the sufficiency of the affidavit upon which this attachment is founded.

The objection was properly overruled, as the affidavit is not only sufficient, but very full and explicit in stating facts, which make out a *prima facie* case.

The matter is discussed in the late case of *Hughes v. Person,* 63 N.C. 548, and we will content ourselves with a reference to that case.

Per curiam.

Judgment affirmed.

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(110)

MARY LOWERY v. PATRICK LOWERY, AND OTHERS.

In a petition for Dower, in the County Court, judgment was given that the petitioner was entitled, and an order made for a jury to allot it; upon the return of their report at the next term, a person who claimed to be true heir of the deceased, came in, and suggested that there had been no marriage between the latter and the petitioner; an issue was made up accordingly, and at an ensuing term it was tried, and a verdict given in accordance with the suggestion; upon the petitioner's appealing to the Superior Court, she moved that the report be confirmed; this the Judge declined to do, and ordered another issue to be tried, and petitioner appealed again. *Held:*

1. That the alleged heir could not intervene to have the *judgment* for Dower set aside, as he was no party to the proceedings.

2. That such intervention could not, under the circumstances, be supported as an application by one *aggrieved* by the particular admeasurement, to have it set aside.

DOWER, heard by *Buxton, J.,* at July Special Term 1869, of ROBESON Court.

The proceedings had commenced in the County Court of Robeson at August Term 1856, by a petition on the part of the widow, to which her children were made parties defendants as heirs of Allen Lowery deceased, and *service* had been accepted, and no defence made. The writ of dower thereupon issued, and at February Term 1867 a report was made allotting dower, and no exception was filed by the defendants. At that Term one Goins and his wife, filed a petition verified by affidavit, that Mrs. Goins was a daughter of the deceased, and had not been made a party to the proceedings, and charging that the petitioner never had been married to the deceased, and therefore was not entitled to dower; upon this an issue was made up, and being continued, was brought to trial at August Term 1867, and thereupon a verdict found, that the petitioner had not been married to the deceased. Judgment was given "accordingly," and the petitioner appealed.

At the above mentioned Term of the Superior Court, the
(111) petitioner moved that the report of the jury should be confirmed, and the defendants did not object; but, at the instance of the said Goins and wife, the Court refused to make an order of confirmation, and directed an issue, "whether Elizabeth Goins, wife of William Goins, is one of the heirs at law of said Allen Lowery, deceased," to be submitted to a jury.

The petitioner appealed.

RODMAN, J. At August Term 1866 of Robeson County Court, Mary Lowery filed her petition against Patrick Lowery and others, described as the children and heirs of Allen Lowery, praying that dower might be assigned to her as his widow, in certain lands. It does not positively appear that any judgment for dower was entered on the records of the Court. The Clerk however, issued a writ, tested on the 4th Monday of November 1866, commanding the Sheriff to summon a jury to assign the petitioner dower, and in this writ he recited the filing of the petition, "and it was ordered by the Court that a writ of dower should be issued to the Sheriff in her behalf," etc. At February Term 1867 the Sheriff returned the writ, and a report of the jury assigning dower. At the same Term, William Goins and Elizabeth his wife, filed a plea alledging that she is heir of the deceased, and that there was never a marriage between him and the petitioner. Thereupon, at the next Term, a jury was empanelled who found that the petitioner was not the wife of the deceased. "Judgment is given accordingly" and the Petitioner appealed. In the Superior Court the petitioner moved for a confirmation of the report; this the Judge refused, and directed an issue, whether Elizabeth Goins is the heir of the deceased; from which judgment the petitioner appealed. This brief abstract of the record is made for the purpose of showing how the case of *Stiner v. Cawthorne*, 20 N.C. 501,
(112) is applicable to it. In that case the Court, by Gaston, J., say: "In a proceeding by petition under the act (Rev. Code ch. 118, § 2.) as in a writ of dower at common law, the suit for dower is at end by the judgment of the Court awarding dower. This is the *only* judgment to be rendered in that suit; any proceeding to set aside the inquisition, is in the nature of a new suit." He continues: "The appeal taken from the County Court, is not, therefore, an appeal from the judgment in this suit for dower, but merely from the decision made upon the motion" to set aside the inquisition, etc. We think that from the recital in the writ issued by the Clerk, we are bound to presume that there was a judgment that the petitioner was entitled to dower. None but the parties could move at a subsequent term to

set aside this judgment for irregularity: *Jacobs v. Burgwyn,* 63 N.C. 196; and if it was a regular judgment, the Court could not set it aside at a subsequent term: *Murphy v. Merritt,* 63 N.C. 502.

If therefore we consider the paper filed by Goins as an application to the Court to set aside the judgment of November Term, which the Court granted, it had no power to do so. True, any one aggrieved could except to the admeasurement of dower, *(Stiner v. Cawthorne, ubi supra;)* but, conceding that Goins was a party aggrieved, that does not seem to have been the nature of her application, nor would a re-admeasurement, going only to the quantity, benefit her. But if it was in the nature of an exception to the inquisition, the appeal from the judgment on that, did not take up, or avoid the judgment for dower, which, in either view, stands yet in force. The action of the Judge in the Superior Court, was therefore erroneous. Goins, however, does not lose any rights which she may have; being no party to the action for dower, she is unaffected by it. As to her, it is *res inter alios.* Upon this view of the case, *Edwards v. Bennett,* 32 N.C. 361, and *Purvis v. Wilson,* 50 N.C. 22, have no analogy.
We refer to them only to show that they have not escaped (113) our notice.

Let this be certified.

Per curiam.

Judgment reversed.

CORINNA M. AVERY, EX PARTE.

When, for payment of a deceased husband's debts, it becomes necessary to resort to lands devised by him to his wife, she is remitted to her rights of *dower,* which, as in other cases, is not subject to those debts during her life.

A petition for dower may be *ex parte,* in the names of the widow and the heirs, but if the widow be guardian of the heirs, and the estate be insolvent, the heirs should be made parties defendant, with a properly constituted guardian *ad litem;* and the creditors also are to be allowed to come in if they choose, and make themselves defendants.

DOWER, tried before *Mitchell, J.,* at Fall Term 1869, of BURKE Court.

The petition, which was *ex parte,* in the names of the widow and heirs of William Waightstill Avery deceased, set forth that the deceased died in 1864, leaving a considerable estate in lands, which he

bequeathed to his widow for life, etc.; that the will was duly proved in Burke County Court, and the widow has been duly appointed guardian of the heirs, etc.; also that the estate is found to be insolvent; the prayer was for dower, etc.

The Judge dismissed the petition, on the ground that the widow had not dissented from the will in due time.

The petitioners appealed.

(114) *Battle & Sons for the appellants.*

DICK, J. A widow who takes land as a devisee under the will of her husband, is remitted to her right of dower, when it becomes necessary to resort to the lands devised to her, for the payment of the debts of her husband: *Mitchener v. Atkinson,* 62 N.C. 23; *Gully v. Holloway,* 63 N.C. 84. She may have her interest ascertained and allotted to her, in the manner provided by law for the assignment of dower, which shall not be subject to the payment of the debts of her husband during the term of her life. When the rights of creditors are not interfered with, the widow and heirs at law may properly join in an *ex parte* petition for the assignment of dower; but this ought not to be done when the interest of creditors will be affected. In such a proceeding the rights of creditors are supposed to be represented by the heirs, and they ought to be made defendants: *Ramsour v. Ramsour,* 63 N.C. 231. When the estate is insolvent the heirs have no personal interest in the lands, and it cannot reasonably be supposed that they will resist an improper admeasurement of dower; and the creditors should be allowed to protect their rights and be made parties defendant: *Mary Ann Moore, ex parte, ante* 90.

There was error in the ruling of his Honor in the court below. The estate of the testator is insolvent, and the executor has filed a petition to subject the lands devised to the widow, to the payment of the debts of the testator. The widow's rights as devisee, accrued before the Act restoring to married women their common law right of dower; and the interest to which she is remitted, is one-third of the lands of which her husband died seized and possessed. This petition was filed after the Act of 1869, chap. 93, and must be governed by its provisions.

As the widow is the regular guardian of the heirs, and as the estate is insolvent, the heirs must be made defendants, and be represented by a duly constituted guardian *ad litem,* and the creditors of
(115) the estate must be allowed to make themselves defendants, if they so desire.

The petitioner Corinna M. Avery, is entitled to the relief which

she seeks, but the petition should be amended in the court below in the partciulars above indicated. Let this be certified.

Per curiam.

Ordered accordingly.

Cited: Simonton v. Houston, 78 N.C. 411; *Welfare v. Welfare,* 108 N.C. 275; *Morris v. House,* 125 N.C. 555; *Seaman v. Seaman,* 129 N.C. 295; *Fulp v. Brown,* 153 N.C. 534; *Freeman v. Ramsey,* 189 N.C. 795; *Wadford v. Davis,* 192 N.C. 487.

JAMES H. CARSON v. R. M. OATES, ADM'R., ETC.

Upon the death of a non-resident, intestate, leaving assets in this State, they are to be applied to the payment of the claims of his resident creditors, if there be any such, in the order prescribed by our law, and not by that of his domicil.

Such assets are to be *collected* by an *administrator* appointed here, and not by the creditors.

The "Supplemental proceedings," under the C.C.P., Title XI, ch. 2, do not apply to such a case, but are intended to supply the place of the former proceedings *in Equity* where relief was given after a creditor had recovered a judgment *at law,* and was unable to obtain satisfaction under further *legal* process. Where one who is charged in Supplemental proceedings as holding property belonging to a judgment debtor, claims such property as his own, the question cannot be decided in the course of such *proceedings,* but must be settled by an *action.*

ORDER, made in the course of *supplemental proceedings,* (C.C.P. Tit. xi, c. 2,) by *Logan, J.,* at Chambers, MECKLENBURG Court, December 1869.

The facts were that the plaintiff, a resident of this State, had recovered judgment, still pending, against the defendant as administrator of one Brawley Oates, who died a resident of Florida, in 1864; that one Spratt, resident in Mecklenburg county, had possession of a certificate, issued to the deceased, for 36 shares in the Charlotte & S. C. R. R. Company, and this was the only assets which could be found applicable the debt; but Spratt refused to make such application or to surrender it to the defendant.

The plaintiff thereupon applied for the benefit of Supplemental proceedings, and asked judgment that Spratt be re- (116) quired to deliver up the certificate, so that it might be sold, etc., and meantime for an injunction.

A citation was then ordered by the Judge to be served upon Spratt, calling on him to show cause, etc.

The cause alleged by Spratt was that the deceased was a resident of Florida at his death, and that his personal property, including this certificate, which had been as such residence, was brought into North Carolina after his death, in order to save it from the Federal troops, etc.; that, about 1867, it was returned to the administrator who had been regularly appointed in Florida; was by him sold at public sale in Micanopy, in that State, when said Spratt purchased it; that he had paid for it, and since held it as his own.

Upon this affidavit being filed, His Honor, at Fall Term 1869, ordered that Spratt should surrender the certificate to the defendant, as administrator of Brawley Oates. This was done. A few days afterwards, upon further application by Spratt, the Judge at Chambers, ordered the certificate to be brought into Court, and the former order to be suspended until, etc.

From this order the plaintiff appealed.

H. C. Jones for the appellant.
Wilson contra.

DICK, J. "If a citizen of another country dies indebted to citizens of this country, and owns personal property here, we appropriate it to the payment of his creditors in the order required by our law, and not that of his domicil." *Moye v. May,* 43 N.C. 131. In order to make this appropriation, an administrator must be appointed in this State, and it is his duty to collect the assets, and dispose of them in the payment of debts in the order required by our law. A creditor of the intestate cannot collect the assets, and apply them in satis-
(117) faction of his debt to the prejudice of other creditors, but he must look to the administrator for payment. These principles are so well settled that they need neither argument nor the citation of authorities to sustain them.

In our case, if the shares of R. R. Stock, which are the subject matter of controversy, are effects in this State belonding to the estate of Brawley Oates deceased, then the administrator, R. M. Oates, must collect them by civil action, and apply the proceeds to the payment of debts in this State, and hand over the surplus, to be distributed according to the law of the domicil.

The present proceedings cannot be sustained, as the provisions of the Code of Civil Procedure—Title xi, chap. 2, upon which they are founded—do not apply to this case. Those provisions were intended to supply the place of proceeding in Equity, where relief was given after a creditor had ascertained his debt by a judgment at law, and

was unable to obtain satisfaction by process of law. The creditors of an intestate had no such remedy, for if an administrator failed to perform his duty in collecting assets and paying debts, the remedy of creditors, was an action on his administration bond. Such is still the remedy of creditors of an intestate.

If they could by these "Supplemental Proceedings" force a debtor of an intestate to satisfy their executions, they could render nugatory the laws regulating the administration of the estates of deceased persons. Such an interference with the rights and duties of administrators, was certainly not contemplated by the provisions above referred to. There is another objection to the present proceedings. They are supplemental to, and a continuation of the remedy sought in the original action, and an order for the delivery of property belonging to the judgment debtor held by a third person, must be made for the direct benefit *of the plaintiff*. In this case the order of delivery was made for the benefit *of the defendant*, and, of course, cannot be sustained.

As Spratt sets up a distinct and specific claim to the property in controversy, his title cannot be enquired into in these (118) proceedings, but a separate action against him must be brought by the administrator, in which the rights of the claimants can be determined.

There is error in the ruling of the Court below, and the proceedings must be dismissed.

Per curiam.

Error.

Cited: Rankin v. Minor, 72 N.C. 426; *Rand v. Rand,* 78 N.C. 17; *Holshouser v. Copper Co.,* 138 N.C. 258; *Dillard v. Walker,* 204 N.C. 73; *Cotton Co., Inc. v. Reaves,* 225 N.C. 443; *Cornelius v. Albertson,* 244 N.C. 268.

HENRY O. PARKER v. WILLIAM H. SCOTT.

In a contest between a trustee, under a deed made by the *holder* of a note, and a creditor, by attachment and garnishment of the *maker*, the lien of the former begins from the time at which the deed is delivered to the Register, and that of the latter from the time when the summons is *personally* served upon the maker; *Therefore,*

Where the deed was delivered to the Register at 10 o'clock, A.M., Dec. 20th 1866, and actually registered January 28th, 1867; and the summons

for the garnishee was left at his residence at 8 o'clock A.M., Dec. 20th, 1866, but not actually received by him until the evening of that day, *Held*, that the lien under the deed had priority.

ATTACHMENT, tried by *Watts, J.*, at December Special Term 1869, of WAKE Court.

It appeared that a summons to one Moses A. Bledsoe as garnishee in the action, was left at his abode at 8 o'clock, A.M., Dec. 20th 1866, by the Sheriff, who thereupon returned that he had served it upon Bledsoe by leaving it, etc.; that Bledsoe appeared at Court as summoned, and filed an answer; that on the 15th of November 1866, Bledsoe had executed to the defendant four notes, for $250 each, payable at one, two, three and four years; that the defendant, on the 1st day of Dec. 1866 executed to one Young, as trustee, a deed, (119) conveying to him said notes, to secure certain debts, and, at the same time, he endorsed them to said Young, for the same purposes; that the deed was proved, and filed for registration with the Register of Wake county December 20th, 1866, at 10 o'clock, A.M., and was registered January 28th 1867; and that Bledsoe, being absent from home when the summons was left there, did not actually receive it until he returned, at night.

Thereupon his Honor gave judgment against the garnishee, and the defendant appealed.

Bragg for the appellant.

1. The deed in trust was in law registered when *filed* for registration, *McKimmon v. McLean*, 19 N.C. 79, *Mills v. Bright*, 26 N.C. 173.

2. That a garnishment shall be a lien (under the doctrine of *Tindall v. Wall*, Bus. 3) the service must be *personal.*

3. The transfer of the notes by endorsement and delivery, is sufficient, without registration of the deed, *Patton v. Smith*, 29 N.C. 438, *Gillis v. McKoy*, 15 N.C. 172, *Doak v. Bank of the State*, 28 N.C. 309: See other cases of *Pledge*, 2 Bat. Dig.

Rogers & Batchelor, and Fowle & Badger contra.

1. A conveyance of a chose in action in trust to pay debts, is within the registry laws: *Smith v. Washington*, 16 N.C. 318.

2. The rule, that the time of filing a deed for registration, is to be considered as the time of its registration, applies, on principle, only where the subsequent steps of registration follow as soon after such filing as reasonably may be: See *Moore v. Collins*, 15 N.C. 402.

3. Notice left at the usual place of residence is valid service: *Kennedy v. Fairman,* 2 N.C. 465.

DICK, J. The notes executed by Bledsoe, which are the subject of this controversy, were assigned, by a deed in trust, (120) to Young, on the 1st of December 1866, and were also duly endorsed to him, by the payee, Scott, to secure certain debts mentioned in said trust. It is admitted that said endorsements were made to effect the purposes of the trust. This constituted a sufficient consideration to support the contract of endorsement, and vested the legal title of said notes in the trustee. The deed in trust was delivered to the Register for registration, at 10 o'clock, A.M., on the 20th day of December 1866, and was actually registered on the 28th day of January 1867, as appears from the certificate of the Register. In contemplation of law, the deed in trust was duly registered from the time of its delivery to the Register and from that time was good against creditors: *McKimmon v. McLean,* 19 N.C. 79, *Mills v. Bright,* 4 *id.* 173.

It is insisted by the plaintiff, that his attachment was properly served on the debtor, Bledsoe, before the registration of such trust, as a summons for him as garnishee was left at his residence by the Sheriff at 8 o'clock, A.M., on said 20th day of December. The summons was not actually received by Bledsoe until he returned home, in the evening of said day.

The question presented for our determination, is, whether this constructive service of process was sufficient, or was personal service necessary to give priority to the claims of the plaintiff. In many instances, usually prescribed by statute, the leaving a written notice at the residence of a person, is sufficient service to bind the party, etc.; *Rev. Code,* ch. 31, sec. 121. But in most cases where process is used to call a person as a party into Court to determine a question of right in which such party is personally interested, the law requires actual service of such process on the defendants: 3 *Chit. Genl. Pr.* 144, *Cooley Const. Lim.* 403.

The statute in relation to garnishments (Rev. Code, ch. 7, sec. 7) evidently contemplated personal service, as no provision is made for a constructive service of the summons, and this (121) statute has always been strictly construed. The attachment in this case is substantially an action at law by the defendant against the garnishee, and, as in common law actions, personal service is required. The plaintiff in this case can have no right against the garnishee, which the defendants would not have had in a common law action to recover the debt.

The service of the summons upon Bledsoe, was not effectual until he actually received it, and as that was after the registration of the trust, the rights of the trustee are not affected. The judgment in the Court below must be set aside, and the proceedings dismissed.

Per curiam.

Judgment accordingly.

Cited: Davis v. Whitaker, 114 N.C. 280; *Glanton v. Jacobs,* 117 N.C. 429; *Smith v. Lumber Co.,* 144 N.C. 49; *Wilkinson v. Wallace,* 192 N.C. 158.

JAMES WILSON v. J. H. BARNHILL.

An affidavit that the defendant is "about to leave the State," is insufficent as a basis for a warrant of arrest; it ought to have added, "with an intent to defraud his creditors as the affiant believes;" and then set forth *the grounds* of such belief, so as to show some probable cause.

Refusal to allow a second affidavit to be filed, is an exercise of discretion, which cannot be reviewed upon appeal; the plaintiff might have filed a second sufficient affidavit immediately, and obtained a second warrant of arrest.

MOTION to vacate an order of arrest, made before *Logan, J.,* at January Special Term 1870, of MECKLENBURG Court.

The affidavit upon which the order had been granted, after stating the cause of action, set forth that the defendant "is about to leave the State." The order was thereupon made, and the defendant arrested December—1869.

At the above Term, a motion was made by the defendant to
(122) vacate the order; and also one by the plaintiff to amend the affidavit, by filing another in which it was stated, upon information and belief, that the defendant "has disposed of his lands and portions of his personal property, and is using efforts to dispose of the residue, with the purpose of removing to the State of Texas, with the intent thereby to defraud his creditors," etc.

The Court refused the order to amend, and ordered that the order of arrest should be vacated. The plaintiff appealed.

Wilson for the appellant.

Dowd contra.

PEARSON, C.J. The affidavit upon which the warrant of arrest issued, was not sufficient to authorize it.

It sets out merely that the defendant Barnhill "was about to leave the State." This may be said of every man who is about to take a trip South; or every merchant who is going to the North to buy goods. The affidavit must set out that the party is about to leave the State, with an intent to defraud his creditors, as the affiant believes, —and the grounds of his belief, so as to show some probable cause.

If the defendant had filed a counter affidavit, that would have opened the way for affidavit in reply on the part of the plaintiff; *Clark v. Clark, post* 152. But as no affidavit was filed by the defendant, the motion rested on the insufficiency of the affidavit on which the warrant of arrest issued.

The leave asked, to amend by filing an additional affidavit, was matter of discretion, and its refusal cannot be received in this Court.

After the defendant was discharged for the insufficiency of the affidavit, on which the warrant of arrest issued, we can see no reason why the plaintiff, if so advised, could not have applied instantly for a second warrant of arrest based on the second (123) affidavit, which sets out sufficient ground.

There is no error.

Per curiam.

Judgment affirmed.

Cited: Wood v. Harrell, 74 N.C. 340; *Devries v. Summitt,* 86 N.C. 130; *Hale v. Richardson,* 89 N.C. 63; *Judd v. Mining Co.,* 120 N.C. 399.

E. A. COVINGTON AND ANOTHER v. BENJAMIN INGRAM.

Final decrees in the late Courts of Equity, can be impeached at present only by *actions*, commenced, as others, by summons.

MOTION to dismiss a rule theretofore obtained, made before *Buxton, J.*, at Fall Term 1869 of ANSON Court.

The facts were that at Fall Term 1859 of Anson Court of Equity, upon the petition of the plaintiffs and others, certain lands had been ordered to be sold, for partition; at Spring Term 1861, the Master reported that he had made the sale, and his report was confirmed: At Fall Term 1861, an order was made to collect the bonds given for the

purchase money: In May 1863, the defendant, Ingram, who had purchased one of the tracts, paid the price to the Master, in Confederate money, and, thereupon, at Fall Term 1863, a decree was made, reciting that the purchase money had been paid, and ordering, that the lands be conveyed by the Master to the purchasers, "to-wit: the Mount Pleasant land to Benjamin Ingram the purchaser, in fee simple, etc."—that the costs be paid, that a distribution of the residue of the money be made among the petitioners, and that the decree be enrolled.

This was accordingly done, excepting that the plaintiffs re-
(124) ceived no part of the shares due to them.

Before Spring Term 1869 of Anson Court, notice in writing, *entitled* as being in the petition filed in 1859 for partition and sale, was given by the plaintiffs to the defendant, that at the next term they would apply for a rule upon him, to show cause why the proceedings in regard to the alleged payment by him of the money for the Mount Pleasant land, and the deed for such land to him, should not be set aside, and an order made requiring him to pay the difference between the price bid by him for the land, and the real value of the depreciated money which he had paid to the Master. The matter was *continued* at Spring Term. At Fall Term, after argument upon both sides, the rule was granted. Subsequently the defendant moved to dismiss the rule, upon the ground that the relief which was asked for, could be had only by an action commenced by *summons*. This motion having been overruled, the defendant appealed.

Blackmer & McCorkle, and Phillips & Merrimon for the appellant.
Ashe, and Battle & Sons contra.

SETTLE, J. The sole question presented by the record, is one of pleading.

The merits of the controversy are not now before us; and we are therefore not at liberty to consider the fact, that the defendant has the plaintiff's land, and has paid but little or nothing for it.

We are of the opinion that the decree of the Court of Equity, made and ordered to be enrolled at Fall Term 1863, was final; leaving nothing further to be done by the purchaser, Benjamin Ingram, and that so far as he was concerned in that proceeding, it was *res adjudicata*, the plaintiffs having had their day in court. It may be that the plaintiffs could have obtained the relief which they
(125) seek, if the suit had still been pending, by *orders made in the cause*. This was the mode of procedure in *Emerson v. Mallett*, 62 N.C. 234, where there had been no final decree, and therefore the

court retained full control of the whole matter, and could adjust all the equities growing out of it. Indeed, a Court of Equity would not entertain a bill seeking no other relief than that which might have been had by orders in a suit then pending: *Rogers v. Holt,* 62 N.C. 108.

On the other hand a final decree could only have been impeached before the adoption of the Code of Civil Procedure by a bill of review. Since the adoption of the Code, relief against such a decree can only be had by a civil action, commenced by issuing a summons: *Barnes v. Morris,* 39 N.C. 22, cited in the argument by both sides, is not in point, and is mentioned only to show that it has not been overlooked.

There was error in ruling that an action was unnecessary, and that relief might be granted by orders in the cause. Let this be certified.

Per curiam.

Error.

Cited: Thaxton v. Williamson, 72 N.C. 126; *Eure v. Paxton,* 80 N.C. 19; *Melvin v. Stephens,* 82 N.C. 288; *Peterson v. Vann,* 83 N.C. 122; *England v. Garner,* 84 N.C. 214; *Fleming v. Roberts,* 84 N.C. 539; *Thompson v. Shamwell,* 89 N.C. 286; *Mock v. Coggin,* 101 N.C. 368; *Smith v. Fort,* 105 N.C. 453.

S. T. JONES v. JERRY MCCLAIR.

Under the act of March 16th 1869, suspending the C.C.P., the summons in a civil action is to be returned to the *Term.*

Therefore an action in which the summons was returnable before the Clerk, upon demurrer by the defendant, will be dismissal; and an incidental warrant of attachment (issued because defendant was removing his goods, etc.,) although properly returnable, will follow the fate of the action.

ACTION tried, upon demurrer by the defendant, by *Watts, J.,* at Chambers, December 9th 1869, JOHNSTON Court. (126)

The summons was *returnable* before the Clerk of the Court, and a warrant of attachment, sued out at the same time (because the defendant had removed part, and was about to remove other, of his property,) was *returnable* in the same way.

The defendant demurred to the complaint, for want of jurisdiction. His Honor overruled the demurrer, and the defendant appealed.

Bragg and R. G. Lewis for the appellant.
Phillips & Merrimon contra.

1. The 11th Section of the act of March 11th 1869, is to be construed as excepting from the general provisions of the act, all *actions* in which an attachment issues contemporaneously with the summons.

2. The act of March 11th 1869, is unconstitutional, as violating Art. 4, § 4, of the State Constitution, which provides that "the Superior Courts shall be at all times open," etc.

3. The act is unconstitutional, as being on its face, a Stay-law: It is temporary in its objects and effect,—the 11th section is copied from former Stay-laws; *Jacobs v. Smallwood,* 63 N.C. 112.

RODMAN, J. It seems to us that the only question presented by this record, is as to the proper return day of the summons; a question which was decided in *McAdoo v. Benbow,* 63 N.C. 461, which decision the Court is not disposed to review. The summons was returnable before the Clerk of the Superior Court not in Term time.

According to that case it was irregular, and ought to have been dismissed. It seems to us that the warrant of attachment must share the fate of the action to which it was only an adjunct. With
(127) this opinion, we do not think it necessary or proper to decide the other interesting questions which were discussed at the bar. Action dismissed.

Let this opinion be certified.

Per curiam.

Judgment dismissed.

THE STATE v. JOHN HARRIS.

An indictment for stealing "fifty pounds of flour, of the value of sixpence," is good; and is sustained by proof that the party charged stole a *sack* of flour, although there was no proof of its weight, or of its value further than that the defendant had said that he gave five and a half dollars for it.

LARCENY, tried before *Tourgee, J.,* at Fall Term 1869, of CHATHAM Court.

The indictment described the article taken, as "Fifty pounds of flour, of the value of sixpence." A special verdict was found: viz:

1. That the defendant had stolen, etc., "one sack of flour the property of," etc.

2. That there was no evidence of its weight.

3. That the only evidence of its value, was an allegation of defendant given in evidence, that he paid $5.50 for it.

Thereupon, His Honor ordered a verdict of Not Guilty to be entered, and gave Judgment accordingly; and the Solicitor for the State appealed.

Attorney-General for the State.
No Counsel contra.

READE, J. The object of describing property stolen by its quality and quantity, is that it may appear to the Court to be of value. The object of describing it by its usual name, owner- (128) ship, etc., is to enable the defendant to make his defence, and to protect himself against a second conviction.

In the case under consideration, the substance of the charge, is, stealing flour—fifty pounds of flour—from which it is apparent that it was of value; and the exact quantity and value need not be proved. The objection made, is, that it was a *"sack* of flour;" by which we understand *flour* in a sack or bag. If the defendant stole the flour, it makes no difference whether it was in a sack, or bag, or box, or lying about loose. It was of value, and its character was not changed. An indictment charged the stealing of "a parcel of oats;" held to be sufficient. So another indictment charged the stealing of a "hog;" the proof was a shoat: held to be sufficient. But proof of stealing mutton will not support a charge of stealing a sheep, for the things are different.

In the case under consideration, the proof of stealing a sack of flour, *i.e.*, flour in a sack or bag, sustains the charge of stealing flour, and it was not necessary to prove its exact weight or value.

There is error. This will be certified, to the end that there may be judgment in the Court below upon the verdict, according to law.

Per curiam.

Error.

Cited: S. v. Nipper, 95 N.C. 655; *S. v. Kiger,* 115 N.C. 750; *S. v. Caylor,* 178 N.C. 808; *S. v. Houser,* 183 N.C. 770.

RUSSELL H. KINGSBURY v. E. B. LYON AND OTHERS.

In ordinary dealings during the late war, without design to aid the rebellion, Confederate treasury notes were a sufficient consideration to support a contract.

DEBT, submitted, upon a case agreed, to *Watts, J.*, at Fall (129) Term 1869, of GRANVILLE Court.

The suit was brought upon a bond for $1,000.00 executed by the defendants to the plaintiff, March 3d 1863, upon a loan of Confederate treasury notes by the plaintiff to the defendant, Lyon. The pleas were, General Issue, Illegal consideration.

If the Court were of opinion with the plaintiff, judgment was to be rendered for him, for $488.38, of which, etc., otherwise, judgment was to be for the defendants.

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

Bragg for the appellant.
No counsel contra.

READE, J. In the case of *Phillips v. Hooker*, 62 N.C. 193, it was decided, upon full argument and much consideration, that Confederate Treasury notes were a sufficient consideration to support a contract, when such notes were used in ordinary dealings, without intent to aid the Rebellion. That case has been frequently cited with approbation; so that the question is settled.

The judgment below is reversed, and judgment here for plaintiff upon the case agreed.

Per curiam.

Judgment reversed, etc.

STATE v. HARPER.

From the rule, that in indictments upon *statutes* it is safe to use the *very words* of the statute, are to be excepted cases in which a statute (in enumerating offences, charging intent, etc.) uses the disjunctive *or*. In some such cases *and* is to be substituted for *or;* in others, doubts as to the proper terms are to be met by using several *counts;* and *or* is never used, unless in the statute it means *to-wit*, or is surplusage: *Therefore*,

STATE *v.* HARPER.

An indictment for larceny, which charges the thing taken, to be the property of J. R. D. "*and another or others,*" (in the words of Rev. Code, c. 35, § 19) is fatally defective, and no judgment can be given thereupon.

LARCENY, tried before *Thomas, J.,* at Fall Term 1869 of GREENE Court.

The prisoner was convicted. His counsel thereupon moved to arrest judgment, because the indictment charged the property in the thing stolen, to be in "John R. Dail and another, or others." This motion was refused, and the defendant appealed.

No Counsel for the appellant.
Attorney-General contra.

SETTLE, J. "In any indictment wherein it shall be necessary to state the ownership of any property whatsoever, whether real or personal, which shall belong to, or be in the possession of more than one person, whether such persons be partners in trade, joint-tenants, or tenants in common, it shall be sufficient to name one of such persons, and state such property to belong to the person so named, and another, or others, as the case may be." *Rev. Code, ch.* 35, *sec.* 19.

Before the passage of this Act, which is a copy of 7 *Geo.* 4 *ch.* 64, *sec.* 14, it was necessary, where the goods stolen were the property of several persons, to name all the partners or point-owners correctly in the indictment. A failure to do so would have been fatal. How far has this Act changed or modified the common law?

It creates no new offence, but only relaxes to a certain extent, that degree of certainty and particularity heretofore required, in charging the ownership of stolen property.

As a general rule, it is sufficient in framing an indictment upon a statute, to use the very words of the statute, but this (131) rule is not without exception, for where a statute, in enumerating offences, charging intent, etc., uses the disjunctive *or,* it is common to insert the conjunctive *and* in its stead, in the bill of indictment, for alternative or disjunctive allegations make the bill bad for uncertainty.

True, cases may be found where *or* has been used in the sense of *to-wit,* and hence there was no objection; and in others it has been rejected as surplusage, but these cases are rare and form the exception, not the rule.

Sometimes it will not do to use either. In *State v. Haney,* 19 N.C. 390, which was an indictment for stealing a slave, one of the exceptions was, that the indictment did not set forth the offence as described by the statute; it charging the seduction to be, "with an in-

tention to sell, dispose of and convert to their own use," whereas the words of the statute were, "with an intention to sell or dispose of to another, or appropriate to his own use." The court say, "had the count pursued the words of the statute, *with intention to sell, dispose of to another, or appropriate to their own use,* it would have been bad, because of uncertainty. Had it varied from them by changing *or* into *and,* and charged an intention to sell, dispose of to another, *and* appropriate to their own use, we apprehend that it would have been bad, because of repugnancy."

The property in stolen goods must be averred to be in the right owner, if known, or if not, in some person or persons unknown; and if it appear that the owner of the goods is another and a different person from the person named as such in the indictment, the variance will be fatal. A variance or omission in the name of the person injured, is more serious than a variance in the name of the defendant, the one furnishing good ground for acquittal, if the variance occurs on the trial, or for arresting the judgment when the error appears on the record, while the other can only be taken advantage of by (132) plea in abatement. *Whart. Cr. Law,* Sec. 256.

The defendant is charged with stealing one peck of corn, "of the goods and chattels of one John R. Dail and another, or others."

Here we have alternative allegations, in the same count, as to the ownership of the stolen property. It is common to insert several counts in order to meet the different views which may be presented by the evidence, but alternative allegations in the same count make it bad for uncertainty.

Mr. Archbold, in his work on Criminal Pleading, page 177, calls attention to the words "another, or others," in the statute of 7 *Geo.* 4, and says, "if the property be described as belonging to 'A,' and another, there being more partners than one, or *vice versa,* the variance will be fatal."

The words "as the case may be" are also important, showing that it must be laid according to the truth of the matter, but not both ways, for then either the one or the other allegation must be false.

This is a matter of substance, and not an informality or refinement which is cured by our statute.

The Judgment must be arrested.

Per curiam.

Reversed.

Cited: S. v. Capps, 71 N.C. 96; *S. v. Hill,* 79 N.C. 659; *S. v. Tytus,* 98 N.C. 706; *S. v. Watkins,* 101 N.C. 705; *S. v. Van Doran,* 109 N.C. 865; *S. v. Williams,* 210 N.C. 161; *S. v. Albarty,* 238 N.C. 132.

(133)

JAMES P. LEAK v. THE COMMISSIONERS OF RICHMOND COUNTY.

The distinction between such acts of the State authorities during the recent war as are valid, and such as are not, turns upon the enquiry whether or not they were extraordinary, arising out of the condition of things, and intended to obstruct or modify some part of the policy of the United States in regard to the rebellion, or not.

Measures taken during that war by parties, whether States, counties or individuals, the object of which was to counteract plans set on foot by the United States for the suppression of the rebellion, were, and are, contrary to the public policy of that Government; and so, contracts arising out of them, cannot be enforced: *Therefore,*

Notes taken for money lent in 1862 to a county to enable it to provide *salt* for its citizens, and thus avoid one of the penalties of *blockade*, are void.

The present State and County authorities are under no obligation to fulfil contracts made by their predecessors during the rebellion, unless they come within the provisions of the Ordinance of 1865, (October 18th,) "Declaring what laws and ordinances are in force," etc., and that requires such as it validates to be "consistent with allegiance to the United States," which is not true of the transaction in question.

The burden of proving that any act of the State authorities during the late rebellion which may be under debate, was "consistent with allegiance," is, owing to general position of those authorities, upon the party who asserts it.

Transactions like that under consideration fall under the provisions of the Ordinance of 1865, (Oct. 19th,) and the Constitution of 1868, (Art. viii, § 13) *forbidding* the payment of obligations incurred in aid of the rebellion, directly or indirectly.

Those prohibitions are merely declaratory of principles of the common law in regard to contracts, and therefore do not impair the obligation of the *contracts* referred to.

When Acts of Assembly provided that certain orders of the County Courts might be made, *a majority of the justices being present*, the record must show affirmatively a compliance with that condition.

SPECIAL Proceedings, tried before *Buxton, J.*, at Spring Term 1869 of RICHMOND Court.

The complaint alleged: That at October Term 1862 of the former County Court of that county, the following order was made: "Ordered that H. W. Harrington, Chairman of this Court, be authorized to borrow from banks or individuals the sum of one thousand dollars, to be paid over to L. W. McLaurin Esq., for the purpose of paying for salt, freight and expenses, etc., and that the said Chairman be

further authorized to borrow as aforesaid, from time to time,
(134) as may by him be deemed necessary, not exceeding five thousand dollars, to pay for the quotas of salt that may be apportioned to the county by the State-works at Saltville, Va., and pass the same over to said L. W. McLaurin for the purposes aforesaid"; that thereupon, and relying upon said order, the plaintiff, upon the 12th of November 1862, lent to said county two thousand dollars, and received from Harrington two bonds, payable to himself, for one thousand dollars each, referring to the above order, and signed by Harrington as Chairman, etc. Also that no part of such amount had been paid.

The defendants demurred, because:

1. The court had no jurisdiction over the subject matter of the action.

2. The complaint did not state facts sufficient to constitute a cause of action.

After argument, the court declared, as a conclusion of law:

That the contracts of the late rebel authorities of the county of Richmond, of which that before it was one, have no binding, legal obligation upon the present defendants, who are the rightful authorities of the same county; and thereupon allowed the demurrer, and dismissed the complaint.

The plaintiff appealed.

Ashe, Leitch and Hinsdale for the appellant.
N. McKay contra.

PEARSON, C.J. This is a special proceeding, under the new mode of procedure, in the nature of a writ of *mandamus*, under the old mode, to compel the authorities of the county of Richmond to pay money lent by the plaintiff to the persons then exercising the powers of the county, to enable them to provide salt for the use of the citi-
zens during the war. As evidence of which the plaintiff relies
(135) on a note executed by H. W. Harrington, Chairman of the County Court.

The note recites an order of the Court of Pleas and Quarter Sessions, but it no where appears that a majority of the justices of the county were present when the order was made, and there is no averment that such was the fact.

This objection is fatal, for both the ordinance of the convention and the statute on which this transaction is based, give the authority:—"a majority of the justices being present."

This fact must appear affirmatively, it not being a matter within

the ordinary powers of the Court of Pleas and Quarter Sessions. The maxim, *omnia presumuntur* has no application: *State v. Powell,* 24 N.C. 275; *Pierce v. Jones,* 4 Ib. 327; *State v. King,* 5 Ib. 203.

Passing by this objection, and assuming that the Commissioners of a county may be sued, as to which, see *Winslow v. Commissioners of Perquimans Co., post* 218, upon the main question there are several views which sustain the objection of his Honor:

1. At the time of the legislative act, giving power to the justices to make the contract, and at the date of the contract, the persons exercising the power of the State, and the persons exercising the power of the county, had disavowed their allegiance, and put themselves in open hostility to the rightful State government, and to the government of the United States. In other words, there was rebellion.

It follows, that the courts of the rightful State government, which has regained its supremacy, cannot treat the acts of persons so unlawfully exercising the powers of the State and county authority as valid, unless the court is satisfied that the acts were innocent and such as the lawful government would have done. So when the plaintiff asks the court to compel the defendants, who are in the rightful exercise of the power of the county, to perform a contract made by a set of men who were wrongfully exercising the power, the onus of showing that the contract was for an innocent purpose, (136) and not made in aid of the rebellion, is upon the plaintiff; if the matter be left in doubt, the courts cannot enforce the claim against the rightful authorities of the county.

So far from being left in doubt, it is clear that the contract was in aid of the rebellion.

Any act which would not have been done except for the existence of the rebellion, and which was calculated to counteract the measures adopted by the government of the United States, for its suppression, and to enable the people in insurrection to protract the struggle, was in aid of the rebellion.

The idea can be more clearly expressed by examples: Statutes sanctioning and protecting marriage and the domestic relations, and Appropriations for the ordinary administration of justice, or for the support of the Lunatic Asylum, are acts having no reference to the rebellion, and would have been done in any event. So, although it may be true that the doing of these things made the condition of the people more endurable, in no fair sense can they be considered, as having been done in aid of the rebellion: On the other hand, Statutes and Appropriations to run the blockade, and introduce for the use of the people, cotton-cards and medicine; or to supply the people with salt by erecting works for its production, and providing for its transportation and distribution: whether done directly by the State,

or indirectly, through the agency of the county authorities, are acts of a novel and unprecedented character and such as would not have been done except for the existence of the rebellion. So the case is covered by the first requisite in the definition of an act in aid of the rebellion.

That the act of providing salt for the use of the people was calculated to counteract the blockade and other measures of the United States to suppress the rebellion, and to enable the people of the insurgent States to protract the struggle, is a matter too plain for discussion; any one who attempts to prove the contrary must
(137) confess the soft impeachment of allowing his reasoning faculties to be obscured by prejudice and sympathy for "the cause of the South," as it was called on the argument.

Grant seizes a man, in the act of carrying corn and salt into Vicksburg, who says, "the women and children are in a state of actual starvation, and my motive was to do an act of charity and humanity, and mitigate the rigors of war;" the reply is obvious: "The laws of war are paramount to motives of charity and humanity. Starving the citizens was resorted to, in order to compel the authorities to surrender, and you attempt to counteract my measures, and aid them to protract the seige?"

This instance, of a single act of an individual, is given by way of illustration. But when the act is done under the authority of a wrongful government, which had subverted the rightful State government and was in open rebellion, whether it be done directly by the government, or indirectly through the agency of its creatures the wrongful county authorities, the position, that it is done "merely as an act of charity and humanity," and was not calculated to aid the rebellion, carries the evidence of fallacy on its face.

The act, *per se*, did aid the rebellion, and its being done by the wrongful authority, acting as part and parcel of the wrongful State government, organized for the avowed purpose of sustaining the rebellion, tends the more strongly to fix its character.

The Court is not at liberty to shut its eyes to the historical fact, that furnishing salt was not a single act, but was one of a long series of acts in aid of the rebellion: *"noscitur a sociis."*

The ordinances of the Convention of 1861 assuming legislative powers; the acts of the Legislatures during the war; and the acts of the county authorities, *all*, follow out a common purpose, *to resist the invasion!* A military board is established; appropriations are made to procure clothes and arms for the soldiers, cotton-cards,
(138) medicine, salt, etc., for the people; bounties are offered for volunteers; the powers of the county authorities are enlarged; the counties equip volunteers, and transport their baggage to camp;

take measures to provide salt, etc., and give every assurance that the wives and children of soldiers will be cared for; in short, the authorities, both State and county, strain every nerve to "resist the invasion." Witness, the debt of the State and counties accumulated *during the war!*

A change takes place, what was then considered *"resisting an invasion"* turns out to have been *"aiding a rebellion."* Thereupon it is said with seeming seriousness, "certain of these acts ought not to have been entered as items under the head of 'resisting invasion,' and should now be transferred and posted as items under a distinct head viz: "charity and humanity!" for such acts were not calculated or intended, either to resist invasion, or to aid rebellion, and did not have that effect!"

In *Texas v. White,* 7 Wall. U.S. 700, it is held that "the act of a Military Board in applying bonds belonging to the State, to pay for cotton cards and medicine, for the use of the people of Texas during the war, is void, on the ground that the purchase of these articles was an act in aid of the rebellion; and to the suggestion "that the purchase of cotton cards and medicine, was not a contract in aid of the rebellion," but "for obtaining goods capable of a use entirely legitimate and innocent," the Court merely says "we cannot adopt this view," and reference is made to the fact, that the act was done by a military Board and was only one of a series of acts calculated to aid the rebellion, for the purpose of showing that the question was too plain to admit of discussion.

There is another view of the subject on which his Honor seems to have put his decision: "The rightful authorities of the county are under no obligation to pay a debt contracted by a set of men who were wrongfully exercising the power of the county, and were engaged in open rebellion." (139)

"To meet this objection the plaintiff relies on the ordinance of the Convention 18th October 1865, sec. 4: All the acts and doings of the civil officers of the State, since 20th May 1861, done under, and in virtue of any authority, purporting to be a law of the State, which is consistent with its allegiance to the United States, and with the Constitution of the State, shall be valid, etc."

The question is, was the legislative act conferring power on the Justices of the county of Richmond to contract this debt, consistent with the allegiance of the State to the government of the United States?

There too, the onus is on the plaintiff. The train of reasoning in the first view taken of this case, applies with equal, if not more force to this, and proves clearly that the legislative act, purporting to be a law of the State, under which the Justices contracted this debt,

so far from being consistent with the allegiance of the State to the United States, was in aid of resisting the invasion of the United States, as it was then termed, in other words, in aid of the rebellion.

According to these two views, to entitle the plaintiff to judgment, he must satisfy the Court, both in respect to the innocency of the contract,—that it was not calculated to aid the rebellion, or intended to have that effect, and in respect to the legislative act, under which the Justices derived their power to borrow this money,—that it was also innocent and was not calculated and intended to aid the rebellion and protract the struggle. Upon which latter point the "acts and doings" of the Convention of 1861, and of the Legislatures following it, during the war, bear perhaps with greater force, than upon the contract made by the Justices.

The question is against the plaintiff on both points.

There is another view of the question. The people in Convention (Oct. 1865) ordain "that all debts incurred by the State in (140) aid of the late rebellion, directly or indirectly, are void, and no General Assembly of this State shall have power to assume or provide for the payment of the same or any portion thereof, nor to assume or provide for the payment of any portion of the debts incurred directly or indirectly by the late so-called Confederate States," or by its agents, or under its authority, (Oct. 19th 1865). By the State Constitution: "No county, city, town or other municipal corporation, shall assume or pay, nor shall any tax be levied or collected, for the payment of, any debt, or the interest upon any debt contracted directly or indirectly in aid or support of the rebellion." Art. 7, sec. 13.

Here is a declaration of the will of the people, obligatory upon the courts, that no "war debt" as it is termed, contracted either by the State, or by the counties, or cities, or towns, shall be paid.

The discussion of the subject into which we have entered at large, was considered important, to show, 1st, That furnishing salt to the people during the war was a measure calculated and intended to aid in resisting the invasion, in other words, aiding the rebellion; and 2d. That the ordinance of the Convention of 1865, and the provision of the Constitution are not obnoxious to the charge of impairing the obligations of contracts, for that these contracts, without this provision, could not have been enforced by the courts of the rightful government of the State as now reconstructed, without violating a well settled principle of the common law, and without impairing the integrity of the conditions accepted and acted upon, in restoring the State to its constitutional relations to the government of the United States, as one of the States of the Union.

Per curiam.
Judgment affirmed.

Cited: Setzer v. Comrs., 64 N.C. 521; *Smitherman v. Sanders*, 64 N.C. 524; *Rand v. State*, 65 N.C. 197; *Logan v. Plummer*, 70 N.C. 392; *Lance v. Hunter*, 72 N.C. 179; *Brickell v. Comrs.*, 81 N.C. 241; *Bluthenthal v. Kennedy*, 165 N.C. 373; *Smith v. Express Co.*, 166 N.C. 158.

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(141)

R. B. BRYAN v. JOHN WALKER AND OTHERS.

Military officers charged with a particular duty, may take private property for public use without making themselves trespassers, but in such cases, the necessity must be urgent, such as will not admit of delay, and where action upon the part of *civil* authority in providing for the want, will be too late.

The burden of proving such exigency, in case of suit, devolves upon the defendants:

Therefore, where all that the case showed, was, that a wagon and two mules of the plaintiff had been seized in January 1863, in Wilkes County, by the defendant commanding a detachment of Confederate troops, under the *parol* orders of a Brigadier-General, for the transportation service of the detachment; and nothing appeared as to the exigency of the necessity (if any) for such service; *Held*, that the defendants had not made out a defense.

The State "Amnesty Act" of 1866, does not include cases of *civil* remedy for private injuries; unless (sect. 4) when the injury occurred under some *law*, or authority *purporting to be a law, of the State;* which the *parol orders* here could not pretend to be.

Quere as to the power of the State to pass such an act in regard to civil remedies for injuries?

TROVER for two mules, tried before *Mitchell, J.*, at Fall Term, 1869, of WILKES Court.

The facts were, that in 1863, Robert F. Hoke, then a Brigadier-General in the service of the Confederate States, commanding two regiments in Wilkes County, issued a parol order to the defendant, commanding a detachment of soldiers near the plaintiff's residence, to distrain, for the transportation service of such detachment, a wagon, and mules. Thereupon the defendant took the mules mentioned in the declaration.

By consent, a verdict was rendered for the plaintiff, for $350.00, subject to the opinion of the Court, etc. His Honor afterwards set aside the verdict, and gave judgment of non-suit.

The plaintiff thereupon appealed.

Boyden & Bailey for the appellant.
No Counsel contra.

SETTLE, J. This is an action of trover for the conversion (142) of two mules.

The defense relied upon, arises out of the following facts: In 1863, Robt. F. Hoke, Brig. Gen'l., in the service of the Confederate Government, and commanding two regiments in that service in Wilkes County, by parol, issued an order to an officer, commanding a detachment of his soldiers, in the vicinity of plaintiff's plantation, to distrain, for the transportation service of his detachment, a wagon and two mules. It is admitted that the mules were taken in pursuance of said order; upon the trial, a verdict was returned, by consent, in favor of the plaintiff, subject to the opinion of the Court on the question of law reserved; and his Honor being of opinion that the order of Gen'l. Hoke was a sufficient justification for the conversion, set aside the verdict, and gave judgment for the defendant. None of the evidence accompanies the statement of the case sent to this Court; we simply have the verdict of the jury establishing the fact of the conversion, and the order of Gen'l. Hoke, as the defense.

The case presents no question as between the rightful government, and its citizens in rebellion; and we are therefore relieved from the consideration of the delicate and embarrassing questions growing out of cases where the owner has done something by which he has forfeited his rights.

Nothing appears, save the fact that the defendants, who were Confederate soldiers, operating in North Carolina, a State then subject to the Confederate authority, took the private property of the plaintiff without compensation, in Wilkes County, for the transportation service of General Hoke's detachment. Admitting the right of a military officer in a case of extreme necessity, for the safety of the government, or the army, to take private property for the public service; they have here shown no immediate pressing necessity, in which they were compelled to act promptly, having no time to acquire the property according to law. The burden of showing such necessity, rests upon the defendants.

As a matter of history, we know that the County of Wilkes (143) was not the theatre of war. It was comparatively quiet, the

forces of neither army occupied it in numbers, or for any length of time.

We are fortunate in having a decision of the Supreme Court of the United States directly in point, declaring the law, as it has always been held in England and in this country. In citing the case of *Mitchell v. Harmony,* 13 How. 115, we will remark that the opinion of the Court was delivered by Taney, C. J., before the minds of our people became confused by questions growing out of the late rebellion. The defendants certainly cannot claim to be in a better situation in respect to the private property of a citizen of North Carolina, than the officers and soldiers of the army of the United States were, in respect to the property of our citizens, when they invaded Mexico.

Mitchell was an officer of the army, and was sued in an action of trespass by Harmony, for seizing his property in the Mexican State of Chihuahua. Harmony was a trader, engaged in a business recognized and allowed by the United States Government.

The declaration charged that the defendant seized and converted to his own use, the horses, mules, wagons, etc., of the plaintiff.

The defendant pleaded not guilty, and specially "that war existed at the time, between the United States and Mexico; that he was a Lieutenant Colonel, etc., forming a part of the military force of the United States, and under the command of Colonel A. W. Doniphan, and he justifies the taking, etc., under and in virtue of the order, to that effect, of his superior and commanding officer, Col. Doniphan; that the order was a lawful one, which he was bound to obey, and that he was no otherwise instrumental in the alleged trespass."

The jury found a verdict for the plaintiff, for $90,806.44, for which and the costs, amounting to $5,048.94, the Court gave judgment for Harmony.

The case was brought up by writ of error, and the Supreme Court of the United States, in sustaining the judgment of the (144) Circuit Court, say "where the owner has done nothing to forfeit his rights, every public officer is bound to respect them, whether he finds the property in a foreign or hostile country, or in his own. There are, without doubt, occasions in which private property may lawfully be taken possession of, or destroyed, to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property into the public service, or take it for public use. Unquestionably, in such cases the Government is bound to make full compensation to the owner; but the officer is not a trespasser. But we are clearly of opinion, that in all of these cases, the danger must be immediate and impending; or the necessity urgent for the public service, such as will

not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. It is impossible to define the particular circumstances of danger or necessity, in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist, before the taking can be justified. It is not sufficient to show that he exercised an honest judgment, and took the property to promote the public service, he must show by proof, the nature and character of the emergency, such as he had reasonable grounds to believe it to be, and it is then for the jury to say whether it was so pressing, as not to admit of delay; and the occasion such, according to the information upon which he acted, that private rights, must for the time, give way to the common and public good.

Our duty is to determine under what circumstances private property may be taken from the owner by a military officer in time of war, and the question is, whether the law permits it to be taken
(145) to insure the success of an enterprise against a public enemy which the commanding officer may deem it advisable to undertake. And we think it very clear that the law does not permit it."

We have seen that where private property is taken, the officer is a trespasser unless he can show an emergency. This is our case, for it is not changed by the fact that the defendants acted under the order of their superior officer. The opinion from which we have quoted, goes on to say, "Upon principle, independent of the weight of Judicial decision, it can never be maintained that a military officer can justify himself for doing an unlawful act, by producing the order of his superior. The order may palliate but it cannot justify."

Had the defendants shown an emergency, they would not have been trespassers, but still their Government (had it been successful) would have been bound to make full compensation to the plaintiff. Upon the determination of a war between independent powers, a treaty of peace usually follows, in which they provide for indemnity; each Government paying its own citizens for the wrongful acts of its own officers and soldiers, but upon the suppression of the rebellion, there was no one to treat with, and, of necessity, the citizen must look to the trespassers upon his property, for indemnity. It is their misfortune that there is no Government which can afford relief, by paying for their wrongful acts.

We have examined the act of 1866, commonly known as the "Amnesty Act," and find that while it is very full and comprehensive in granting amnesty and pardon for public wrongs, it is quite restricted when it treats of private wrongs.

The first section enacts that "no persons who may have been in the civil or military service, etc., shall be held to answer on any *indictment,* for any act done in the discharge of any duties imposed on them, purporting to be by law of the State or late Confederate States Government, or by virtue of any *order* emanating from any officer, commissioned or non-commissioned, of the late Confederate States Government, or any officer, commissioned or non-com- (146) missioned, of the United States Government, etc."

The 2nd section enacts that, "In all cases where *indictments* are now pending, etc., if the defendant can show that he was an officer or private in either of the above named organizations at the time, it shall be presumed that he acted under *orders,* until the contrary shall be made to appear."

The 3rd section extends the benefit of the act to all private citizens, who, for the preservation of their lives or property, or for the protection of their families, associated themselves together for the preservation of law and order in their respective counties or districts.

The 4th Section is in the following words, "No person who may have been in the civil or military service of the State or late Confederate States Government, or in the service of the United States Government, in either of the above named organizations, shall be held liable in any civil action for any act done in the discharge of any duties imposed upon him by any *law* or *authority purporting to be a law* of the State or late Confederate States Government."

The power of the Legislature to make a law shielding trespassers upon private property from liability in civil actions, is not now before us; but we are inclined to think that it has no more right to do so than it has to violate the obligation of a contract, or to destroy any other vested right. But as we have said, our case does not present that question, for it will be observed that the words "by virtue of any order emanating from any officer, etc.," which we find in sec. 1, which treats of public wrongs, are omitted when we come to sec. 4, which treats of civil injuries. Sec. 4 professes to relieve from liability, only for such acts as were done in the discharge of duties imposed by law, or authority purporting to be a law, of the State or late Confederate States Government. Here there was only an order by parol, not warranted by any law or authority purporting to be a law. *Yost v. Stout,* 4 Cold. 205.

The judgment of the Superior Court must be reversed, and judgment entered here upon the verdict returned, by consent. (147)

Per curiam.

Judgment reversed, etc.

Cited: Franklin v. Vannoy, 66 N.C. 50; *Broadway v. Rhem,* 71 N.C. 201; *Koonce v. Davis,* 72 N.C. 220.

GEORGE W. PATTERSON v. THE N. C. R. R. COMPANY.

Destruction of whiskey by a provost-marshal, under the authority of the Confederate States, in 1862, cannot be claimed as *the act of a public enemy,* by a Railroad Company situated within the limits of that government, and recognizing its control.

Leaving leaking barrels of whiskey, for a day and night, in a car whose doors were nailed up, standing upon the track in a village, at that time a military Post, was gross negligence; and rendered the Railroad Company responsible for its destruction by the provost-marshal under his authority in matters of police.

ASSUMPSIT, tried before *Tourgee, J.,* at Fall Term 1869 of ALAMANCE Court.

The facts were that on the 21st of March 1862, the plaintiff had delivered to the defendant, at Gibsonville, N. C., eighteen barrels of whiskey, in good order, for the purpose of being transported to Goldsboro'. The doors of the cars in which they were placed, was nailed up, the keys being lost. Upon the way, the conductor discovered that the whiskey was leaking badly, running through the floor and dripping upon the ground, but, after trying to do so, he found himself unable to stop it. The train reached Goldsboro' upon Sunday, the 22nd of March, between 11 A.M., and 3 P.M., and was placed upon a side track, some 125 to 300 yards from the warehouse, because at the warehouse the track was occupied by other cars. Upon Monday morning the 23d, the whiskey was destroyed by the Confederate military authorities, acting through the Pro-
(148) vost Marshal's office of that post.

The defendant, upon these facts, asked the Court to instruct the jury:

1. That it was not obligatory upon the Company to store the whiskey in their warehouse immediately upon its arrival, and that the time during which it had actually been left unstored, was not unreasonable.

2. That the whiskey had been destroyed by the public enemy, without negligence or default by the company.

His Honor instructed the jury, among other things:

1. If they believed the destruction of the whiskey was caused, directly or indirectly, by the leakage, or by the failure of the defendant to secure the door by a lock, it was negligence, and the plaintiff ought to recover.

2. If the defendant knew that it was part of the military regulations of the Post of Goldsboro', that liquors conveyed to that station should be destroyed by the Provost Marshal, it was negligence in the defendant to assume its transportation and delivery there, and in such event the plaintiff ought to recover.

The defendant excepted.

Verdict for the plaintiff, for $3,190.77 with interest, etc.: Rule, etc.; Judgment, and Appeal by the defendant.

Blackmer and McCorkle for the appellant.
Graham contra.

1. As to liability: The question is one of *legal obligation,* not of *actual blame; Backhouse v. Sneed,* 5 N.C. 173, *Harrell v. Owens,* 18 N.C. 273; *Arrington v. W. & W. R. R. Co.,* 51 N.C. 68; *Knox v. N. C. R. R. Co., Id.* 415.

2. The danger is not *remote: Hatchell v. Kimbrough,* 49 N.C. 163, *Lane v. Washington,* 30 N.C. 248; *Green v. Dibble* 46 N.C. 332, Sedge. Dam. 88 and *seq.*

3. Confederate troops were not *public enemies,* for any purpose material in this suit: *Story, Bailm.* § 506; See also *Benbow v. N. C. R. R. Co.,* 61 N.C. 421. (149)

DICK, J. The defendant, as a common carrier, received the goods of the plaintiff for transportation to Goldsboro'. As no special contract was made, limiting the common law responsibility of common carriers, the defendant was liable for any loss or damage not occasioned by the act of God, or the public enemy. The goods were destroyed by soldiers under an order of an officer of the Confederate government.

This can not be regarded as the act of a public enemy. The Confederate government at that time was well organized and in full operation, and, so far as its citizens were concerned, it was certainly a government *de facto,* performing many of the duties, and exercising more than the ordinary powers of a government *de jure.* Both the plaintiff and defendant were within the limits of that government, and recognized its control, and received its protection, and neither of them can properly say that any thing done by its authorities was the act of a public enemy.

The defendant has no right to complain of the stringent rules of the common law in regard to common carriers; for the loss of the goods might have been prevented by the exercise of ordinary care. It was gross negligence in the defendant to leave a car loaded with leaking barrels of whiskey, for a day and night in a place where it was exposed, and in a condition calculated to invite the depredations of soldiers.

Per curiam.

Judgment affirmed.

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(150)

JOSEPH D. CLARK, ADM'R., ETC. v. B. F. CLARK AND OTHERS.

The plaintiff made an affidavit, for a warrant of attachment, that was insufficient in point of form, but the warrant was issued: the defendant, as ground for a motion to discharge the warrant, made a counter affidavit; and thereupon the plaintiff replied with another affidavit, the form of which, was unobjectionable: *Held*, that upon the motion, the plaintiff was entitled to have his second affidavit considered, and that *its* completeness did away with what otherwise would have been the consequences of defects in his original affidavit, (C.C.P. § 196.)

MOTION to discharge an attachment, heard before *Watts, J.*, at Fall Term 1869 of NORTHAMPTON Court.

The action had been begun on the 4th of August 1869, returnable to Fall Term; and an affidavit for an attachment returnable before the Clerk, was made upon the 30th of the same month. The ground alleged was, "That the defendant, Benjamin F. Clark, is about to dispose of his property with intent to defraud his creditors," and the affidavit went on to allege, "That I am able to prove the grounds of my fears, and am willing and ready to do so if necessary, but the violence and lawlessness of the defendant's, Benjamin F. Clark's character, prevents specification at the present time."

The Clerk ordered a warrant to issue as asked, and at Fall Term 1869 the defendant appeared, and answered the complaint, and also filed a counter affidavit on the subject of the attachment, denying the allegation of the plaintiff as above, and then making some explanations and statements as to the amount, etc., of his property.

In reply to this, the plaintiff made another affidavit, giving, in detail, acts done by the defendant, in sending property out of the State in fraud of creditors, and also specific threats made by the de-

fendant, of his purpose to evade the payment of the debt sued upon, and also, after the bringing of the action, to defeat the action.

Previously to the term, the defendant Clark, had given notice to the plaintiff of his intention to move the Judge to discharge the attachment.

His Honor granted the order to discharge, and the plaintiff appealed. (151)

Peebles & Peebles for the appellant.
Barnes and Rogers & Batchelor contra.

PEARSON, C.J. Passing by the objection that the Judge could not entertain a motion to vacate the order for an attachment of property, upon a notice returnable before the Court—that is, the Clerk, and admitting the first affidavit to be insufficient to support the warrant of attachment, upon the distinction taken between a *thing done*, and a thing which the party fears and believes is *about to be done*, *Hughes v. Person*, 63 N.C. 548: We think his Honor erred in not allowing the plaintiff to have the benefit of his additional affidavit. It sets out fully the grounds on which he believed that the defendant was about to dispose of his property, in order to defraud his creditors, and particularly, to prevent the plaintiff from collecting his debt, which in a general sense, is expressed by the words "to defraud creditors."

If the defendant had put the question on the insufficiency of the first affidavit, the distinction taken in *Hughes v. Person, supra*, would have supported the objection; unless the allegation of the plaintiff that he was afraid to set out specifically the ground of his belief, because of the general character of the defendant as a violent and lawless man, could be taken as sufficient to make an exception.

But the defendant, not content with filing an answer to the complaint, also files an affidavit in reply to the affidavit on which the warrant of attachment issued. This let in the additional affidavit of the plaintiff, which cures any omission in the affidavit of the plaintiff: C.C.P. sec. 96.

In proceedings of this nature, a party, aided by the advice of counsel learned in the law, is left to make the move which he thinks best, and if his move gives to his adversary a right to make another move, it belongs not to the Court to take sides, and, (152) by ruling out the last two moves, put the matters upon the sufficiency of the first affidavit. "Fair play" is a rule of the common law, and when one takes his chance, he must abide by the result.

There is error. This will be certified.

Per curiam.

Error.

Cited: Wilson v. Barnhill, 64 N.C. 122; *Howerton v. Sprague,* 64 N.C. 454; *Brown v. Hawkins,* 65 N.C. 649; *King v. Winants,* 68 N.C. 64; *Wood v. Harrell,* 74 N.C. 340; *Benedict v. Hall,* 76 N.C. 115; *Weiller v. Lawrence,* 81 N.C. 69; *Peebles v. Foote,* 83 N.C. 104; *Devries v. Summit,* 86 N.C. 130; *Hale v. Richardson,* 89 N.C. 64; *Penniman v. Daniel,* 90 N.C. 158; *Bank v. Blossom,* 92 N.C. 701; *Harris v. Sneeden,* 101 N.C. 278; *Judd v. Mining Co.,* 120 N.C. 399; *Thornburg v. Burton,* 197 N.C. 194.

R. F. SIMONTON, ADM'R. ETC. v. GEORGE W. CHIPLEY.

The Supreme Court has appellate jurisdiction over questions *of law* only, and so cannot review the exercise of a discretionary power over matters *of fact:*

Therefore, it cannot review a question as to the propriety of an order striking out a judgment for irregularity; turning, in some degree, upon whether it were given without a verdict, and in the absence of the defendant and his attorney.

Where an order of amendment given in the County Court, had been appealed from, and, pending the appeal, that Court had been abolished, and its records transferred to the Superior Court; *Held,* that upon an affirmation of the order, the amendment should be made in the latter Court.

MOTION to set aside a judgment, heard by *Buxton, J.,* at July Special Term 1869 of IREDELL Court.

The question had been brought by appeal from the County Court of that county, in which at August Term 1867, an order had been made, upon the motion of the defendant, to set aside a judgment in *debt,* taken by the plaintiff's intestate against him, at August Term 1861.

In support of his motion the defendant had introduced evidence that upon the return of the writ in the action (May Term
(153) 1861) he had appeared, and pleaded General Issue, Payment-and-set-off, and Statute-of-Limitations; and that at the next term, in his absence, and the absence of his attorney, an entry of "Judg't" had been made on the docket,—upon which, execution had been issued for $788.93 and costs, etc.; that the affiant was not informed of the rendition of the judgment for a long time after, etc.

From the order to vacate such judgment and amend the record *nunc pro tunc,* etc., the plaintiff appealed to the Superior Court.

His Honor affirmed that judgment, and the plaintiff appealed again.

W. P. Caldwell for the appellant.
Clement & Boyden and Bailey contra.

DICK, J. This court cannot review the judgment in the court below, as it was rendered in the exercise of a discretionary power in matters of fact.

The appellate jurisdiction of this court extends only to the correction of errors in law. It cannot hear evidence in a cause, and of course cannot properly determine questions depending upon facts.

This doctrine has been so fully discussed, and is so well settled, that it is unnecessary for us to consider it further: *Britt v. Patterson,* 32 N.C. 390; *Bagley v. Wood,* 34 N.C. 90.

We concur in the ruling of his Honor in the court below, and the judgment must be affirmed.

As the records of the late County Court are now under the control of the Superior Court, that court must make the amendment ordered by the County Court, and the parties can proceed as they may be advised.

Let this be certified.

Per curiam.

Judgment affirmed.

Cited: Long v. Gooch, 86 N.C. 710.

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(154)

W. M. WALTON v. W. F. MCKESSON AND OTHERS.

An account due by the plaintiff to one of several defendants, is not competent as a set-off against the debt which is the subject matter of the action.

Actions pending at the adoption of the C.C.P. are to be tried under the laws previously existing.

DEBT, tried before *Mitchell, J.*, at Fall Term 1869 of BURKE Court.

The plaintiff declared upon a single bill executed to him by the defendants, W. F. McKesson, Charles McDowell, the intestate of the defendant N. W. Woodfin, and James McKesson, the intestate of the defendant W. F. McKesson as adm'r. The pleas were Payment and Set-off. On the trial the defendant McKesson, offered in evidence a book account alleged to be due to him by the plaintiff

together with one Thomas S. Walton, as partners. This evidence was objected to by the plaintiff, and excluded by the court. The defendant excepted. Verdict for the plaintiff. Rule, etc.; Judgment, and Appeal by the defendants.

Folk for the appellants.
Furches contra.

RODMAN, J. This suit began by writ issued March 14th 1866; and although the pleas appear not to have been put in until Fall Term 1869, it was a suit pending at the ratification of the Code of Civil Procedure, and therefore to be tried by existing laws: *Teague v. James,* 63 N.C. 91; *Gaither v. Gibson, Id.* 93.

We think the cases of *State Bank v. Armstrong,* 15 N.C. 523, and *Jones v. Gilreath,* 28 N.C. 338, are decisive against the defendant.

This case may be enlightened from *Hurdle v. Hanner,* 50 N.C.
(155) 360, which was cited for the defendant, in this: in that case there was but one defendant, here there are several. What relief the defendant may find in the Code, it is not for us to say.

Judgment below affirmed. Let this be certified.

Per curiam.

Judgment affirmed.

Cited: Walton v. McKesson, 101 N.C. 436; *Wilson v. Pearson,* 102 N.C. 307; *Dameron v. Carpenter,* 190 N.C. 598; *Benevolent Assoc. v. Neal,* 194 N.C. 403.

THE RALEIGH & GASTON RAILROAD COMPANY v. JOHN A. REID.

The charter of a Railroad Company, granted in 1852, provided, that "the said Railroad and all engines, cars and machinery and all the works of said Company, together with all profits which shall accrue from the same, and all the property thereof of every description, shall be exempt from any public charge or tax whatsoever for the term of fifteen years; *and thereafter the legislature may impose a tax not exceeding twenty-five cents per annum on each share of the capital stock held by individuals,* whenever the annual profits shall exceed eight per cent;" The annual profits had never exceeded eight per cent: *Held,* that the Legislature, in 1869, might, notwithstanding, levy, and authorize to be levied, an *ad valorem* tax not exceeding *two-thirds of one per cent,* upon *the franchise, rolling stock* and *real estate* of such Company.

R. R. *v.* REID.

Arguendo: All contracts between the sovereign and its citizens, as in *bank* and *railroad* charters, are made, subject to any change of circumstances that future events may develope, and to the permanent right and duty of the State to regulate the currency, and to preserve its own existence by equal taxation;

Regulations of taxation in such charters, are rather *rough estimates* of what will be required, *things remaining as they are*, than contracts holding *in all events;* say, even after the disasters which the common fund liable to taxation, suffers by a great war.

The theory that such regulations are *contracts* in the ordinary sense, has issued in *refinements*, devised in order to escape its results; such as the sub-division of corporations, for taxing purposes, into *franchise, stock, dividends*, etc.,—an exhaustion of the chartered restraints upon the power of taxation in one or more of which, is held not to effect that power over others.

MOTION to vacate an injunction, before *Watts, J.*, January 11th 1870, at Chambers, HALIFAX Court. (156)

The complaint in the action alleged that the defendant, as Sheriff for Halifax, had distrained and was about to sell an engine belonging to the plaintiff, upon the grounds that by the lists in his hands for said county and for the State, it appeared that the plaintiff owed to him as tax for 1869, $2,368.96; a portion of it being levied upon the apportioned share for such county of the entire *franchise and rolling stock* of the company jointly; and the residue upon certain *lots of land* in said county belonging to the plaintiff, and necessary for the successful operation of its business. It was admitted that an Act had been passed in March 1869, which purported to authorize such a tax, and that the Sheriff had proceeded regularly thereunder. But the plaintiff claimed that it was not competent for the Legislature to levy any such tax, because of a provision in its charter, (Act. of 1852, c. 140 § 8,) according to which: "the said railroad and all engines, cars and machinery, and all the works of said company, together with all profits which shall accrue from the same, and all the property thereof of every description, shall * * * be exempt from any public charge or tax whatsoever, for the term of fifteen years, and thereafter the Legislature may impose a tax not exceeding twenty-five cents per annum, on each share of the capital stock held by individuals, whenever the annual profits shall exceed eight per cent.

The prayer was for, amongst other things, an order enjoining the sale of the engine, etc.

This order was accordingly made, and afterwards a motion (as above) to vacate such order, was made by the defendant, and refused.

The defendant appealed.

(157) *Attorney General, Bragg and Battle & Sons for the appellant.*

1. If upon a fair reading of a charter, doubts arise, they are to be decided in favor of the State: Binghamton Bridge case, 3 Wallace 51.

2. The power of taxation cannot be restrained except by plain expressions to that effect. *Bank of Pa. v. Commonwealth,* 19 Pa. 144; *State v. Newark,* 2 Dutch. 519; *Mayor of Truro v. Reynolds,* 1 Moore & S. 272; *Lord Middleton v. Lambert,* 1 Ad. & E. 401; Cooley Const. Lim. 280, and *seq.*

3. The *franchise* is a thing entirely distinct from the *property,* and has so been recognized both by our courts and our Legislature: *State v. Rives,* 27 N.C. 297; See Rev. Code, ch. 29 §§ 9, 10, 11, and ch. 26 §§ 5 to 10; Act of 1630-'31, c. 24, particularly § 5; *State v. Petway,* 55 N.C. 396; *Attorney General v. Bank of Charlotte,* 26 N.C. 287.

Here, the exemption is of the *stock,* not the *franchise.*

Moore and Rogers & Batchelor contra.

1. That companies are regarded as purchasers of their franchises; that the object of rules of construction when applied to contracts, is to arrive at the intention of the parties thereto, and that charters are to be construed most strongly against the corporations: are principles well established.

2. The intention of the parties *here* was to confer a total exemption from taxation for fifteen years, and an exemption subject to certain qualifications, thereafter. A tax upon the *property* is necessarily a tax upon the *stock,* which is only a representative of the property. The provision here virtually forbids taxation upon the Company in any respect at present, as there have been no annual profits of 8 per cent.

PEARSON, C.J. The distinction between corporations that
(158) are mere agencies of the State, and corporations based on contract, is fully established, *Mills v. Williams,* 33 N.C. 558.

It is equally well settled that contracts made by the State with individuals, in granting charters, are not to be construed by the same rules as contracts between individuals. In the latter, the rule of the common law, which is the same as common sense, is, "words are to be taken in the strongest sense against the party using them;" on the idea that self-interest induces a man to select words most favorable for himself. It is otherwise when the State is a party; for it

is known that in obtaining charters, although the sovereign is presumed to use the words, in point of fact the bills are drafted by individuals seeking to procure the grant, and that "the promoters," as they are styled in England, or the "lobby members," as they are styled on this side of the Atlantic, have the charters or acts of incorporation drafted to suit their own purposes; and a matter of this kind, instead of being, in its strict sense, a *contract,* is more like the act of an indulgent head of a family dispensing favors to its different members, and yielding to importunity. So the Courts, to save the old gentleman from being stripped of the very means of existence, by sharp practice have been forced to reverse the rule of construction, and to adopt the meaning most favorable to the *grantor.* In contracts between individuals it is often difficult to say, what was intended to be *a part of the contract, Baum v. Stevens,* 24 N.C. 411, *Foggart v. Blackweller,* 26 N.C. 238; or was only an affirmation, "chaffering" (a Anglo Saxon word meaning a *chat* about the matter,) but not *in the bargain.* A horse is offered for sale; the man says, "this is as sound an animal as ever worked in harness;" Do you warrant him to be sound? There is a magic in that word *warrant;* so he says, "The horse is sound as far as I know or have reason to believe, but if you take him at my price, it is no part of the bargain that I am to stand good, if it turns out that he is not sound; pay me a consideration for the *warranty,* and that will make a difference."

Such is the law between individuals. Reverse the rule, and see how it ought to be when the State is granting charters. It (159) is known that the State is obliged to have the means of support, and that no one set of members of the General Assembly, have power to impoverish the State for all time to come, or to throw the burthen of taxation more heavily upon one class of citizens, than on another. So the terms of the charter must be construed in reference to this known state of facts, and the State must be considered as saying: "As things now seem, a certain amount from your corporation is enough to meet the estimates."

Suppose, however, a disastrous war, or that the State loses by being security, or by the fraud of agents: Is the State to perish, and be without the means of support; or may it not be heard to say: "This talk about the sum you have to pay annually, was no part of the bargain. For the general good as was supposed,—the franchise of being a corporation, and the right to take the land necessary for your purposes, was granted, in consideration of the labor and outlay of money on your part necessary to construct the work; what was said about the sum you were to pay annually, for the support of the government, was simply an incident to the contract, based on rough estimates, and was *no part of the contract;* no consideration

was paid for it, and it is ungrateful on your part to make a question about it, under this unforeseen change in the consideration of things."

These suggestions are made as fit matter for reflection and as tending in a great degree, to justify the *refinements* made in many of the cases, of dividing corporations into several parts for the purposes of taxation: 1. The franchise privilege of association for a common purpose, 2. The stock of the corporation, 3. The shares of the members, 4. The dividends or profits; and, in this way, supporting a power to impose a tax on one of the parts, notwithstanding the power of taxation was seemingly exhausted, by having been made on one of the other parts, so as by implication to exempt the whole,
(160) except for the rule, that in the construction of charters the words are to be taken most strongly against the *grantees.*

These refinements are evidently resorted to in order to avoid an expression of the plain fact: A State cannot by contract or in any other mode, surrender the power of taxation necessary for its existence. A question like this was presented in *State v. Matthews,* 48 N.C. 451. By the words of charter, the Bank of Fayetteville was authorized to issue bills of a denomination less than $3. This charter was granted in 1848. In 1854, "for the purpose of regulating the currency," an Act passed prohibiting the circulation of small notes, viz: under $3. The court say "these positions have been stated, to clear the way, and present the naked question. Is authority to issue small notes, conferred by the charter as a *part of the essence of the contract,* with the intent to put it beyond the control of all future legislation: or is it conferred as a mere incident, with the intention that it should be subject to such limitation as the Legislature might at any time thereafter, deem expedient to make for the purpose of regulating the currency of the State? This is a mere question of construction; and a plain statement seems sufficient to dispose of it. With the exception of the powers surrendered to the United States, each State is absolutely sovereign, and, with the exception of the restraints imposed by the constitution of the States and the Bill of Rights, all legislative powers are vested in the General Assembly. It is consequently unreasonable to suppose that the General Assembly, admitting that it has the power, would alien or surrender and make subject to any individual or corporation, a portion of its sovereignty; and thereby disqualify itself from doing that for which these ample powers are conferred on it.

As is said in *McRee v. W. & R. R. R. Co.,* 47 N.C. 186, we should hesitate long before bringing our minds to the conclusion that it was the intention of the Legislature to take from itself the power of doing that for which all governments are organized; "promot-
(161) ing the general welfare, etc."

This case and the authorities by which it is supported, fully sustain the conclusion to which we have arrived, upon a broad and liberal view of the powers of government; that all contracts between the sovereign and its citizens in Bank and Railroad charters, are presumed to be made, subject to the change of circumstances that future events may develope, and to the right and duty of the State to regulate the currency and to preserve its own existence by equal taxation.

Taking a more narrow view of the subject, and descending to the *refinement* by which corporations are treated in the courts as divisible into four parts: The charter provides that the railroads and all engines, etc., and all profits, and all the property of the company, shall be exempt from any public charge or tax whatsoever for the term of fifteen years, "and thereafter the Legislature may impose a tax not exceeding twenty-five cents per annum on *each share of the* capital stock held by individuals, whenever the annual profits shall exceed eight per cent."

The question is, does the express right, after fifteen years, to impose a tax of twenty-five cents, on each share of the capital stock, exclude, by *implication,* the right to tax the franchise or the land on which the road is constructed, and the depots, etc., are built, with the rolling stock, etc.

No one can entertain a doubt on the subject, after reading the authorities, unless he loses sight of the fact that in railroad and bank charters and the like, the words are to be taken most strongly against the corporation, and that no intendment or implication is to be made by which a sovereign can divest itself of the right of taxation and the duty to regulate the currency, and so to govern, as to provide for and protect the general welfare.

State v. Petway, 55 N.C. 366, which was ably argued and well considered by the court, fixes the principle: A tax in the charter, of twenty-five cents on each share of the capital stock, does (162) not exhaust the power of taxation; and the General Assembly may impose an additional tax on the dividends, etc., etc.

Here is a corporation owning land that, to suit its convenience, is located to reach from Raleigh to Weldon; on this land is constructed a road bed; the company likewise owns parcels of land at suitable distances, on which depots, warehouses, etc., are erected; it also owns rolling stock, etc., of great value: Why should not the franchise and all of this property be liable to an *ad valorem* tax?

The plaintiff answers:—"It was exempted from taxation for fifteen years, and individuals are supposed to have bought stock on the idea that no tax would be imposed, except the twenty-five cents on

the share whenever the profits exceed eight per cent."

But, until recently, horses and farming utensils have never been taxed, and it may as well be said that this kind of property was bought on the idea that it would never be made the subject of an *ad valorem* tax.

For a second reason the plaintiff says:—"After the expiration of fifteen years, it is in the power of the Legislature to impose a tax *not exceeding* twenty-five cents on each share: but here is an attempt to exceed that amount, and to disregard the qualification that even twenty-five cents on the share can be exacted only when the profits exceed eight per cent."

It may be, that, according to the ruling in *Attorney General v. Bank of Charlotte,* 57 N.C. 386, the tax *on the shares* could not have been increased, from twenty-five cents, say, to fifty cents; but this case recognizes the power to tax any other subject on which the tax is not imposed by the charter. As in our case, the tax spoken of in the charter is that upon the shares of stock, *how can that* exhaust the power of taxation in regard to the franchise, or on the land, and personal property of the corporation?

It does not, unless like King Lear, the State has divested it-
(163) self of all of the attributes of sovereignty and divided "the kingdom" among ungrateful children.

Order in the court below reversed. This will be certified.

Per curiam.

Reversed.

Cited: R. R. v. Reid, 64 N.C. 232; *S. v. Krebs,* 64 N.C. 606; *McAden v. Jenkins,* 64 N.C. 800; *Bridge Co. v. Comrs.,* 81 N.C. 502; *R. R. v. Lewis,* 99 N.C. 62; *Rowland v. B. & L. Assoc.,* 116 N.C. 879; *Comrs. v. Call,* 123 N.C. 315.

ROBERT PATTON, EX'R v. J. A. HUNT, AND OTHERS.

There is a difference between the plea of *tender* in actions for *money,* and the like plea in actions for the non-delivery of *specific articles;* in the latter case no averment of *continued readiness,* or of *profert,* is necessary, —*because,* by the tender the articles became the property of the party to whom it is made, and if subsequently they be *converted* by him who made it, he is responsible for their value when converted.

In case of *tender* of *specific articles,* under a contract to deliver them, they must be *separated* from others of the same sort, so as to be capable of identification, as upon a sale.

PATTON *v.* HUNT.

Where the question raised by the appeal, is, whether there be *any evidence*, etc., it will be taken for granted that the record sent up contains the whole of the evidence bearing upon the point.

Damages for not fulfilling a contract, that was to have been performed in October 1865, may be estimated in currency, and need not at first be estimated in gold and then adding depreciation.

COVENANT, tried before *Mitchell, J.*, at Spring Term 1869 of BURKE Court.

The action was brought upon the following note:

$1,330.39. Twelve months after date, we, or either of us, promise to pay Robert Patton, Exr. of John Warlick, dec'd, the sum of thirteen hundred and thirty dollars and thirty nine cents, in good current bank notes on the banks of North or South Carolina, for value received, this the 31st of October 1864. (164)

J. A. HUNT [Seal.]
WM. F. MCKESSON [Seal.]

On the day that the note fell due an agent of the defendants, meeting with the plaintiff, made known to him that he was sent to pay the above note, in South Carolina bank bills; and at the time, he had such notes in his possession. The plaintiff refused then to accept them, but said, if his counsel advised him to do so, he would. Nothing further, then or afterwards, was said or done in regard to payment of the note; no tender or payment of any bank notes or money in pursuance of such tender, was made in Court.

The Court instructed the jury that this offer of payment by defendant's agent, did not bar the plaintiff's recovery; that the plaintiff had no right to claim the value of $1,330.39 in the equivalent of specie, but the value of that numerical amount of notes in genuine, current bank notes on the banks of North or South Carolina in specie, at the day when the note fell due, and that in their verdict it would be proper to add the premium on gold at that time, and render their verdict in *legal tender*, with lawful interest.

The counsel for the defendants excepted to the charge:

1. The bank bills tendered by the defendant's agent to the plaintiff were specific articles, and being offered as such when the note fell due, were a full discharge of the covenant; and that the plaintiff thereafter could not recover principal or interest thereon.

2. The Court should have instructed the jury to find that the defendants had complied with their agreement to pay the note declared on, and that the plaintiff should not have recovered the value of the bills specified in said note, in gold, with the premium in Federal cur-

rency added, with interest; and that the tender being made as stipulated, it was not necessary that the bank-bills, after being tendered, should be paid into Court.

Verdict for the plaintiff, for $663.70; Rule for a new trial; (165) Rule discharged; Judgment, and Appeal.

Folk and F. H. Busbee for the appellants, cited 2 Pars. on Contracts, 165, note 3; 2 Kent 665; *Fort v. Bank of Cape Fear,* 61 N.C. 417; *Lacky v. Miller,* 61 N.C. 26.

Battle & Sons contra.

RODMAN, J. This is an action of Covenant, brought on the obligation of the defendants to deliver to the plaintiff, twelve months after the 31st of October 1864, a certain sum, in good current bank notes on banks in North and South Carolina, for value received. The defendants pleaded a tender of such notes to the plaintiff on the day, and a refusal by him to accept, but did not aver a continued readiness, or make a *profert* in Court. Upon the tender, the case states that the agent of the defendants met the plaintiff, and told him "that he was sent to pay the obligation in South Carolina bank bills, and that at the time, he had such notes in his possession," and the plaintiff then refused to accept them. The judge instructed the jury, that the offer of payment did not bar the plaintiff's recovery. We do not know whether this instruction was given under an opinion that what was done was insufficient as a tender, or that any tender would be insufficient unless the plea averred a continuing readiness, and was accompanied by a *profert.* If the alleged tender was insufficient in either point of view, the Judge committed no error, and we are compelled therefore somewhat to consider both questions. There appears to be a material difference between a plea of tender in an action on a contract to pay money, and one on a contract to deliver specific articles. The first must aver a continued readiness to pay, and bring the money into Court. But the contract in this case must be held to be for the delivery of specific articles. Neither when it was made, nor when it became due, were bank bills money: a note payable in them is not negotiable, nor can an action of debt be main- (166) tained on it: *Lacky v. Miller,* 61 N.C. 26.

The authorities to which we were referred by the counsel in an action for the non-delivery of specific articles, may be for the defendants, sustain their position, that a plea of tender sufficient, without an averment of continued readiness and without a *profert.* In 2 *Pars. Cont.* 164: "If by the terms of the contract, certain specific articles are to be delivered at a certain time and place, in payment

of an existing debt, this contract is fully discharged, and the debt is paid, by a *complete and legal tender* of the articles, at the time and place, although the promisee was not there to receive them, and no action can thereafter be maintained on the contract, but the property in the goods has passed to the creditor." At p. 167, he says "whenever a tender would discharge the contract, it must be so complete and perfect as to vest the property in the promisee, and give him, instead of the *jus ad rem* which he loses, an absolute *jus in re.*" The articles must be separated so as to be capable of identification as on a sale. A tender of one sheep, in a flock of several, or of ten bushels of grain, in a bulk of more, would be insufficient: *Powell v. Hill post* 169.

In our opinion, the doctrine thus stated by Parsons, rests on sound reasons of justice and convenience. A promisee should not be allowed, by a wrongful refusal to accept the articles for whose delivery he has contracted, to throw on the promisor the burden of continuing to keep them at his own expense and risk. In some cases, it has been held that after a refusal to accept, the promisor may throw the goods upon the ground, and be no longer liable for them. However this may be, if he keeps them it is as the bailee of the promisee, who is regarded as the owner; if he converts them to his own use, he is liable for their value at the time of such conversion. His situation is certainly different from that of a promisor bound to deliver at all events.

The statement in this case is so vague, that it is impossible to say what was the character of the alleged tender. (167)

It does not appear whether the bills tendered were in a separate parcel, or mixed with others of the same kind, so as not to be distinguishable. In the former case the tender would be good, because thereby the plaintiff acquired, notwithstanding his refusal, a title to the bills; in the latter case it would be insufficient. The Judge, by his instruction, in effect, says that there is no evidence from which a jury could reasonably infer the complete tender which was requisite to discharge the contract. In a case where the question is whether there was any evidence of a given state of facts, we must understand the Judge as setting out in the case the whole evidence bearing on that point, and we think from the statement, vague as it is, 'that the agent had in his possession *such bills,*' a jury *might* infer that they were such, both in kind and amount, as would just satisfy the contract, and no more, and consequently, were specific and capable of transfer to the plaintiff, all other specification being waived by his refusal to accept. We adopt this view the more readily, because it seems to us that upon the trial below, the importance of the matter in question was not clearly seen, and probably, that on another the facts will be more fully exhibited.

This view supersedes the necessity of expressing any opinion on the other questions raised by the exceptions. It may be remarked however that no reason can be seen why damages arising out of a breach of contract for the delivery of goods in 1865, should not be estimated directly in legal currency, without resorting to the circuitous process of first estimating them in gold and then adding the depreciation.

There must be a *venire de novo*. Let this opinion be certified.

Per curiam.

Venire de novo.

Cited: Terrell v. Walker, 65 N.C. 94; *Wooten v. Sherrard,* 66 N.C. 338.

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(168)

SAMUEL CALVERT v. HENRY WILLIAMS, JR.

A note in renewal of a former note of the maker *for money won at cards,* given to one who is endorsee of such former note for value and without notice, is not affected by the *gaming* consideration.

CASE-AGREED, decided by *Watts, J.,* at Fall Term 1869 of WARREN Court.

The claim of the plaintiff was founded upon a note given to him by the defendant, partly in satisfaction of another note, and partly for board. The former note had been made by the defendant to one Christmas, for money won at cards; and it had been endorsed to the plaintiff by Christmas, for value, and without notice of its consideration; and at the time the new note was given, he had no such notice.

His Honor, thinking the plaintiff was not entitled to recover, gave judgment for the defendant; and the plaintiff appealed.

Rogers & Batchelor for the appellant.

The *gaming* consideration does not infect the present note: *Gray v. McLean,* 12 N.C. 46; *Greenland v. Dyer,* 17 E.C.L. 315; *Cuthbert v. Haly,* 8 Term Reps. 390; *Turner v. Hulme,* 4 Esp. 11; *Boulton v. Coglen, cited, Hay v. Ayling,* 71 E.C.L. 430.

They also cited *Hawker v. Hallowell,* 39 Engl. L. & E. 70; *Edwards v. Dick,* 6 E.C.L. 405; and 6 Alabama 144.

Bragg contra; cited *Turner v. Peacock,* 13 N.C. 303, 1 Sel. L. Cas. 169, and *Warden v. Plummer,* 49 N.C. 424.

PEARSON, C.J. A note to secure the payment of money won at cards, is void by statute. Although the note be passed by endorsement, for valuable consideration, and without notice to the endorsee, it is void in his hands. So, if the maker executes a second note to the *original payee,* either in renewal of the first note simply, or including another debt, the second note is void; for it is to secure the payment of money won at cards, and the taint in the part of the consideration vitiates the whole — "a rotten egg:" *Palmer* (169) *v. Giles,* 58 N.C. 75.

In our case the maker executed the second note to *Calvert,* who was the endorsee for valuable consideration, and without notice. This second note was given to secure the price paid by Calvert for the first note, and not to secure the payment of the money which Christmas had won: for the purpose of making it must be referred to the proximate, and not the remote cause. The consideration, therefore, is not tainted by the illegality which vitiated the first note. His Honor erred in failing to note the distinction.

Cuthbert v. Haly, 8 Term 390, cited by Mr. Batchelor, establishes this distinction. The more recent case *Hay v. Ayling,* 71 E.C.L. 423, treats the point as settled, and is put on the ground that the endorsee had notice, and that the second note was a mere device or contrivance to cover over the taint in the first note.

There is error. Judgment reversed, and Judgment for the plaintiff on the case agreed.

Per curiam.

Judgment reversed, etc.

Cited: Kingsbury v. Suit, 66 N.C. 603; *Weith v. Wilmington,* 68 N.C. 29; *Fineman v. Faulkner,* 174 N.C. 15; *Bank v. Crafton,* 181 N.C. 405; *Grace v. Strickland,* 188 N.C. 373; *Bank v. Felton,* 188 N.C. 392.

EDGAR E. POWELL v. A. B. HILL.

In an action where the *complaint* stated, a bailment of a certain quantity of corn and fodder to the defendant, with a refusal by the latter to deliver it, and asked judgment for such goods (or their value) and for damages, and the *issue* was upon the *detention*, and also upon the plaintiff's *title;* the fact being that the plaintiff and defendant were tenants in common of the articles: *Held*, that the Court could give no "relief consistent with the case made by the complaint, and embraced within the issue."

A tenant in common cannot maintain an action against a co-tenant *to recover specific goods*, upon a refusal by the latter to deliver possession thereof: His remedy is *partition.*

ACTION, with *claim and delivery*, tried before *Watts, J.*, at (170) Fall Term 1869 of HALIFAX Court.

The plaintiff complained that he was the owner of a certain quantity of corn and fodder, which he had deposited with one Brodie for storage; that in February 1869, Brodie left the premises where the articles were stored, and the defendant took possession, and afterwards refused to deliver them to plaintiff, and thereupon, he demanded judgment for the goods, or the value thereof, with damages. The defendant answered: 1st, That defendant does not detain the said goods 2nd. That plaintiff is not the owner, or entitled to the immediate possession thereof.

The case stated that, on the trial before the jury, it appeared that Brodie rented certain lands from Hyman, for 1868, and employed the plaintiff to work on the farm during the year, agreeing to give him a certain part of the crop as wages; the whole crop was measured, and the part thereof due plaintiff ascertained, but such part was never divided off or separated from the rest, but remained mixed with the rest of the crop, until, and after, 1st July 1869, when the defendant, as the incoming tenant, and purchaser from Brodie of the whole crop, except the quantity demanded by the plaintiff, took possession of the whole.

Upon the trial below, the plaintiff recovered a verdict: Judgment accordingly, and Appeal by the defendant.

Rogers & Batchelor for the appellant.

As there had been no setting apart of the plaintiff's share of the crop, there can be no recovery in this action, which is a substitute for replevin.

They cited 1 Ch. Pl. 163, *Wood v. Atkinson*, 6 N.C. 87; *State v. Jones*, 19 N.C. 554; *Jones v. Morris*, 29 N.C. 370; *McNeely v. Hart*, 32 N.C. 63; *Brazier v. Ausley*, 33 N.C. 12; *Rooks v. Moore*, 44 N.C. 1; *Morgan v. Perkins*, 46 N.C. 171; *Hill v. Robinson*, 25 N.C. 501.

Walter Clark contra. (171)

1. The Constitution abolishes all distinctions in forms of action.

2. This action is like, but is not governed by the rules in, Replevin; the *claim and delivery* part is merely incidental, and that part may be set aside, without defeating the *action* itself: *Clark v. Griffith,* 24 N.Y. 595; *Van Nest v. Conover,* 20 Barb. 547.

RODMAN, J. (After stating the facts as above,) by Sect. 249, C.C.P., the Court may give the plaintiff "any relief consistent with the case made by the complaint, and embraced within the issue." The plaintiff in this case demands the recovery of specific goods, or the value thereof. It may be conceded that if entitled to either the one relief or the other, that is to say, if he could have recovered either in an action of detinue or trover, he is entitled to judgment. He is not entitled to any specific goods, because the only goods which he claims, are blended in a mass with others, from which they are undistinguishable. On the proof, he is a tenant in common with the defendant, and the Court could not order the Sheriff to put him in possession of any distinct and specific quantity of corn or fodder, out of the common mass. Neither is he entitled to damages for the conversion of his share of the common property. It is well settled that one tenant in common cannot recover in trover upon a mere demand, and refusal to deliver to him his share: *Campbell v. Campbell,* 6 N.C. 65; *Hill v. Robinson,* 51 N.C. 501. In *Rooks v. Moore,* 44 N.C. 1, it was held that one who was to receive a share of the crop, could not maintain trover for a conversion before a division. It is true, that in this case the particular number of barrels of corn and of bundles of fodder which the plaintiff was entitled to receive out of the mass, was ascertained: But that did not amount to a specific appropriation; he was still but a tenant in common, just as one is who is entitled to one sheep out of a flock, which must be of the average value. In this case the plaintiff was entitled to his (172) number of barrels, not of the best, nor of the worst, nor out of any particular place in the barn — but of an average value with the mass. Had a portion of the common property been accidentally destroyed, would not the loss have fallen on the parties, in proportion to their respective interests? If the defendant had destroyed or consumed the common property, the plaintiff would have been entitled to recover the value of his share: *Simmons v. Sikes,* 24 N.C. 98. In this case the property remained *in specie.* The plaintiff is entitled to partition, but he must resort to the proper proceeding for that purpose. Judgment reversed.

Per curiam.

Venire de novo.

Cited: Patton v. Hunt, 64 N.C. 166; *Blakely v. Patrick,* 67 N.C. 43; *Ins. Co. v. Davis,* 68 N.C. 21; *Grim v. Wicker,* 80 N.C. 344; *Shearin v. Riggsbee,* 97 N.C. 220; *Barham v. Perry,* 205 N.C. 430; *DuBose v. Harpe,* 239 N.C. 674.

STATE TO THE USE OF SOLOMON FISHER, ETC. v. MARY L. RITCHEY, ADMINISTRATRIX, ETC.

During the late war, an administrator, having in his hands a distributive share belonging to one of the next of kin residing in Illinois, upon being called upon by the District Court of the Confederate States to answer certain interrogatories propounded for the purpose of finding whether he had in hand any property liable to *sequestration,* without demur or further requisition, paid over to the Receiver such distributive share, five months before he settled up the estate: *Held,* that he did not therein exhibit ordinary care, and therefore, was still responsible to the next of kin, for such share.

DEBT upon an administration bond, tried before *Logan, J.,* at Fall Term 1869 of CABARRUS Court.

The plaintiff was administrator *de bonis non* of Clarissa M. Ritchey deceased, and the defendants were the administratrix,
(173) and the sureties upon the bond, of William R. Ritchey, deceased, who was the administrator of said Clarissa.

As such administrator, the said William, in 1862 had in his hands the distributive share of one Martin A. Ritchey, who resided in Illinois. Thereupon he was served with the following process:

CONFEDERATE STATES OF AMERICA, DISTRICT OF NORTH CAROLINA. } *In the District Court for the District of Cape Fear.*

To W. N. Ritchey, Adm'r of Clarissa Ritchey, greeting:

In pursuance of a request to me made by C. N. White, a Receiver under the Act of the Confederate Congress, entitled "An Act for the Sequestration of the estates, property and effects of alien enemies, etc.," you are hereby commanded to appear before the Honorable the Judge of the District Court for the District of Cape Fear, in the District of North Carolina, at the term of said court to be held at Salisbury, on the 2d Monday of February next, to answer under oath the interrogatories hereunto appended.

Witness, the Hon. Asa Biggs, Judge of the said court, at Wilmington, in the District of Cape Fear, in the District of North Carolina, this 14th day of January, A.D. 1862.

JOHN L. CANTWELL, *Clerk.*

INTERROGATORIES.

1. Have you now, or have you had in your possession, or under your control since the 21st of May 1861, and if yea, at what time, any land or lands, tenement or tenements, hereditament or hereditaments, chattel or chattels, right or rights, credit or credits, within the Confederate States of America, held, owned, preserved or enjoyed for or by an alien enemy; or in or to which any alien enemy had, and when, since that time, any right, title or interest, either directly or indirectly?

2. If you answer any part of the foregoing interrogatory in the affirmative, then set forth specifically and particularly a description of such property, right, title, credit or interest, and if you have disposed of it in whole or in part, or if the profit, or rent, or interest, accruing therefrom, then state when you made such disposition, and to whom, and where such property now is, and by whom held?

3. Were you, since the 21st day of May 1861, and if yea, at what time, indebted, either directly or indirectly, to any alien enemy, or alien enemies? If yea, state the amount of such indebtedness, if one, and of each indebtedness, if more than one, give the name or names of the creditor or creditors, and the place or places of residence, and state whether or to what (174) extent such debt or debts have been discharged, and also the time and manner of the discharge?

4. Do you know of any land or lands, tenement or tenements, hereditament or hereditaments, chattel or chattels, right or rights, credit or credits, within the Confederate States of America, or any right or interest held, owned, preserved, or enjoyed, by or for one or more alien enemies since the 21st day of May 1861, or in or to which one or more alien enemies had since that time any claim, title or interest, direct or indirect? If yea, set forth specifically and particularly what and where the property is, and the name and residence of the holder, debtor, trustee or agent.

5. State all that you may know which will aid in carrying into full effect the Sequestration Act of the 30th August 1861, and state the same as fully and particularly as if thereunto specially interrogated.

(Signed,) C. N. WHITE, *Receiver.*

NOTE.

The garnishee in the foregoing interrogatories is specially warned, that the Sequestration Act makes it the duty of each and every citizen to give the information asked in said interrogatories. [Act of 30th August 1861, section 2.]

And if any agent, attorney, former partner, trustee or other person, holding or controlling any property or interest therein of, or for any alien enemy, shall fail speedily to inform the Receiver of the same, and to render him an account of such property or interest, he shall be guilty of a high misdemeanor, and upon conviction, shall be fined in a sum not exceeding five thousand dollars, and imprisoned not longer than six months, and be liable to pay besides to the Confederate States, double the value of the property or interest of the alien enemies, so held, or subject to his control. [Section 3.]

The Attorney General has also prescribed the following rule of practice for the courts, by virtue of the authority vested in him under the 16th section of the law:

RULE.

Garnishees, to whom written or printed interrogatories are addressed, may make appearance by filing written answers, sworn to before a Justice of the Peace or other competent officer, unless specially ordered by the court to appear in person.

After being served with such process, to-wit, on the 23d of May 1862, the said William paid the said distributive share to the said White, as Confederate Receiver.

His representative and sureties relied upon this transaction as a defence against the claim put up for said Martin A. Ritchey
(175) through the plaintiff.

In the course of the suit an account was taken, and the commissioner allowed the payment to White as a full defence. Thereupon the plaintiff excepted. Upon appeal to the Judge such exception was sustained; and the defendants appeal to this court.

R. Barringer and Blackmer & McCorkle for the appellants.
Wilson contra.

DICK, J. We are aware of the many difficulties which were encountered during the late war by the fiduciary holders of property, and we are disposed to consider such cases with all the liberality which the facts will justify.

Such persons, in order to free themselves from responsibility for the loss of such property, — must show that they acted in good faith and with the ordinary care which prudent men exercised in the management of their private affairs: *Shipp v. Hettrick,* 63 N.C. 329; *Cobb v. Taylor, post* 193.

This case was argued with much ability; and, after full consideration, we are of the opinion that the facts show that the testator of the defendant did not act with proper care in regard to the funds in question. He paid them to the Confederate Receiver five months before the estate of the intestate was settled, and before there was any decree of the Confederate Court requiring such payment. The process served upon him, only required him to appear before said Court, and show cause why such a decree should not be made. The Court to which he was summoned was to be held in an adjoining county, and was easily accessible by Railroad. It does not appear that he attended the Court, or employed counsel to assist him in protecting the funds from confiscation, although he would have been justified in using a part of the trust funds for that purpose. His conduct
(176) was not that of a prudent trustee who was desirous of protecting the rights of his *cestui que trust.* He paid over the

funds without being compelled to do so by any legal process, and we must infer that he acted voluntarily and with the purpose of assisting in the enforcement of the confiscation laws.

If he had employed counsel, and made a proper defense in Court, and a decree had been made against him; and he had paid over the fund, to free himself from the penalties of an indictment or attachment; then he might not have been responsible for the loss of the fund.

Per curiam.

Judgment affirmed.

JAMES M. B. HUNT v. WILLIAM M. SNEED AND WIFE.

Clerks of the Superior Courts have original jurisdiction of all proceedings for the settlement of the estates of deceased persons.

That jurisdiction is also *exclusive* whenever adequate; *i.e.* perhaps, in all cases except where a provisional remedy by injunction may be required pending the proceedings before the Clerk.

Orders for an injunction in such cases must be had from the Judge, and must be modified or vacated by him; but applications for the orders must be made by motion in the original proceedings, and returns upon the Judge's order, must be made to the Clerk.

Therefore an action demanding that an executrix, who was alleged to be wasting the estate, should turn it over to a receiver, that the plaintiff should be paid a legacy, etc., which had been brought to term time, was dismissed.

ACTION, tried before *Watts, J.*, at Fall Term 1869 of GRANVILLE Court.

On the 24th of July 1869, the plaintiff issued a summons returnable at the regular term of the Superior Court of Granville, and filed his complaint, in which he alleged, in substance, (177) that the defendant, Sarah, was the executrix of one Bullock, and had intermarried with the other defendant; that the plaintiff was both a creditor and a legatee of the testator; and that defendants were wasting the estate; and demanded judgment that the defendants account, and pay his debt and legacy, and that in the meanwhile they be enjoined, etc., and a receiver be appointed. The defendants put in an answer, and the Judge continued an injunction which he had previously granted: from which the defendants appealed.

Bragg for the appellant.
Graham contra.

RODMAN, J. (After stating the case as above.) It is contended that the Court had no jurisdiction of the case, because original jurisdiction of all proceedings necessary for the settlement of the estate of a deceased person, is, by law, vested exclusively in the Probate Judge. Section 17, Art. IV, of the Constitution gives to the Clerks of the Superior Courts jurisdiction of "the granting of letters testamentary and of administration," and "to audit the accounts of executors, administrators and guardians, and of such other matters as shall be prescribed by law." The words of this grant of jurisdiction are somewhat general and indefinite, and it was intended to leave to the General Assembly, by proper enactments, to define the jurisdiction with precision, and to prescribe the mode in which the power should be exercised. This the General Assembly undertook to do, partly by the Code of Civil Procedure, Title XIX, chapters III to IX, and, more especially, by the act of 1868-9, chapter 113 ratified April 6th 1869.

Without referring to the particular sections of this act, by which remedies are given to creditors and legatees, and proceedings
(178) are provided by which a due administration by an executor or administrator may be enforced, it will be sufficient to say that it seems evident to use that the intent of the act was to give to the Clerks of the Superior Courts original jurisdiction of all proceedings for the settlement of the estates of deceased persons. Without saying that the General Assembly might not, consistently with the Constitution, have given to the Judges of the Superior Courts some concurrent original jurisdiction of proceedings for the settlement of estates, we think their intention was to give that jurisdiction exclusively to the Clerks, except (as will be presently explained) when the remedy by injunction may become necessary as a provisional one in the course of a proceeding.

In every case in which the Court of Probate (the Clerk of the Superior Court) can give an adequate remedy, the party seeking it must apply to that Court. There may be cases in which that Court can not give an adequate remedy. For example, it may in the course of the proceedings become necessary, in order to protect the rights of one party or the other, to have an injunction, which the Clerk can not order. In that case the party needing it must of necessity apply to a Judge of a Superior Court; but such an application would not oust the jurisdiction of the Court of Probate. The order for an injunction is a provisional remedy, and must necessarily be incidental

to the main cause, which would still remain in its original form; the motion for the injunction before the judge, would not remove the original cause of action before him, and the order for the injunction would be merely subsidiary to the judgment to be rendered in the original proceeding.

It is true the Clerk would have no power to modify or vacate such an injunction, but application could be made to the Judge at any time to do so, whenever its propriety became apparent through the proceedings or judgments in the probate Court. There may be other orders besides that for an injunction, for which it may be necessary to apply to a judge of a Superior Court, though no other occurs.
to us at present. But in all such cases the order is made in the (179)
original proceeding, and is a part of the record in that pro-
ceeding. In case of another appeal from the order of the Judge, so much only of the case comes up as is necessary for a decision upon that order; the original proceeding remains in the Court of Probate, and any action may be taken therein in the meantime, not inconsistent with the orders of the Judge, and with the law. Consequently, all returns upon the order of the Judge must be made to the Court of Probate, and if any further order be needed from the Judge, application must be made by motion in the original cause.

In every attempt to introduce a new system of procedure by statute, much must necessarily be left not distinctly provided for, and the Courts are obliged gradually to fill up the details of the system conformably to the general legislative intention. In attempting to do so, the *argumentum ab inconvenienti* avails much. By any other course than that which we have indicated as the proper one in this case, the inconvenience could scarcely be avoided of having parts of the same settlement pending in two different courts, and in two entirely separate proceedings, at the same time, in which neither Court could give more than a partial remedy; or, if the Judge of the Su-
the former Courts of equity, he could only do so by totally depriving the Probate Court in the particular case, of the jurisdiction expressly
Probate Court in the particular case, of the jurisdiction expressly given it by statute, and defeating much of the lawful action of that Court. In connection with this subject, we take occasion to suggest to the Judges of the Superior Courts the propriety of the greatest liberality in allowing parties to amend their proceedings.

Our opinion on this question renders it unnecessary to express any opinion on the others which were debated by counsel. The present proceedings being *coram non judice,* should have been dismissed.

Per curiam.

Judgment reversed, etc.

Cited: Heilig v. Foard, 64 N.C. 713; *Heilig v. Foard,* 65 N.C. 68; *Staley v. Sellers,* 65 N.C. 469; *Sprinkle v. Hutchinson,* 66 N.C. 451; *Hutchinson v. Roberts,* 67 N.C. 226; *Hendrick v. Mayfield,* 74 N.C. 632; *Barnes v. Brown,* 79 N.C. 406; *Simpson v. Jones,* 82 N.C. 324; *Stancill v. Gay,* 92 N.C. 462; *Wilson v. Alleghany County,* 124 N.C. 8; *Baker v. Carter,* 127 N.C. 94; *In re Sneed,* 158 N.C. 392; *Retreat Assoc. v. Development Co.,* 183 N.C. 45; *Clark v. Homes,* 189 N.C. 711; *In re Estate of Wright,* 200 N.C. 627; *Jackson v. Jernigan,* 216 N.C. 403.

(180)

JAMES M. B. HUNT v. W. M. SNEED AND WIFE.

Jurisdiction over cases seeking from administrators additional securities upon their bonds, is vested in the Clerk of the Superior Court, in his character as Probate Judge.

NOTE.—See *Hunt v. Sneed, ante* 176.

ORDER, before *Watts, J.,* upon appeal from the Clerk, at Chambers, March 22d 1869, GRANVILLE Court.

His Honor had affirmed an order, made by the Clerk upon application by the plaintiff, that the defendant Sneed, give better security upon his bond as administrator.

The defendant objected, for want of jurisdiction in the Clerk, etc.

The facts are the same as in the case between the same parties, *ante* 176.

Bragg for the appellants.
Graham contra.

DICK, J. Clerks of the Superior Court, as Judges of Probate, have jurisdiction to grant letters testamentary and of administration, and to audit the accounts of executors and administrators, etc. Const. Art. IV, sec. 17.

As there are now no Courts of Equity in this State, the jurisdiction of Judges of Probate combines in many respects, the powers of the Court of Chancery and the Ecclesiastical Court in England, on this subject. In England, letters testamentary and of administration, are granted by the Ordinary of the diocese in which the testator, or intestate, resided. The Ordinary was formerly the administrator of

such intestate, but the statute 31 Edw. III required him to appoint an administrator, of "the next and most lawful friends" of the intestate; and the statute 22 and 23 Car. II required the Ordinary "to take sufficient bonds with two or more able sureties, respect being had to the value of the estate."

Administrators are the officers of the Ordinaries, and subject to their control in the Ecclesiastical Courts. Upon the application of persons interested in an estate, and upon sufficient cause (181) shown, the Ecclesiastical Court will, by citation, require the administrator to appear and render an account of his administration, and renew his bond or justify his sureties. The limited power of the Ecclesiastical Court to enforce its orders and decrees gave rise to a concurrent jurisdiction in Chancery.

The Court of Chancery regards executors and administrators as trustees, and compels them faithfully to execute their trusts in administering the assets of the estate in their hands. In cases in which the Ecclesiastical Court cannot do complete justice, the Court of Chancery assumes exclusive jurisdiction, and will compel the performance of its orders and decrees by the process of attachment.

The Courts of Equity in this State exercised a similar jurisdiction until they were abolished by the present constitution. They would not interfere to take an estate out of the hands of an executor merely on the ground of an insolvency which existed at the time of his appointment, for he derived his power from the will of his testator. If an insolvent executor was guilty of a *devastavit*, or any other maladministration, then a Court of Equity would have taken the estate out of his hands by appointing a receiver; or would have required him to enter into bond with sufficient sureties to secure the proper administration of the assets.

An administrator was appointed by the officers of the law, and was required at the time of his appointment, to give bond with sufficient sureties, to secure the faithful discharge of the duties of his office; and the courts had ample powers to enforce the proper performance of such duties, and to require said bond to be kept at all times sufficient to secure the object for which it was given. The courts only interfered upon the application of persons directly interested in the assets, and upon sufficient cause being shown, until their jurisdiction was enlarged by statute (Rev. Code, chap. 46, sec. 39,) in behalf of the sureties on the bonds of executors and administrators.

Under our new system, the Superior Courts have all the powers which formerly belonged to the County Courts, the (182) Superior Courts of Law, and the Courts of Equity.

The Superior Court has two departments, *i.e.*, the Court of Probate,

under the control of the Judge of Probate, and the Superior Court proper, under the control of the Judge of the District. The jurisdiction of the Court of Probate, which is expressly defined in the constitution (Art. IV, sec. 17) is original, and cannot be exercised by the Judge of the Superior Court except upon appeal. The constitution (Art. IV, sec. 17,) provides for the extension of the powers of the Judge of Probate "to such other matters as shall be prescribed by law," but this jurisdiction may be modified at any time by the Legislature: *McAdoo v. Benbow,* 63 N.C. 461.

In the case before us the defendant W. M. Sneed, intermarried with the executrix of the testator, and had given the bond required by law in such cases. He thus became substantially administrator *cum testamento annexo,* and on the adoption of the constitution, he was subject to the supervision and control of the Judge of Probate of Granville county. The proceedings against the defendants, to compel them to account and give a new bond with additional sureties, or justify the sureties on the old bond, were properly commenced before said Judge of Probate. His powers in this respect are derived from the constitution and the Code of Civil Procedure, and the Act of 1868-'69, ch. 113, only sets forth the forms of proceedings and other details by which those powers are to be exercised. Before the passing of said Act, he had the power to require the defendants to account for the assets of the estate in their hands, and give a new bond with sufficient sureties, or be removed from office, and he might have enforced his orders and decrees, by process of contempt.

As it appears that the estate in the hands of the defendants has been greatly diminished by the results of the late war, the
(183) Judge of Probate should only require a new bond sufficient to secure the assets, with which the defendants are now properly chargeable.

There is no error in the order appealed from.

Let this be certified to the Judge of Probate for Granville county, so that he may proceed with this matter according to law.

Per curiam.

Ordered accordingly.

Cited: Barnes v. Brown, 79 N.C. 406; *Simpson v. Jones,* 82 N.C. 324.

DANIEL M. FINGER AND OTHERS v. ALFRED K. FINGER, ADM'R. ETC., AND OTHERS.

That the plaintiffs in equity were not served with process, in a petition at law by the defendants against them, is ground for a proceeding *in such petition*, to have relief, but none for a bill in equity.

The declarations as to the state of the assets made in the course of a petition by an administrator to sell lands, is not *binding* upon the heirs, etc., and under our former system, those heirs had a right to a bill in equity against the administrator, for an account of his dealings, etc., and for an injunction against a sale in the meantime.

Where the deficiency in personal assets resulted from accident, after they had come into the hands of the administrator, *(here,* Emancipation, etc.,) *held*, that the Courts of law (formerly) were not competent to order a sale of lands to pay debts, under the act of 1846, but that application must be made to a Court of Equity.

The receipt by an administrator in September 1863, of Confederate money upon sales of personalty made in August before, no more appearing, does not exhibit a want of ordinary care in an administrator.

EXCEPTIONS to an account in equity, before *Logan, J.*, at Fall Term 1869 of LINCOLN Court.

The plaintiffs, by their bill, alleged, that they were heirs at law of Henry Finger, who had died in 1863, and that the defendant was his administrator; that the defendant had, upon his (184) qualification in 1863, taken into possession several valuable slaves and other personal property; that he had sold the personal property other than slaves, for Confederate money, had retained the slaves until they were emancipated, and that having thus wasted the personalty, he had recently filed a petition for the sale of lands to pay certain outstanding debts, had obtained an order therefor, and was about to make sale; that, but for his negligence, the debts would have been paid without taking the lands, and that two of the plaintiffs had not been made parties to the *petition* of the plaintiffs, etc. The prayer was for an account, for an injunction against the sale.

The administrator answered, that, in August 1863, he had sold personal property of the deceased, at the high rates then prevailing, to the amount of some $2,000; that with this he had paid more than $1,000 of debts due before the war; that he had made certain other applications of the proceeds of the sale, as by arrangement at that time with the plaintiffs (excepting one of them); that early in 1864 he had been conscribed into the Confederate army, and had remained there until the Surrender; that at the close of the war he had on hand, of such proceeds, about $360; that he refrained from selling other portions of personal property, and from hiring out the slaves, at the

instance of the plaintiffs (excepting as above) who took this property and slaves into their own hands, and gave the defendant a bond to indemnify him, etc. The answer proceeds at some length to state the condition of the estate, and show the grounds for the order of sale, etc.

An account was ordered, and taken. The commissioner charged the administrator with the value of some of the slaves, and with the hire of others; and also with the Confederate money in his hands at the Surrender.

The plaintiff filed exceptions to this account: the first *five,* because the commissioner had charged him with the slaves and
(185) other personalty taken by the next of kin in 1863; *two* others, because he was also charged with the value of the Confederate money which remained in hand and also with interest upon it; the *other* (No. 8) because the proofs upon which their report rested, were not given.

His Honor sustained the exceptions, and the plaintiff appealed.

Bragg and Bynum for the appellants.
Phillips & Merrimon contra.

RODMAN, J. The bill in this case prays an injunction against a sale by the administrator, of certain lands of the deceased, under an order of sale obtained in the County Court, as upon a deficiency of personal assets, to pay the debts of the deceased: it alleges that the order in the County Court was obtained without the service of notice on two of the heirs, which would be ground for setting the order aside on motion in the County Court, or in the court to which that order has been transferred. A sale would not pass the estates of those who were not made parties by a service of process, and obviously in a case like this, a sale of the estates of some of the heirs only, would be unjust. If that ground of relief existed alone, the plaintiffs would have no right to sue in equity, because they would have ample remedy in the original action; but they also demand an account from the defendant, of his administration, to which they are of course entitled; and as subsidiary thereto, that the sale of the lands may be enjoined until the account shall be taken and it shall be found that a state of things exists which makes a sale necessary and proper. On a petition by an administrator to sell the lands of the deceased, he must satisfy the court, either that the personal estate has been exhausted in the payment of the debts, and that others are due, or that
(186) it will clearly be insufficient for that purpose. The court, for its own satisfaction, may require an account of the adminis-

tration of the personal estate to be taken; but the decree giving or refusing the order of sale, does not profess to pass on the account except to the extent that may be necessary to justify the order, and binds nobody as a decree declaring the state of the account: *Latta v. Russ,* 53 N.C. 111. This will be obvious without further argument, by the reflection that the distributees, who are entitled to an account of the personalty, may not be the same with the heirs, who are the only necessary defendants in a proceeding to sell the land. In this case it appears that the administrator received personal property which, if it could have been sold at the time for money which the creditors were willing to receive, would probably have been ample to pay all the debts. The condition of the country, however, in the latter part of 1863, made it uncertain whether that could be done, and this we may suppose, was the inducement to the agreement among the distributees, for a division of the property among them. After a partial division, the slaves were emancipated and thus become lost to the estate. We think the rule announced in *Wiley v. Wiley,* 61 N.C. 131, applies in this case, and that under the circumstances, the distributees have a right to come into this court, where alone the account can be fully taken, and the propriety of a sale of the lands properly determined, and the rights of all the parties adjusted. We think therefore, the Judge erred in dissolving the injunction.

As to the exceptions to the account: The first five are sustained; the plaintiffs who come into Court for equity must do equity. The administrator did not receive the sums mentioned in these exceptions, and part of the property was delivered to the plaintiffs, at their request, and held and enjoyed by them. As to holding the administrator liable for the value of the slaves, because he did not sell them in 1863; we think it would be unreasonable: of course they could only have been sold for Confederate money, and the plaintiffs seek to charge the defendant with the full sum of what he did re- (187) ceive. The exceptions relating to Confederate money are also sustained. We think the administrator was justified, in receiving it, and it does not appear to us that he was negligent in endeavoring to pay the debts with it.

The case will be remanded to the Superior Court, in order that the account may be modified according to this opinion. If the defendant shall there by a petition in this cause, pray for a sale of the lands, it will be competent for the Court to make such order, provided there are circumstances to justify it.

Judgment below reversed in part — Injunction continued until final hearing. Suit remanded.

Per curiam.
Ordered accordingly.

Cited: Kerns v. Wallace, 64 N.C. 189; *Fike v. Green,* 64 N.C. 667; *Womble v. George,* 64 N.C. 762; *Sprinkle v. Hutchinson,* 66 N.C. 452; *Wood v. Skinner,* 79 N.C. 94; *Shields v. McDowell,* 82 N.C. 140; *Blount v. Pritchard,* 88 N.C. 448; *Temple v. Williams,* 91 N.C. 91; *Wilson v. Pearson,* 102 N.C. 310; *Austin v. Austin,* 132 N.C. 265; *Stimson v. Phifer,* 213 N.C. 356.

THOMAS M. KERNS, ETC., ADM'RS v. JAS. WALLACE AND OTHERS.

Under the former system, a County Court had no power, in a petition by an administrator to sell lands, etc.,—to order an account which could bind the next of kin: this could be done only in a proceeding the direct object of which was such an account.

Whether an administrator were blamable for selling property at a time when he could only obtain for it Confederate money, *(here,* November 1863) depends upon circumstances; viz.: the sort of property sold, whether perishable or other—the unwillingness of creditors, etc., to receive such currency, and the like.

It is not true, as a general proposition, that a *mere sale* at such a time *imports* negligence; *therefore,* where the case showed no *circumstances* indicating negligence, held that, as the presumption was in favor of innocence, the administrator was not chargeable with the consequent loss.

PETITION by administrators to sell lands, etc., before *Logan, J.,* at Spring Term 1869 of MECKLENBURG Court.

(188) The petition was filed in the County Court, January Term 1868, and afterwards was *transferred;* and it alleged: That the intestate died in 1863, and administration was granted to the petitioners in October 1863; that in November thereafter they sold personalty to the amount of $3,274.87, which was paid in Confederate currency; that with this they paid off all the debts they knew of (some $1,200) and distributed the residue to the next of kin, excepting a share due to a non-resident (some $220) which has been lost; that since the war they have been notified of other debts (some $500); that there are no personal assets remaining, and that the intestate died seized in fee of a tract of land which descended to his heirs, etc.

The heirs were duly made parties.

One of the heirs, James Wallace, answered, denying that there were grounds for sale as desired; relying upon the allegations: That the administrators were chargeable with *negligence,* — in selling for Confederate money, — in not so dealing that the present claims would have been barred by the statute of limitations, — and in paying over the Confederate money to the next of kin without taking *refunding bonds.*

The Court ordered an account, which showed that the sales in Nov. 1863, were $3,277.51. Adding some small notes, and interest upon all, the administrators were charged, July 1868, with $4,557.14. The credits (year's allowance $259.65) with interest, were $777.61; also, for commissions, etc., $437.93. The balance in the administrators' hands was stated to be $3,341.60 in Confederate money; of which, in money distributed to the next of kin, $2,342.50. The debts still due, excepting one to the defendant Wallace, ($325.21) amounted to $436.95.

Upon this the Court granted an order of sale; and the defendants appealed.

Dowd for the appellants.
Wilson contra.

RODMAN, J. This is a petition by administrators to sell land to pay debts, pending in the County Court at the time (189) of the abolition of that Court, and then transferred to the Superior Court. The defendants allege in their answer that the plaintiffs have personal assets in their hands sufficient to pay the debts. A referee was appointed to state an account. As there is no exception to this account, we must assume it to be correct. He reports that there are debts out-standing, and that the plaintiffs have no personal assets, except $3,341.60 in Confederate money. So that the question intended to be presented, and which ought, regularly, to have been presented by an exception to the account, is, whether the administrators are chargeable with this sum or any part of it.

Before considering that question, we refer to *Finger v. Finger, ante* 183, where it is said that a County Court, under the former system, had no power on a petition like this, to make a decree respecting the administration account, which would bind the next of kin; that such a decree could only be made in a suit whose direct object was an account, and to which the next of kin were necessary parties. But in passing on the plaintiff's claim to the relief demanded, the Court is obliged, of course, to ascertain whether there appear to be personal assets in the hands of the administrators. If, in this

case, the administrators are chargeable with the Confederate money, it must be either because they sold the property improperly, or sold it improperly for Confederate money, or negligently kept the money on hand, instead of applying it to pay the debts of their intestate when they might have done so. We find that on the 5th of Nov. 1863, they sold property for $3,277.51, which they received in Confederate money. They are charged with sundry small notes amounting, exclusive of those of James Wallace, to about $150, which we suppose the report to say they collected in Confederate money. It is matter of common knowledge that in Nov. 1863, if an administrator sold at all, he could sell for Confederate money only. Now whether (190) the administrator was justified in selling at that time, will depend very much on the kind of property sold, whether perishable or otherwise, on the probable willingness of the creditors to receive it, and upon other circumstances, none of which are stated. The fact of the sale at that date, stands bare in the report, neither supported by evidence showing its necessity, nor impeached by exception, or evidence. This Court cannot say, as a general proposition, that a sale by an administrator in Nov. 1863, was tortious under all circumstances. The administrators paid off debts to the amount of $887.13, and there are others now out-standing, to the amount of $436.92. If the administrators could have paid off these debts in 1863, it was their duty to have done so: but in the absence of all evidence, this Court cannot say that they were guilty of negligence in not doing so. The presumption must always be in favor of a party charged with breach of duty. The burden of proof is on the party that charges negligence.

What is said in *Wiley v. Wiley,* 63 N.C. 182, is not applicable in this case. We can see no error in the judgment below.

Per curiam.

Judgment affirmed.

Cited: Fike v. Green, 64 N.C. 667.

JAMES MOORE v. WILLIAM E. BOUDINOT, EX'R. AND OTHERS.

The various solvent sureties given by a Clerk and Master upon the annual bonds of any one term of office, are liable to *contribution, inter se,* in a ratio determined by the aggregate of the penalties of the bonds signed by each.

CASE agreed in regard to a question in difference between the parties, submitted to *Tourgee, J.*, July 1st 1869, at Chambers, CHATHAM Court.

The parties (with others who are admitted to be insolvent) were, in person or as representatives, sureties upon one or (191) more of the four official bonds given by the Clerk and Master for Chatham County, during the years 1855, 1856, 1857 and 1858, and, some of them having been compelled to pay money on account of a default by their principal, a question arose, whether contribution could be enforced against the others, and if so, in what proportion. The principal, who is insolvent, was appointed Clerk and Master at Fall Term 1847, and was never formally re-appointed, but continued to act as such from that time until 1859. But the bonds above specified were regularly approved by the Judges presiding at the respective Terms when they were given; and among others, by Judge Caldwell, who presided at Fall Term 1855, to-wit: at the close of eight years from the time of the original appointment.

In 1857, a large sum of money came, in due course of law, into the hands of the said Clerk and Master, and a default having been committed by him, in not paying the same to the parties entitled under an order of the Court of Equity, at Fall Term 1858 suit was brought upon the bond of 1858, and thereby the above named James Moore, and others were compelled to pay, in equal proportions, the sum of $4,084.00, at Spring Term 1869 of Chatham Court.

The plaintiff claimed that he had been compelled to pay more than, upon a due account, would appear that he should, as betwixt himself and the other parties above; and that now he was entitled to contribution from them.

A demand upon the co-sureties was admitted, and all preliminary questions of fact, or of law, arising upon the above statement, the determination of which, might be necessary to a decision of the main question, were submitted to his Honor for determination.

His Honor thereupon decided that the acceptance of the bond of 1855, was equivalent to a re-appointment for the next term, or was conclusive proof of such re-appointment; and so, that the plaintiff was entitled to contribution from the sureties to the (192) various bonds given during that term: the ratio between the parties, being determined by the aggregate of the penalties of all the bonds executed by them respectively, during that term, etc.

The defendants appealed.

Manning for the appellants.

1. There is no *record* of an appointment of the C. & M. in 1855, and this should be *matter* of record: See Rev. Code, cc. 19 and 82.

2. The act requires an *appointment,* and also a *qualification; renewing* a bond may be part of the latter, but does not supply the place of the former.

3. Rev. Code c. 77, § 4, is not intended to make officers who *hold over,* such, *de jure. Holloman v. Langdon,* 52 N.C. 49, was well argued and was decided after the passage of that act. That case cites *Chairman, etc. v. Daniel,* 51 N.C. 444, and distinguishes the case of a C. & M., from that of a Superintendent of Common Schools.

4. Supposing that these bonds are cumulative as regards *creditors,* they are not so as regards the respective *sureties* upon them.

Phillips & Merrimon contra.

1. Rec. Code c. 77, § 4, constitutes officers holding over, officers *de jure;* they were such *de facto,* without its aid. The case in 52 N.C. 49, shows upon its face that the attention of the Court was not called to that Statute.

2. The acceptance of the bond by Judge Caldwell, at Fall Term 1855, was virtually a re-appointment.

3. As to contribution, and ratio, *Bell v. Jasper,* 37 N.C. 597.

SETTLE, J. This was a case agreed, and submitted to his Honor to find the facts, and to declare the law arising upon them.

(193) He finds the facts that the principal was appointed to the office of Clerk and Master in Equity, for the County of Chatham in 1847; and that his appointment was renewed in 1851, and again in 1855.

These facts being established, (and we must say that we concur in the view of the matter taken by his Honor,) the case is relieved of all further difficulty; for it is well settled that when a term of office is for more than one year, the bonds given for a proper discharge of the duties thereof, at the time of the appointment and from time to time afterwards, are cumulative during the term of office; *Poole v. Cox,* 31 N.C. 69.

Per curiam.

Judgment affirmed.

Cited: Pickens v. Miller, 83 N.C. 547; *Fidelity Co. v. Fleming,* 132 N.C. 336; *Pender County v. King,* 197 N.C. 54.

JOHN B. COBB AND WIFE AND OTHERS v. W. P. AND J. W. TAYLOR, EXECUTORS, ETC.

Where executors collected the funds of an estate in Confederate money, in 1861, 1862 and up to February 1863, for next of kin living in Tennessee, and the latter received such money without objection until, in the progress of the war, communication was cut off; and thereupon the executors invested it in Confederate *Certificates*, State Treasury notes, and other securities—all of which failed by the results of the war: *Held*, that they had exhibited ordinary care in this respect, and were not responsible for the loss.

EXCEPTION to an account, tried by *Tourgee, J.*, at Fall Term 1869 of CHATHAM Court.

The plaintiffs, at Spring Term 1867, filed a petition against the defendants, for an account and settlement of the estate of Mary Taylor, deceased. The defendants answered separately, and very fully; and an account was taken. The plaintiffs excepted (194) to part of the account, because the commissioner had allowed the defendants certain Confederate money received and invested by them, and subsequently lost by the results of the war.

The material facts upon which this question turned, are to be found in the opinion.

His Honor allowed the exception, and the defendants appealed.

Phillips & Merrimon for the appellants.
Howze contra.

SETTLE, J. There is a marked distinction between this case and that of *Shipp v. Hettrick*, 63 N.C. 329. That was said to be a case of peculiar hardship, but the court felt constrained to hold the executor liable for the value of the Confederate currency which came into his hands, upon the ground that no good reason was shown for receiving Confederate currency in 1862 and 1863, and holding it until it became worthless, without investing it in some manner, or making a special deposit of it for the benefit of the party interested. In that case it is said that "if the plaintiff had invested this fund in Confederate bonds, or had loaned it out upon individual security, he would not have been held responsible, although the investment may have proved a total loss. Or, if he had separated this money from all other moneys in his hands, and retained it as a special deposit for Louisa E. Hettrick, the case would have been different, notwithstanding the fact that it became worthless. But he did none of these things; on the contrary he kept it with his own moneys."

In the case before us, the executors state in their answers, that they received and paid over to the different legatees, residing both in this

State and Tennessee, Confederate currency, without objection on their part, until they extinguished the claims of all the legatees (195) except the plaintiffs in this petition; that they had made partial payments to these, and had in the latter part of 1862, and on and before the 10th day of February 1863, collected Confederate currency with a view of sending it to the petitioners, who reside in Tennessee; that, in consequence of all communication being cut off, they were unable to send the fund, as they wished and intended to do; that, finding Confederate currency rapidly depreciating, they invested all in their hands belonging to the estate of their testator, except a small sum which they still hold, in certain securities (State Treasury notes, Confederate Certificates of Deposit, and others), *for the benefit of the petitioners;* that not knowing when they would be called on to account, or when they would find an opportunity to transmit the securities, they kept them constantly on hand, ready at any moment to turn them over to the petitioners. They allege, in short, that they received the currency in good faith, expecting to pay it over at an early day to the petitioners, who were clamorous for their shares. Finding themselves unable to do so, they invested in certain securities for the benefit of the petitioners, and retained the same until they became worthless by the results of the war. The report of the Commissioners appointed to audit and settle their accounts, sets forth each investment and the date thereof, and adds: "We are satisfied from the testimony taken by us, that the executors received most of the funds invested as aforesaid, in 1861 and 1862, and none after February 1863: That their investments were made promptly for the benefit of the heirs not in this State, the communication being very difficult and dangerous between this State and the parts of Tennessee in which they resided."

There is nothing to support the exception taken by the plaintiffs. The answers of the executors are fully sustained by the report of the Commissioners, and we see nothing to impeach either.

There is error. This will be certified, to the end that the funds in the hands of the executors may be disposed of under an order (196) of the Superior Court.

Per curiam.

Error.

Cited: Fisher v. Ritchey, 64 N.C. 175.

W. R. SAVAGE TO THE USE OF MILLS E. G. BARRETT v. WILLIE CARTER AND OTHERS.

An action at law upon a note payable to *B. agent of A.*, brought before the adoption of the present Code, should have been in the name of B., as plaintiff, and not in that of A.

DEBT upon bond, tried before *Pool, J.*, at Fall Term 1869 of BERTIE Court.

The plaintiff declared upon a bond for money, payable by the defendants to "Mills E. G. Barrett, agent of William R. Savage."

The defendants pleaded the General Issue, and moved for a non-suit, on the ground of variance.

In obedience to an intimation from his Honor, the plaintiff submitted to a non-suit, and appealed.

Peebles & Peebles, and Rogers & Batchelor for the appellant.

A *principal* may sue upon a bond in which his name is disclosed as such. Add. Cont. 9 and 10, Chitty, Cont. 231, *Whitehead v. Riddick,* 34 N.C. 95.

Smith contra.

The legal contract is with Barrett, the subjoined words being merely, *of description.* Brown on Actions (45 Law Lib.) (197) 100, 1 Chit. Pl. 9; Brown on Parties (56 Law Lib.) 42, 3, *Schach v. Anthony,* 1 M. and S. 573; *Buckley v. Hardy,* 5 B. and A. (11 E.C.L.) 355; *Grist v. Backhouse,* 20 N.C. 362.

RODMAN, J. This was an action of debt, brought before the adoption of the Code of Civil Procedure by which the law in respect to parties to actions is materially altered. We are therefore to decide the question presented on the law as it stood when the action was brought. By its express provisions the Code does not apply to such actions, until after judgment. The bond sued on, was payable to "Mills E. G. Barrett, agent of Wm. R. Savage," for the hire of certain slaves. It is a deed poll: it does not appear, except inferentially, to whom the slaves belonged. Therefore *Whitehead v. Riddick,* 34 N.C. 95, which was a deed *interpartes,* is not applicable. It is said in 1 *Chit. Pl.* 3, "If a bond be given to A, conditioned for the payment of money to him for the use or benefit of B, or conditioned to pay the money to B, the action must be brought in the name of A, and B, cannot sue for or release the demand." The reasons for this

doctrine are previously stated. Conformable to it are several decisions in this court. In *Grist v. Backhouse,* 20 N.C. 362, the note was payable to "Richard Grist, agent of his assignees," in *Dowd v. Wadsworth,* 13 N.C. 130, it was payable to A, guardian of B: In *Waddell v. Moore* 24 N.C. 261, it was payable to A, executor of B. In the two first of these cases it was held that the legal payee was the only proper plaintiff, and in the last, that the executor need not describe himself as executor, and such description was surplusage. We think ourselves bound by these authorities, especially by *Grist v. Backhouse,* as being most closely in point, in the present case.

The Judgment below must be affirmed.

Per curiam.

Judgment affirmed.

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(198)

W. F. JONES v. A. B. HILL.

A was assignee of a mortgage creditor, and at a sale by the mortgagee, made under a power in the deed, bought the land mortgaged; *B* had previously purchased the mortgagor's interest in the land, and then had let the land for a year to *C*, who was in possession: *Held*, that *A*, upon making demand for possession upon *C*, could recover from him rent due for the year of his tenancy.

Also, that C had a right to enquire, by an account in the case, whether the price given by *A* upon his purchase exceeded the amount due to him as assignee of the creditor, and if so, then, as representing *B*, probably *C*, might have the benefit of the surplus, for the purpose of his defence.

MOTION to vacate an injunction, heard by *Watts, J.*, January 19th 1870, at Chambers, HALIFAX Court.

The action in which the injunction had been ordered, was based upon the following facts:

In 1859 John Devereux sold certain lands to Gavin H. Clark, who executed a mortgage to secure the price, thereby empowering Devereux, in default of payment of the price, to sell the lands, etc. Clark paid part of the price, and then sold his interest to Hyman, who gave his notes for the residue of the purchase money, to Mrs. Elizabeth Jones, who, as assignee of Devereux, held the unpaid notes of Clark. Afterwards she assigned them to the plaintiff. Hyman took possession of the land, and leased it to the defendant for the current year beginning January 1st 1869. On the 26th of August 1869

Devereux sold the land, under the power, and the plaintiff became the purchaser. Soon afterwards he demanded possession of the lands from the defendant, which was refused. He then (10th Nov. 1869) commenced this action, to recover the rent for 1869, which he claims to be $1,500. The complaint alleged that the defendant is insolvent and is disposing of the crop, and prayed for an injunction to restrain the defendant in the meantime, from disposing of more of it.

An answer put in by the defendant, admitted the charge of insolvency, and that he had sold a part of the crop. (199)

The judge granted, and, on a motion to vacate, continued, the injunction; and the defendant appealed.

Rogers & Batchelor for the appellant.

1. The action is *for rent,* and therefore has been brought too soon.

2. The action is not brought for *the land;* if it be said that the plaintiff may maintain a suit for that, as purchaser.

3. He makes no case for an injunction: C.C.P. §§ 188, 189.

Bragg contra.

1. The mortgagee may treat the lessee either as trespasser or as tenant, Crabb, Real Prop. § 2217, *Pope v. Briggs,* 9 B. & C. 245; much more may the plaintiff, after the sale under the power, having rights of both mortgagor and mortgagee. Coote Mortg. Part 1, 332 to 334; *Lane v. King,* 8 Wend. 584; *Crews v. Pendleton,* 1 Leigh 297; *Shepherd v. Philbrick,* 2 Denio 174; *Jones v. Thomas,* 8 Blackf. 428.

2. Although plaintiff may not be *in privity* with the defendant, yet this action can now be considered as one in equity, as well as at law.

3. As defendant admits his insolvency, and that he is about to remove the crop, having already removed a part of it, the plaintiff is entitled to an injunction.

RODMAN, J. (After stating the facts as above.) Under the facts of this case, Hyman must be regarded as a mortgagor, and the plaintiff as a mortgagee, of the lands mentioned in the complaint, *Hyman v. Devereux,* 63 N.C. 624. If a mortgagor remains in possession after the forfeiture of the property, he remains only by permission of the mortgagee. In such case the mortgagor has been sometimes called a tenant at will or sufferance, and some- (200) times a trespasser; but he is properly neither; his position cannot be more accurately defined than by calling him a mortgagor

in possession, but he may be ejected at any time by the mortgagee, without notice, *Fuller v. Wadsworth,* 24 N.C. 263. The mortgagee is entitled to the estate with all the crops growing on it, by Buller J. in *Birch v. Wright,* 1 T. R. 283; Coote on Mortgages 333, 339; Liffords case 11 Co. 51; Doe. dem. *Fisher v. Giles,* 5 Bing. 421, (15 E.C.L. 485); *Roby v. Maisey,* 8 B. & C. 769, (15 E.C.L. 377); *Parsley v. Day,* 2 Q. B. 14, (42 E.C.L. 612.)

There is no injustice in this, because the land, including all its products, is a security for the mortgage debt, and to that extent, the property of the mortgagee. The mortgagor has no right to make a lease, to the prejudice of the mortgagee; the lease is void if the mortgagee elects to hold it so; Coote on Mortgages, *ubi sup.; Keech v. Hall,* Dougl. 21; *Birch v. Wright, ubi sup.; Pope v. Biggs,* 9 B. & C. 245. (17 E.C.L. 358.)

If the mortgagor could lease, he might altogether defeat the claim of the mortgagee.

By his purchase on 26th August, the plaintiff acquired the legal estate, in addition to his previous rights as mortgage creditor; he purchased the land and all the crops growing on it. Hyman, if he had been in possession, would not have been entitled to emblements, neither is his lessee. In this case, however, the plaintiff elected to confirm the lease, and therefore he is entitled to no more than the reasonable rent, which is all he demands. *Coote on Mortgages,* 334.

If indeed the amount of the purchase money overpaid the sum due the mortgagee, Hyman would be entitled to the surplus, and the defendant, as the assignee of Hyman, would probably be entitled to be subrogated to his rights, to the amount of the rents payable by him. If the defendant shall desire it in this case, he will be entitled to have an account of the mortgage debt taken, in order to as-
(201) certain whether it has been overpaid. In that case the defendant must amend his pleadings, so as to present the issue, and the executors of Hyman should be made parties, in order that they be bound by the account. The right of the defendant to this account, arises from the fact that the plaintiff unites the double character of mortgage creditor and purchaser; as purchaser alone he would not be affected by the state of the account.

Whether a mere creditor without any specific lien, is entitled to the provisional remedy of a seizure of his debtor's property, upon the allegation that he is about to dispose of it, and whether a landlord is entitled to such remedy for the recovery of rent, except as given by the Act concerning Landlord and Tenant, 1868-9, ch. 156, p. 355, need not be considered. In this case the plaintiff does not claim, either as a mere creditor, or as a landlord, but as the owner of the whole crop in specie, and as having a specific property in every part

of it. That he does not in fact claim the whole, but only a reasonable share of it as rent, cannot impair his remedy for that part.

Let this opinion be certified.

Per curiam.

Judgment affirmed.

Cited: McCombs v. Wallace, 66 N.C. 483; *Keathly v. Branch,* 84 N.C. 205; *Brewer v. Chappell,* 101 N.C. 253; *Kreth v. Rogers,* 101 N.C. 262; *Killebrew v. Hines,* 104 N.C. 189; *Cooper v. Kimball,* 123 N.C. 124; *Belvin v. Paper Co.,* 123 N.C. 143; *Bunn v. Braswell,* 139 N.C. 139; *Collins v. Bass,* 198 N.C. 101.

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(202)

WILLIAM BIGGS, EX PARTE.

The proper method of bringing before the Supreme Court for review, the order of a Superior Court in regard to alleged misconduct by one of its officers, *(here,* an attorney), is by bringing up the *record proper* of such Court, by a *certiorari in the nature of a writ of error.*

A *mandamus* in such case, would be improper.

The party charged in such case, has no right to *appeal.*

A Court has power, on the ground of self protection, outside of the common law and statutory doctrine of *contempt,* to disbar an attorney who has shown himself unfit to be one of its officers; and such unfitness may be caused not only *by moral delinquency,* but by *acts (here,* a publication) *calculated and intended to injure the Court.*

If an attorney who is also an editor of a newspaper, and who in his latter character writes an article in disparagement of the Court, be put under a rule by such Court, he may by answer raise the point, whether a *prima facie* case has been made out against him and he be *called on* to make a disavowal,—but where, *(as here)* he does not take that course, but *elects to disavow,* the case does not present the question, Whether an editorial written by one who is an attorney as well as an editor, falls under *general principles* governing cases of misconduct by attorneys of the Court.

Where, in such a case, the respondent submitted to *try himself,* and filed a disavowal in these words, "This respondent respectfully answers: That as an attorney and counsellor in this Court, he has ever been respectful, both in his deportment and language, to his Honor Judge E. W. Jones, and disavows *having ever entertained* any intention of committing a contempt of the Court, or any purpose to destroy or impair its authority, or the respect due thereto." *Held,* that although (in the expression italicized) more

general than there was occasion for, the disavowal was sufficient to *excuse*, if not to *acquit;* even although in a subsequent paragraph the respondent *insisted*, that the article was not libellous; that, by becoming an attorney he had not lost his rights as an editor; that, the article was written in the latter character; and that, it did not transcend the limits to criticism upon public men, allowed to the freedom of the press.

CONTEMPT of court by an attorney, adjudged by *Jones, J.*, at Fall Term 1869 of EDGECOMBE Court.

During the present term, on the 8th day of February, a
(203) petition under oath, was filed in this court by William Biggs, late an attorney of the courts of the State, alleging that at Fall Term 1869 of Edgecombe Court, an order had been made by his Honor Judge Jones, then and there presiding, by which, for an alleged contempt of court, he had been *disbarred;* setting forth a transcript of the record in the case, and praying for a *mandamus*, that the said Judge allow him to practice law as heretofore.

The application was presented by Messrs. *Moore, Graham, Bragg and Fowle & Badger*, of counsel for the petitioner, and having been argued, the court delivered the following opinion:

PEARSON, C.J. This is a petition for an alternative *mandamus*, commanding his Honor, E. W. Jones, Judge of the Superior Court for the second judicial district of the State, "To allow the petitioner to practice law in said Court in like manner as theretofore he had been licensed and used to do, or show cause to the contrary."

In presenting the petition, Mr. Graham, one of the counsel of the petitioner, informed the Court that their purpose was to adopt the proceeding most fit and proper to accomplish the end; and that they had concluded to move that notice issue to his Honor, Judge Jones, to show cause why an alternative *mandamus* should not issue.

The Court desired to hear an argument on the questions: 1. Had the petitioner a right to appeal from the order of his Honor, by which the petitioner was disabled from practicing as an attorney in said Superior Court? and 2. Is the appropriate mode of proceeding, by the writ of *mandamus*, or by a writ of *certiorari?*

After hearing a full argument by Mr. Graham and Mr. Moore, attorneys in behalf of the petitioner, we are of opinion: 1. That the petitioner did not have the right of appeal, and 2. That the proper remedy is by writ of *certiorari, in the nature of a writ*
(204) *of error*, to bring up the record now remaining in the Superior Court for the county of Edgecombe, so that it may be reviewed, and such proceedings be had thereon as are agreeable to law.

The matter involves the power of a court, and also the right of an attorney of the court to be protected against error in the exercise of power on the part of the Judge.

It is ordained by the Constitution, Art. 4, Sec. 10: "The Supreme Court shall have power to issue any remedial writs necessary to give it a general supervision and control of the inferior courts." The question is: Does the case made by the petition call for the remedial writ of *mandamus,* or can the purpose be met by the remedial writ of *certiorari* in the nature of a writ of error?

The writ of *mandamus* is a high prerogative writ, and is never resorted to except in cases where there is no other mode of attaining the ends of justice. If there be any other remedial writ that will answer the purpose, this court is not allowed to grant the writ of *mandamus;* and we should be reluctant to resort to it in this instance, for surely it would not be seemly, unless there be a positive necessity, to command a Judge of the Superior Court to appear at the bar of this court, and confront in an adversary suit one who has been an attorney of his court, and now demands to be restored to that privilege.

There is this further objection to the writ of *mandamus:* the court in granting it assumes that, *prima facie,* his Honor is in the wrong. If upon the notice, he appears, and relies upon the order still remaining of record and in full force, then this court would be forced to review that order in a *collateral* way, and the order restoring the petitioner to his rights as an attorney, could not have the legal effect of reversing the order in the Superior Court, but would simply be in disregard of it.

The writ of *certiorari* is used for two purposes: *One,* as a substitute for an appeal, where the opportunity for bringing up the matter by appeal, is lost without laches. It is to *this* that the (205) remarks so forcibly made by Mr. Moore on the argument, as to the difficulty of making up the case, or the *postea* in the record, on bill of exceptions, or from the notes of the Judge, or on affidavits, would fully apply. Such was the case of *Bradley v. Fisher,* 7 Wall. 376, and the case of *People v. Justices of Delaware,* 1 John. Cases, 181, cited on the argument. In these and the like cases, the court is obliged to resort to the writ of *mandamus,* as the only remedy to meet the ends of justice. But this kind of *certiorari* is not now in question.

The other is where the writ of *certiorari* is in the nature of a writ of error, and it is used where the writ of error proper does not lie, *Brooks v. Morgan,* 27 N.C. 481, *Com. of Raleigh v. Kane,* 47 N.C. 288. By this writ, only the record proper is brought up for review, and no *postea* or *case* is to be made up.

Such is our case, for the whole matter rests on error alleged by the petitioner in the proceedings on the record, and nothing can be brought before this court except what appears on the face of the record. The action of this court will be either to affirm or to reverse the order in the court below.

PER CURIAM. Motion for notice to show cause why an alternative *mandamus* shall not issue, refused.

Motion, having the allegations set out in the petition as its foundation, for a writ of *certiorari* in the nature of a writ of error, to bring up the record for review — allowed.

The writ will be returnable forthwith.

Thereupon the *certiorari* was issued, and in obedience thereto, the clerk of Edgecombe court returned a transcript from the minutes of the above term, by which it appeared that on Monday the 6th of December, the petitioner had been called upon, by a rule, to show cause upon Thursday the 9th, why he should not "be
(206) disabled from hereafter appearing as attorney and counsellor in court," it being set forth, as ground for such proceeding, that, as editor of the *Tarboro' Southerner*, he had published during the term, in the village of Tarboro', an article, which was copied at length, but of which the judgment given below renders it necessary to set forth only this much: that, after referring to the Judge as, (in inverted commas) "His Honor," "Judge" etc., it proceeds to say that the charge to the grand jury was "almost identically similar with the one delivered here six months since, with this important exception, his Honor seems to have somewhat deserted the profane poetical masters, and confined most of his quotations to the Holy Scriptures—a happy omen, if it's possible to believe anything happy in such a character."

Upon Thursday the respondent appeared, and answered under oath:

"1. That as attorney and counsellor in this court, he has ever been respectful both in deportment and language to his Honor Judge E. W. Jones, and disavows having ever entertained any intention of committing a contempt of the court, or any purpose to destroy or impair its authority or the respect due thereto.

2. That he admits the writing and publishing of the article headed 'Edgecombe Superior Court,' in the newspaper, *Tarboro' Southerner*, but insists that he wrote and published the same as editor of said paper, and not as an attorney and counsellor at law, and he further insists that the said article is not libellous, and does not contain any comment as applied to a public elective officer not

allowed by the freedom of the press, as defined by the Constitution of the United States.

3. That he insists that by becoming an attorney and counsellor at law, he has not surrendered any right as an editor, and as such he is entitled, according to every republican idea of the 'freedom of the press' to fully comment on all public officers, a right that ought never to be restrained except for abuse, and that, before he is held responsible for any alleged abuse, he is entitled to a trial by a jury of his countrymen."

Thereupon, on Friday, his Honor, being of opinion that paragraph 1, in the answer was not *responsive* to the rule; and besides, as regards paragraphs 2, and 3, that, by assuming the char- (207) acter of an editor, an attorney was not freed in any degree, from the respect otherwise due to the court, made the rule absolute, and disbarred the respondent.

The respondent asked for an appeal. But the court, thinking that, if he were entitled to one, he would have to conform to the provisions of the Code applicable thereto, declined to consider the motion.

The transcript having been returned to the effect above,—

Moore, with whom were *Fowle & Badger,* argued as follows:

1. The common law of England, respecting contempts of court, is the law of this State, except so far as it may have been changed by our political situation, and the act of the General Assembly, concerning contempts, of April 10th 1869.

2. It is confidently submitted, that this act embraces all the matters, which can now constitute contempts of State courts, and utterly displaces the common law upon the subject; just as did the act of Congress of 1831. The great purpose of the Code C.P., was to supersede the existing law, both common and statute, and introduce new rules for judicial action, procedure and practice. This is shown by the radical change in the constitution and laws, as announced by Art. 4, §§ 1, 2 and 3.

The act professes, as well by its title, as by its specific enumeration of causes of contempt, to supersede the existing law, and substitute certain and defined rules for ascertaining and punishing every act, which it intends to regard as a contempt. In this respect, the act follows the policy of many of the States of the Union, and especially that of Congress, as declared in the act of 1831, *Ex Parte Poulson,* 15 Haz. Pa. Reg. 380; and as declared in the act of 1846, ch. 62, of this State, Rev. Code, ch. 31, sec. 113; *Weaver v. Hamilton,* 47 N.C. 343. The recent act, in division 7, adds one other common law cause of contempt to those which were allowed (208)

under the act of 1846. This of itself, proves the legislative purpose to assume entire control of the subject, and regulate it thoroughly: For, by the common law, "any publication pending a suit, which reflects upon the court, the jury, the parties, the officers of the court, or the counsel, with regard to the suit, or which tends to influence the decision, is a contempt, punishable by attachment;" *United States v. Duane,* Wall. C.C. 102. Peck's trial,—*Ex Parte, Poulson;* while the recent act concerning contempts, specifies, in division 7, in express words, the *sole* cause of contempt under this class to be *"the publication of a grossly inaccurate report of the proceedings in any court."*

If the court can add *one* other cause, it may add one hundred, and render the act nugatory.

The act concerning contempts is the work of the commissioners appointed by the constitution to provide *"a Code of the law of North Carolina."* That they offered this act as a substitute for the entire body of law upon the subject, is apparent:

(1.) From the language of the first section, which declares that "any person guilty of any of the following acts may be punished for contempt;"

(2.) From the specific enumeration immediately following, of eight distinct causes of contempt, each of which was a well known cause of contempt at common law;

(3.) From sec. 2 of the Act, which declares and prescribes a *specific punishment* "for contempt" — *all* contempts — of court thus manifestly intending not to leave undefined, or discretionary with the court, either the *causes* of contempts, the *mode* of their punishment by fine and imprisonment, or the *amount* of the punishment;

(4.) In further proof, that the act was intended to dispose of the whole question of contempts, we find that, after contempts are defined, and punished with specific punishments, it is expressly declared, under what circumstances, and before what mag-
(209) istrates, contempts may be committed; *when* the causes shall be *recorded,* and the *mode* of bringing to trial the guilty party.

The supreme, superior, and inferior judicial officers are all invested with the same powers to commit for contempts, *while sitting in the discharge of official business.* The chapter embraces every necessary legislative provision upon the subject. It declares:

(1.) *What acts* are contempts, and how they are to be punished;

(2.) *By whom,* contempts may be punished;

(3.) *Whom and when* courts of record may punish; and

(4.) Allows punishments amply sufficient to protect every court, while engaged in the administration of justice, against every kind

of disturbance and imposition from any and every source whatever. What other or higher "powers," in the language of Chief Justice Nash, in *Weaver v. Hamilton,* "can a well minded Judge desire to possess, further than is necessary to the proper transaction of the business before him." A contrary construction of the Acts leads to absurd consequences.

The publication complained of, if a contempt, is manifestly a *very* trivial thing compared with many contempts designated by the Act. Now, if the publication be construed to be a contempt, and *out* of the Act, then the punishment, too, is *out* of the Act; and, while for the gravest contempts enumerated in that, a court would be restricted to a small fine and short imprisonment, for all others not enumerated therein, however small, any court, even that of a Justice of the Peace, would be left free to fine and imprison, without limit of amount or time; yea, and to disbar, too, if the offender were an attorney!!!

3. The court below seems clearly to admit that the publication, of itself, was not a contempt of *court:* For, had it been so, then the co-editor, Mr. Charles, would have been equally guilty. Yet he is not noticed in the rule. This construction of the Act, by Judge Jones, as applicable to newspaper publications, at this day and (210) in this State, is doubtless the true one, and is fully sustained by its language, its context, and by the interpretation put on the Act of 1846, in *Weaver v. Hamilton;* and on the Act of Congress of 1831, by Baldwin, Judge, *In re Poulson.* But if the publication be not a contempt in Charles, it can be so in Biggs, only because he was an *attorney.*

Such a construction is against reason, because the causes of contempt, which can be committed by Mr. Biggs as an *attorney,* are as distinctly specified in the Act, as those which can be committed by Mr. Charles or Mr. Biggs as a *man;* and such a publication is not one of the acts specified or embraced in its language or meaning, by the broadest construction in regard to persons or attorneys. If the common law be still open for Biggs as an attorney, it is open also for Charles as a man.

4. If, however, the recent Act respecting contempts, shall be construed so as not to disparage the common law jurisdiction, it is insisted, that the article in the *Southerner,* respecting Hon. Edmund W. Jones, is not a contempt of court.

There is but one paragraph, so far as relates to the Judge, from which any expression of disrespect can be selected, which is as follows:

"His Honor seems to have somewhat deserted the service of the profane poetical masters, and confined most of his quotations to the Holy Scriptures — a happy omen, if it is possible to believe anything happy in such a character."

No exception can be taken to any part of this paragraph other than to what is contained in the words, "a happy omen, if it is possible to believe any thing happy, in such a character."

No definite offensive meaning can be given to the expression. The whole is but light ridicule. Nothing is uttered disrespectful of his *official* action. The repetition by a Judge, of his charge to the
(211) grand jury, is but following the example of the illustrious Chief Justice Marshall; and the allusion to quotations in the charge, of poetry and the Scriptures, is too trifling for notice, on or off the bench.

5. By the common law of England respecting contempt, there can be, out of the presence of the Court, no contempt of Court merely by language spoken or written of the person who may be its Judge, unless such language be spoken or written in reference to the official acts of the Judge: 4 Bl. Com. from 284 to 296; Charleton's case 14 E. Ch. Rep. 316, at 339 to 343; the *King v. Watson,* 2 T.R. 199.

There was no allusion in the publication to any official act, except that of charging the grand jury. Of this charge it is said only, that there was nothing new in it, except the substitution of scriptural quotations, in the place of quotations, previously used, from the profane poets.

In order to constitute contempt in other cases, by use of disrespectful language spoken or written of a person who is Judge, but not of his official acts, the language must be used of him *while in the actual discharge of his duties.*

If spoken or written of the *man,* in a place where the language does not tend to disturb the Court, the words do not constitute a contempt. See cases cited as above.

6. But if the publication were , *apparently,* a contempt of Court, the respondent swore that he did not so intend it; and honestly separated his acts done as an attorney from those done as an editor.

He made this distinction upon oath; and upon his oath claimed constitutional rights under the distinction. Suppose that he was mistaken, was not a reprimand from the bench sufficient, or a fine or imprisonment for a short time? The punishment inflicted for so venial an offence, if offence it be, *is unusual and unprecedented.*

7. Attorneys, as to contempt of Court, stand upon the same footing with all other persons, unless the matter constituting the contempt be connected with the discharge of the duties of their office

as attorneys. *In the case of the Executors of Atkins,* 6 (212) E.C.L. 344-5. *In the matter of Knight,* 8 E.C.L. 259. *In re Fenton,* 30 E.C.L. 129. 1 Salk 87, Pl. 5 *Cocks v. Harman,* 63 East 404, Bac. Abr. Att. (A) and (H.)

The office of an attorney, and the vocation of an editor are wholly unlike.

8. If the contempt be of a character, which degrades and dishonors the moral standing of the man, and renders him unfit to practice as an attorney, such a contempt may perhaps, authorize a disbar without trial by jury. As if an attorney allow a person who is not an attorney to practice in his name; such conduct in England (always exceedingly careful of the integrity of her attorneys) is, (by statute 12 Geo. 2, c. 13, § 11) regarded as so gross a fraud and deception upon the public and the office of attorney, as to evince and proclaim a want of moral *status* in the attorney thus allowing the use of his name and the abuse of the office, Bac. Abr. Atty. (A) p. 290. *In re Isaackson* and others, 17 E.C.L. 106.

9. An attorney, who simply commits a disgraceful and degrading act, which is not connected with his profession, is not guilty of a contempt of court. Sergt. Hawkins in his learned work on crimes, treats at large of contempts to Courts; and under all the classifications of which they are susceptible. In B. 2, ch. 22, he notices all such as may be committed by attorneys in the discharge of their official duties, and among them, *forgery of records, etc.* For these and every species of *contempt* of Court, he declares the legal *punishment* to be fine and imprisonment. He nowhere notices disbarring, or striking from the roll, as a *punishment* for the misconduct of attorneys.

10. If an attorney, by an act of infamy, lose his moral *status,* he is not struck from the roll because of *contempt of Court,* but "to keep free from reproach the profession of which he is a member." *Ex parte Brounsall,* Cowp. 829, 1 Ch. Cr. law 660. 1 Tidd. 89. *The King v. Southerton,* 6 E.R. 143. Jeromes case Cr. Ch. 74. (213) *Ex parte Stokes,* 18 E.C.L. 303 and notes (Ed. of 1856.)

11. No practising attorney ought to be disbarred or struck from the roll, unless unfit to be entrusted with professional *status* and character; or "found guilty of moral delinquency in his private character." *In re Wallace,* 1 Priv. Council Cases, 283 (1866.) *Ex parte* Burr, 9 Wheat. 529. *Ex parte* Brounsall.

Even under the common law in England, writing "a letter addressed to the Chief Justice of a Court, reflecting on the Judges, and on the administration of justice generally in the Court," although a letter of "a most reprehensible kind," and a contempt of Court which it was hardly possible for the Court to omit taking cognizance of,

furnishes no evidence of any sufficient *delictum* or of moral delinquency in private character, or of the want of "professional *status* and character," which renders it expedient for the public interest, or protection of the Courts, to interfere with the *status* of the individuals as a practitioner in the Court;" as is expressly held, *In re Wallace.*

The case of *Brounsall* represents the opinion of all the Judges of England in 1778, while that of *Wallace* is the judgment of the highest Court in England in 1866. The law in both is the same, and is now and ever has been the law of this State.

12. The idea of striking a practising attorney from the roll for a contempt of Court, which does not gravely affect his private character as a gentleman and a man of worth, is contrary to all English precedent.

13. The privilege to practice law, is an office, and is protected as property, 4 Bac. Abr., *Mandamus* (C.) *In Re Wallace, Ex Parte Bradley. Ex Parte Burr.* Disfranchisement of ones office, for mere contempt unaccompanied with a loss of moral status, is a "cruel and unusual punishment," unknown to, and forbidden by, the common law of England *In Re Wallace — Baggs case,* 11 Rep. 93.

Such disfranchisement is a deprivation of the means of liv-
(214) ing; and as a punishment is forbidden in England by those parts of *Magna Carta,* which constitute parts of our own Constitution in Sections 14 and 17. I conclude, therefore

1. Every contempt, which can be lawfully noticed by a Court or other body acting judicially, is described in the act of April 1869, "concerning proceedings in contempt."

2. No contempt can be punished otherwise than is therein prescribed: to-wit, by fine or imprisonment, or by both — the fine not to exceed $250; the imprisonment not to be more than 30 days.

3. There is no rightful power to disbar a licensed practitioner but for the loss of moral *status,* that is, that the person is unfit to be trusted to discharge the high duties of an attorney.

4. If, in the investigation of a cause of contempt, such proof of moral delinquency, connected therewith shall appear, as to show the person to be unfit to practice, then the Court may punish for the contempt, and may also disbar, to rid the public of a faithless man who has become "a reproach to the profession of which he is a member."

PEARSON, C.J. The subject of "the power of Courts, and the rights of attorneys," would seem to be exhausted by the elaborate argument of the counsel for the respondent. The want of some "student

of the law" on the other side of the question, equally diligent with Mr. Moore, is met by the very full *expose* of the result of his examination of the cases.

The power of the Court, on the ground of self protection, outside of the common law doctrine, and of the statute in regard to *contempts*, — to disbar an attorney, who has shown himself unfit to be one of its officers, although earnestly contested on a former argument by six learned members of the bar, is now conceded.

So the principle is settled; and the only difference of opinion, is in respect to its application.

On the side of the respondent, it was insisted, that the principle applies only to cases of *moral delinquency;* as, if an at- (215) torney be convicted of crime, say forgery — or, if, without a conviction it appears to the Court, upon an investigation had before it, that an attorney is guilty of gross fraud; say, by making corrupt misrepresentations to his client, and obtaining an assignment for an inadequate consideration.

But we hold that the principle embraces also, cases where an attorney makes a publication calculated to injure the court, and *intended by him* to have that effect — "an evil bird bewrayeth its own nest." The court has power to rid itself of one, who thus proves that he is not fit to be trusted as one of its officers.

If the attorney, when called on, disavows the *criminal intention,* that is an end of the proceeding: — should he be unable to make this disavowal, the only alternative, is an order to strike his name off of the roll.

We were pleased to hear the hope expressed on the argument, that this discussion might induce a better state of feeling. This tender of a return to good feeling, is cordially accepted.

Since the principle is now conceded, and there is only some difference of opinion as to its application, we presume the public mind will be relieved from fear of usurpation of power by the court, and of *"judicial tryanny."*

In our case, the facts not being controverted, it was, in the *first place,* a question of law for the court: Was the publication calculated to injure the court, and destroy its usefulness? The article refers to Judge Jones in his official character, and is calculated to hold the court up to ridicule, and thereby injure and bring it into disrepute. But it purports to be by the editor of a newspaper — has no reference to Mr. Biggs as an attorney of the court, and does not seek to attach to the publication any additional importance, by reason of the fact, that besides being an editor of the newspaper, (it would be the same as to a merchant or a farmer, except that an editor of a newspaper has greater facility for publication,) he is also an at- (216)

torney of the court. This fact, however, being known to his readers, was calculated to add to the force of the article.

There is a marked difference between this article, and one *purporting* to be published by an attorney of the court; and an exceeding difference between a mere editorial of a newspaper, and a solemn Protest, published by a combination and confederacy of many attorneys, assuming to act as the Bar of the State of North Carolina. In this view, perhaps it might have been as well if his Honor had not noticed the article, and had allowed it to pass as a "newspaper squib." But he felt it to be his duty, as a court, to put Mr. Biggs, one of its editors, under a rule. Mr. Biggs, if so advised, had the right, in answer to the rule, to raise the question, that a *prima facie* case was not made out, and that he was not called on to make a disavowal. But he elected to make a disavowal. So the question: Whether an editorial article, when the editor of the newspaper is also an attorney of the court, falls under the principle, is not presented by the record.

This court is not at liberty to go out of the way, in order to express an opinion upon it.

In *Ex parte Moore,* 63 N.C. 397, the court says: "The rule rests on sound reason. In this proceeding, as the court is judge in its own case in the first instance, when a case is made out in the judgment of the court, the party, in the last instance, is allowed to *try himself.* His *intention* is locked within his own breast; is known to himself alone, and he is permitted to purge himself by his own disavowal. He cannot be convicted if he is innocent, as he may be by *false evidence* before a jury. For, the court does not try him; he *tries himself.* C. J. Wilmot's Opinions, 267-8, referred to in the Trial of Judge Peck, 507. If the party, after the court decides against him, declines to *try himself,* it must be because he knows himself to be guilty.

Mr. Biggs submitted to "try himself," and filed a disavowal in these words: "This respondent respectfully answers: 1. That
(217) as an attorney and counsellor in this court, he has ever been respectful, both in his deportment and language, to his Honor, Judge E. W. Jones; and disavows having ever entertained any intention of committing a contempt of court, or any purpose to destroy or impair its authority, or the respect thereto."

Had the answer stopped here, there would have been no difficulty, and the rule would have been discharged, "as of course."

The matter set out in the subsequent part of the answer (as it is termed), might have been relevant in the first stage of the proceeding: in order to show that a "*prima facie* case" was not made, and consequently, that the party could not be required to make a disavowal. But the disavowal had already been made: so this matter

was supererogatory, and had no bearing at that stage of the proceeding, after the party had tried himself. Its only tendency was to "embarrass the question." And so much confusion is thrown on it as to have led his Honor into error. He holds: "The first clause of the answer is not responsive to the rule, because it does not particularly disavow an intention to impair the respect due to the authority of the court by the publication of the article referred to." The respondent disavows *"having ever entertained* any intention of committing a contempt of the court, or any purpose to destroy or impair its authority, or the respect due thereto."

True, this disavowal is more general that it need to have been; and its generality may have been intended to weaken its force. But still "the greater includes the less," and there is a disavowal, included in the general words, of an intention by the publication of the article in the newspaper, to commit a contempt of the Court, or of any purpose to destroy or impair its authority or the respect thereto. We think this in substance responds to the rule.

This proceeding is one of a peculiar nature, of necessity. The Court is to some extent, a judge in its own case, hence, when the respondent submits to "try himself," and a disavowal is made on oath, the Court must accept it, and is not allowed to call (218) in question, the truth or the sincerity of the disavowal. There is no mode of trying such questions; and they are left "to the Searcher of all hearts."

The disavowal entitles the respondent to be excused, or acquitted, and the effect in either view is to discharge the rule.

There is error in the ruling of the Court below. Order reversed, and Rule discharged.

Per curiam.

Error.

Cited: Winslow v. Comrs., 64 N.C. 223; *In re Moore,* 64 N.C. 398; *S. v. Smith,* 65 N.C. 367; *Kane v. Haywood,* 66 N.C. 32; *S. v. Jefferson,* 66 N.C. 311; *S. v. McGimsey,* 80 N.C. 383; *Young v. Rollins,* 90 N.C. 131; *Hughes v. Comrs.*, 107 N.C. 605; *S. v. Herndon,* 107 N.C. 935; *In re Robinson,* 117 N.C. 540; *S. v. Marsh,* 134 N.C. 186; *In re Ebbs,* 150 N.C. 51; *S. v. Webb,* 155 N.C. 430; *S. v. Johnson,* 171 N.C. 801; *McLean v. Johnson,* 174 N.C. 348; *In re Parker,* 177 N.C. 468; *S. v. Rooks,* 207 N.C. 276; *S. v. Moore,* 210 N.C. 689; *In re Ogden,* 211 N.C. 103; *S. v. Todd,* 224 N.C. 777.

F. E. WINSLOW v. THE COMM'RS OF PERQUIMANS COUNTY.

A municipal corporation may be sued in any form appropriate to the cause of action; its liability does not, as respects the form of action, differ from that of a private corporation, or an individual:

Therefore, an action in the form usual upon money demands, was sustained against a county, for a debt due on a contract in regard to bridge building.

Semble, that the plaintiff, upon a proper prayer for judgment, might in such a case, have had a *mandamus,* to compel the defendants to levy a tax and pay his debt.

(Distinction between Corporations, and *quasi*-Corporations stated.)

(Methods of satisfying judgments against municipal corporations, considered and discussed.)

By DICK, J. *dissenting.* A *mandamus* is still the only remedy against a county, for failing, or refusing, to pay its debts.

ACTION for money, tried by *Pool, J.,* at Fall Term 1869 of PERQUIMANS Court.

The plaintiff, under a contract with the county, had built a *float bridge,* which had been accepted; his claim had also been audited, an order upon the Treasurer given therefor, and partial payments thereon made. About $2400 remained unpaid, and for this he brought the form of action usual in money demands, the judgment demanded being "for the sum of $2,433.58, with interest from" etc.

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The defendants demurred to the complaint, upon the ground that *mandamus* is the only form of action proper against counties, etc.

His Honor sustained the demurrer, and the plaintiff appealed.

Bragg for the appellant.
Phillips & Merrimon contra.

RODMAN, J. The defendants are the Board of Commissioners for Perquimans County. The case states that, under a contract with the former County Court, the plaintiff built a certain bridge for which the County was indebted to him: that the defendant admitted the debt, and through their County Treasurer paid a part of it. The action is brought to recover the residue. The defendants demurred, and the only question is, whether a Board of Commissioners for County can be sued otherwise than in an action of *mandamus.*

In my opinion, in a case where a good cause of action exists, a municipal corporation may be sued in any form appropriate to the cause of action, and its liability does not differ as respects the form

of the action, from that of a private corporation, or of an individual. What will be the effect of the judgment, and how it is to be enforced, are questions not before us for decision, and having no bearing on the form of the action.

My reasons for this opinion may be classed under two heads:

1. Those going to show that the ordinary action to recover a debt is maintainable against a municipal corporation.

2. Those arising out of the nature of a *mandamus*, and going to show that it cannot be the only remedy.

By the Constitution, Counties are regarded as municipal corporations. Art. VII, especially Secs. 7 & 43. The Act of (220) 1868, ch. 20, p. 22, concerning the government of Counties, says: "Every County is a body politic and corporate." Ch. 1, Sec. 1: "It has power: To sue and be sued in the name of the Board of Commissioners." "To make such contracts as may be necessary to the exercise of its powers." Sec. 3: "To liquidate and audit accounts against the County, and direct the raising of the sums necessary to defray them." Ch. 2, Sec. 6. Under our former system, the Counties were not considered corporations, but at most, only *quasi* corporations. Hence, the cases in which Justices of Counties have been sued by *mandamus* (although none of them decide that to be the exclusive remedy) are not precedents in point now, to prove that remedy exclusive; neither, for the same reason, are any, where the liabilities of merely *quasi* corporations are discussed, arguments in favor of that view. On the contrary, I think those cases support the view I take, viz: that a corporation, municipal, *quasi*, or other, may be sued in any form appropriate to the cause of action, and to the nature of the relief demanded. The leading case on the liability of *quasi* corporations, such as hundreds, parishes, etc., in England, and such as our Justices of the County Courts, Wardens of the Poor, etc., formerly were, is, *Russell v. The Men of Devon*, 2 T.R. 667. That was an action on the case, against the men dwelling in Devon, to recover damages for an accident occasioned by the road being out of repair. The plaintiff failed, not because of the form of his action, but because he had no right against the defendants.

The doctrine of *quasi* corporations, as I understand it, is this: When a statute imposes upon an uncertain body of men, such as the inhabitants of a Hundred of County, a certain duty, without expressly incorporating them, if the duty is such that a civil liability will arise in favor of any person injured by a breach of it, the courts, in order that there may be no right without a remedy, hold the body to be a corporation *quoad* that liability. It is not a corporation, except by implication only, and for a single purpose, (221) therefore it is called a *quasi* corporation. The expression that

no action will lie against such a corporation, unless given by statute, means only, unless the liability be imposed by a statute, for, there being none of common right, it can only exist by statute. But if the statute gives the right, the common law provides the customary remedy, as it did under the Statute of Winton, 13 Ed. 1, making Hundreds liable for robberies, etc., by an action on the case.

But, apart from any inference to be derived from cases of that sort, what reason can be assigned why a corporation should not be sued in any form appropriate to the cause of action? The diverse forms of actions arose out of the diversity in the nature of the rights claimed, and not out of any difference in the quality or kind of the defendants: if that difference is of any consequence at all, it only becomes so after the right has been ascertained by judgment, and when the question is as to enforcing it. Of course it is not disputed by any one, that a corporation may be sued. But in the case of a corporation authorized to sue and be sued generally, why limit the quality to a single form of action? I do not think there is any authority for doing so, and this court has at least once, sustained another action than *mandamus* against express municipal corporations, such as counties now are. *Meares v. Com. of Wilmington,* 31 N.C. 73; *Brown v. Com. of Washington,* 63 N.C. 514. The only reason I have heard suggested for the exemption contended for, is a supposed difficulty in enforcing a judgment in debt against a municipal corporation. It is said that the county property, the court house etc., cannot be levied on, and there is nothing else to take. That may be admitted, and the supposed difficulty still not exist. In recoveries against the hundred under the Stat. of Hue and Cry. 13 Ed. 1, the execution is levied on the property of any inhabitant of the hundred, *Com. Dig. Hundred;* and in *Russell v. Men of Devon,* 2 T.R. 667, it (222) was conceded that such would be the plaintiff's remedy if he had a right to recover. See also *Tapping* on *Mand,* 317. However this may be, and it may be a matter requiring legislation, a judgment in *mandamus,* when it is for the payment of money, which is said in *Tucker v. Justices of Iredell,* 46 N.C. 451, to be its proper form, has one advantage in that respect over a judgment in debt. In *McCoy v. Justices of Harnett,* 51 N.C. 488, it was said that the judgment could be collected out of the individual Justices, who might reimburse themselves by levying a tax. See also *The Queen v. Vittoria Park Co.,* 41 E.C.L. 547. Of course, this method is equally practicable upon a judgment in debt. But it deserves consideration whether under sections 264 etc., of the C.C.P. respecting proceedings supplementary to execution, the means of enforcing payment there provided, may not be found practically so sufficient and convenient,

as to make it unreasonable to resort now to the property of individuals.

There is another argument which seems to me very strong against the view that *mandamus* is the only remedy against a county. Before the Stat. 9 Anne, ch. 20 (Rev. Code ch. 95, § 5) if a respondent to a *mandamus* made a return good in law, although false in fact, the court was obliged to give judgment against the petitioner, whose only remedy then was an action on the case for a false return; *Tucker v. Justices of Iredell.* So that it would follow, if a county could not be sued in an action in the case, it could before that statute escape liability altogether by the expedient of a false return; a proposition that cannot be admitted.

But if it were true, that by reason of a county having no corporate property liable to execution, a judgment in debt would be barren, it will not follow that *mandamus* is the proper remedy, "for if the writ were to be granted because there happened to be no chattels seizable, it would be difficult on principle to refuse it in any case where the sheriff should return *nulla bona.*" *Tapping on Mand.* 24.

If I have maintained my first position, the second follows of course, for it is admitted, that *mandamus* will only lie when (223) there is no other adequate legal remedy; *Tapping* 18, *Biggs, ex parte, ante* 202. But there is another reason, arising out of the nature of the action of *mandamus,* which is seems to me is conclusive against the idea of its being an exclusive remedy against counties. It lies only to enforce a legal as distinguished from an equitable right; *Tapping* 18, and obviously counties may be subject to trusts or other purely equitable liabilities, which upon the dostrine contended for, would be without remedy.

I do not say that the plaintiff would not have been entitled to a *mandamus* in this case, if his prayer were, that the defendant might be compelled to levy a sufficient tax, and thereupon to pay his debt, for that is a relief which he can obtain in no other way.

I think there was error in the ruling of the Judge.

Let this opinion be certified.

PEARSON, C.J. I concur in this opinion.

SETTLE, J. I concur in the opinion of Justice Rodman.

DICK, J. *(dissenting.)* Under our former system of government, if the Justices of a county made a contract with a person, in pursuance of powers vested in them by law, they could be compelled by a writ of *mandamus,* to perform such contract, upon their legal liability being clearly established. *McCoy v. Jus. of Harnett,* 51 N.C.

488. This writ was granted to a person having a just claim under such contract, because he had no remedy by an ordinary action, to compel these officers to perform a public duty.

Under our present system of government, many of the public duties which were performed by the Justices of a county, are now entrusted to five Commissioners. A person having a specific
(224) legal claim against a county, may still enforce his right by a writ of *mandamus* against the commissioners, unless the Code of Civil Procedure affords him an adequate remedy by civil action: C.C.P. sec. 392.

It is therefore necessary for me to consider in this case, whether the plaintiff can obtain adequate relief by a civil action against the county as a body corporate.

The act of 1868, ch. 20, provides that "every county is a body politic and corporate and has the powers specified by statute, or necessarily implied in such a body and no others." It has power to sue and be sued in the name of the commissioners.

A county is only a *quasi* corporation, established exclusively for public and political purposes, and constitutes, a part of the government of the State. It is entrusted with many high and important functions, which are to be exercised by its officers for the public benefit. The Legislature may, at will, enlarge or modify these functions, but public policy requires that they shall not be impaired by the private action of a citizen, except by the authority of a statute expressly defining the force and extent of such action. The common law does not give any such right of action, and it cannot arise by implication from a general statute providing merely that such a corporation may "sue and be sued."

(1.) The law does not contemplate the satisfaction of a claim against a county, in any other manner than by an assessment upon the taxable property of its citizens; Act of 1868, ch. 20, ch. 2, sec. 8, par. 1, § 3, 9, to 13. If the present action can be maintained, then the plaintiff, upon obtaining a judgment, is entitled to an execution, under which he may sell the court house and jail, and thus obstruct entirely, or produce great inconvenience in, the public administration of justice, and render insecure the public records and papers in which every citizen is interested. The bare statement of such a proposition seems to me to be sufficient to show its fallacy. It cannot be possible that the law by mere implication gives an action when a judg-
(225) ment cannot be enforced by final process without great detriment to the public interests.

I therefore entertain the opinion that a private action cannot be brought against a county for neglect or omission to perform a public duty, without some express statute directing the manner in which a

judgment in such action can be satisfied; *Eastman v. Meredith,* 36 New Hamp. 296, where the authorities are fully cited and ably commented upon.

"The reasons which exempt these public bodies from liability to private actions based upon neglect to perform public duty, do not apply to villages, boroughs and cities which accept special charters from the State. The grant of this corporate franchise in these cases, is usually made only at the request of the citizens to be incorporated, and it is justly assumed that it confers a valuable privilege. This privilege is a consideration for the duties which the charter imposes. In this respect these corporations are regarded as occupying the same position as private corporations," etc. Cooley on Con. Lim. 247; *Meares v. Commissioners of Wilmington,* 31 N.C. 73. Counties and townships do not usually possess corporate powers under special charters, but they exist under general laws, and have to perform certain public duties as a part of the machinery of the State. "Whether they will assume these public duties and exercise these powers they are not allowed the privilege of choice" Cooley, 240. The plaintiff's counsel insists that this action may be prosecuted to judgment, and then the plaintiff can apply for a writ of *mandamus* to enforce the payment of his claim. The law certainly cannot contemplate such circuity of action when the same result can be obtained by a direct remedy, enforceable by attachment.

The proceedings in this case cannot be regarded as an application for a *mandamus,* as that high prerogative writ can be granted only by the Judge of a Court of superior jurisdiction.

In my opinion his Honor was right in sustaining the demurrer. (226)

Per curiam.

Error.

Cited: Leak v. Comrs., 64 N.C. 135; *Pegram v. Comrs.,* 64 N.C. 558; *Gooch v. Gregory,* 65 N.C. 144; *Daniel v. Comrs.,* 74 N.C. 499; *Hughes v. Comrs.,* 107 N.C. 605.

WILMINGTON AND WELDON RAILROAD CO. v. JOHN A. REID.

A charter, granted in 1833, provided that all the property purchased by the officers of the company should vest in the shareholders "in proportion to their respective shares, and the shares shall be deemed personal property; and the property of said company and the shares therein, shall be exempt from any public charge or tax whatsoever": *Held*, that the Legislature might, notwithstanding, in 1869, levy an *ad valorem* tax upon the *franchise.*

MOTION to vacate an injunction, made before *Watts, J.*, January 18, 1870, at Chambers, HALIFAX Court.

The facts were as in the case, *ante,* 155. The provision in the charter, (1833) under which an exemption was claimed is: "All the property purchased by the said President and Directors, and that which may be given to the company, and the works constructed under authority of this Act, and all profits accruing on the said works and the said property, shall be vested in the respective shareholders of the company, in proportion to their respective shares; and the shares shall be deemed personal property; and the property of said company, and the shares therein, shall be exempt from any public charge or tax whatsoever."

His Honor declined to vacate the former order, and the defendant appealed.

Attorney General, Bragg and Battle & Sons for the appellant.

(227) *Moore with whom were Fowle & Badger contra.*

1. The charters of the Railroad Companies are compacts or contracts by statute between the State and Stockholders, and cannot be changed without the consent of each party; and such rights as are legally vested in the companies cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved in the acts of incorporation: *Wales v. Stetson,* 2 Mass. Rep. 143; *Enfield Toll-Bridge Co. v. Conn. River Co.,* 7 Con. Rep. 28-53; *Fletcher v. Peck,* 6 Cr. 87; *St. B'k. of Ohio v. Knoop,* 16 How. at 389; *Town of Pawlet v. Clark,* 9 Cr. 292; *Terrett v. Taylor, Id.* 43; *Dartmouth College v. Woodard,* 4 Wh. 518; *Mills v. Williams,* 33 N.C. 558-opinion 561-2; *B'k. of the State v. B'k. C. Fear,* 35 N.C. 75.

2. Where there is no stipulation by the sovereign against taxation, taxes may be laid; *Prov. B'k. v. Billings,* 4 Pet. 514; *State v. Petway,* 55 N.C. 306.

3. Where there is such a stipulation, it is entitled to a sensible construction so as to effect its obvious purpose, and shall be regarded

as a contract, if so intended; *St. B'k. of Ohio v. Knoop,* 16 How. 369; *Ohio L. and T. Co. v. Debolt,* 18 How. 416; Taney's opinion at p. 322; *Bk. C. Fear v. Edwards,* 27 N.C. 516, opinion; *Gordon v. Appeal Tax Court,* 3 How. 148.

4. A sufficient consideration for all grants by the sovereign is always presumed, and is ever valid until it may be vacated for fraud or other good reason, which must be done in a judicial proceeding:

Consideration for its acts being always presumed, the words of grant are to be construed alike, whether the consideration be expressed or not; *B'k. C. Fear v. Edwards,* 27 N.C. 516; *Mills v. Williams,* 33 N.C. 558. *Opinion of Ch. J.*

In some Railroad charters, it is stipulated that in case of invasion or insurrection, troops, etc., of the State shall be transported free of charge, as in charter of R. & G. R. R. Co., act of 1852, § 9. This is manifestly a consideration for the franchise, (228) though not set forth as such in words. The works and services required to be done by the stockholders are always deemed to be undertaken in consideration of the promises made by the State; and in determining the meaning of the mutual obligations of each, the same rules of construction ought to apply. Such rules are applied in *B'k C. Fear v. Edwards; Att'y. Gen. v. B'k. of Charlotte; St. B'k. of Ohio v. Knoop;* By Taney, Chief Justice, in *Life and T. Co. v. Debolt;* in *Gordon v. Appeal Tax Court.*

Every consideration given by the State is intended to secure a public benefit; and the State is entitled to have these benefits substantially rendered, and not merely technically performed: On the other hand, the stockholders, who are induced by the considerations offered to them to invest capital and secure these public benefits, ought to be fairly dealt by and protected in their bargains. This is the only means whereby the sovereign can preserve its honor; or, in time of need, command the wealth of the people.

5. If the grant of exemption from taxation was intended to induce capital to create those public benefits which the State cannot otherwise establish, save by taxation, what is more reasonable, than that, while the capital thus invested relieves the public from being taxed, the capital itself should be relieved?

The general policy of the times when the original charters of these companies were granted, was and long had been to use this way to enlist the private wealth of the people. See the following charters for building highways:

Dismal Swamp Canal Co., 1790 § 8; Buncombe Turnpike Co., 1824, § 7; Portsmouth & R. R. R. Co., 1832; Louisville, Cin. & Ch.

R. R. Co., 1835, § 43; Roanoke, D. & J., 1835, § 13; N. C. Central R. R. Co., § 14; C. F. & W. R. R. Co., 1836, § 12; Raleigh & G. R. R. Co., 1836, § 27; Norfolk & Edenton R. R. Co., 1836, § 11. Many others might be cited.

In some charters, other and different provisions, having the
(229) same tendency to enlist capital, are employed; as in the Fayetteville & W. R. R. Co. 1833, § 5, and in the C. F. Y. & Pedee R. R. Co. 1834, ch. 53. where very large tolls and freights are allowed, until the entire capital shall be repaid.

Provisions similar to both classes above stated, are to be found in the various charters granted by the State from 1790 to 1860. While in many charters granted during this long period there is no exemption or special privilege granted.

It is impossible to suppose that the General Assembly did not intend something by these provisions so carefully inserted in some charters, and altogether omitted or varied in others, during a period of seventy years.

The history of the W. & W. R. R. Co. fully illustrates the propriety and advantage to the State of this exemption.

The W. & W. R. R. Company have run their road for 32 years, and never declared a dividend, and is not likely to get one in 30 years more. During this long period the public has had the full benefit of the work, without taxation. The only sufferers are the capitalists, whose stock now bears a loss of sixty per cent., and is still further depressed in price by the unexpected burthen.

6. Unless the provision of exemption be wholly rejected, the tax imposed is in violation of the charter. It declares that "the property of said company and the shares therein shall be exempt from any public charge or tax whatever," after having before declared that all the property purchased by the company "or given" to it, "and the works" constructed by virtue of the charter, and all profits accruing on said works and the said company, shall be vested in the respective shareholders of the company. Whatever is the *property of the company,* or constitutes the *shares* of the shareholders, is included in the exemption. It is declared that the share of the shareholder shall embrace the property *purchased* — the property *given* — the *works* and the *profits.*

The *property* of the company embraces the *franchise,* which
(230) is defined by Redfield, in *Thorp v. Rutland R. R. Co.,* 27, Verm. Rep. 140, to be "the privilege of operating the road and taking fare and freight."

The franchise is a vested *property,* springing from the charter, 1

Am. L. Rev. 471—2. *Gordon v. Appeal Tax Court,* 3 How. 133 at 150.

If a franchise be taken to construct a railway it must be paid for as property. Redfield on Railways, p. 129, § 70. Ang. & Ames Corp. § 4 and § 737.

7. It is no argument to say that the exemption is against public policy — that is a matter of speculation in each case. If the public needed the railroad, and, instead of collecting taxes to build it, procured citizens to build it, and paid them by exemption from tax, this is substantially building it by taxation.

8. Nor is it any argument to say that, if built by such means, the taxation is unequal: for by the constitution of 1776, the State was under no obligation to raise tax by an *ad valorem* rule. It might have levied the whole tax from property or poll, from real estate or personal estate. *Taylor v. Comm'rs of Newbern,* 55 N.C. 141, at 145 *et. seq.*

9. Besides, even if the exemption from taxation were an "exclusive or separate emolument, or privilege," it is given in consideration of public services — the grant of them is matter of legislative and judicial inquiry. *Yadkin Nav. Co. v. Benton,* 9 N.C. 10; *Davis v. R. & G. R. R. Co.,* 19 N.C. 451. Such considerations are recognized by the constitutions of 1776, § 3 — and 1868, § 7 Decl. of Rights.

1. The argument so far, embraces the case also, of the Raleigh and Gaston Railroad Company. This company was chartered in 1835.

Section 25 provided that "(1) all machines, wagons, vehicles and carriages purchased with the funds of the company, or engaged in the business of transportation on said railroad, and (2) all the works of the said company constructed, or property acquired under the authority of this Act; (3) and all profits which (231) shall accrue from the same, shall be vested in the respective stockholders of the company forever, in proportion to their respective shares; and the same shall be deemed personal estate, and shall be exempt from any public charge or tax whatsoever, for the term of fifteen years; and thereafter, the legislature may impose a tax not exceeding twenty-five cents per annum per share, on each share of the capital stock whenever the annual profits shall exceed six per cent."

2. In 1838, ch. 29, the Company borrowed $500,000, and gave the State for security, and a mortgage on the Road.

It failed to pay the money, as it became due, and by act of 1844, ch. 73, the mortgage was directed to be foreclosed, and the road, with all its property, was sold, and bought by the State.

In 1848, ch. 82, sec. 45, an attempt was made to place the Raleigh & Gaston Railroad under an incorporation, which was without success.

3. In 1850, ch. 123, the Road was chartered anew, with section 7, requiring the free transportation of troops in case of domestic invasion or insurrection. Section 8 (similar to section 25, in the charter of 1835,) was introduced, and is a copy of section 8, of the charter of 1852, hereinafter recited.

In 1852, ch. 140, the charter was amended, and the amended charter stipulated anew, for the transportation of troops, and munitions of war, free of charge, in case of domestic invasion or insurrection; and by Sec. 8, it was provided "that, (1) the said Railroad, and all engines, cars and machinery, (2) and all the works of said Company, (3) together with all profits which shall accrue from the same; and, (4) all the property thereof, of every description, shall be vested in the said Company, one-half thereof to the use and benefit of the State, and the other half to the use and benefit of the individual stockholders, and the same shall be deemed, and held to be, personal estate, and shall be exempt from any public charge,
(232) or tax, whatsoever, for the term of fifteen years, and thereafter the Legislature may impose a tax, not exceeding twenty-five cents per annum, on each share of the capital stock held by individuals, whenever the annual profits do not exceed 8 per cent."

The annual profits have never reached eight per cent.

5. In the year 1866, an ordinance of the Convention provided that "the State might sell any of its stock in Railroads on its lands, provided the said stocks and bonds were sold, or exchanged at par."

And, in pursuance of this authority, the stock of the State in the Raleigh & Gaston Railroad Company was bought by the Raleigh & Gaston Railroad Company, and ever since, the State has had no interest in the stock of the said Road. See ordinance, ch. 34, 15th. June 1866. Acts of March 4 1866, ch. 119.

PEARSON, C.J. This case falls under the principles set out in the Opinion delivered in *Raleigh and Gaston R. R. Co. v. Reid, ante* 155. The discussion is made in that case, for it seemed to be considered, on the argument, as the one of the most difficulty.

By its charter, the Wilmington & Weldon Railroad Co. has a *franchise;* and a provision is inserted therein, that "the *property* of said company, and the shares therein shall be exempted from any public charge or tax whatsoever." *Non constat,* that the *franchise* is not the subject of taxation; and the fact, if it be so, that the *property* of said company is exempted from liability to taxation for all time

to come, only makes the *franchise* so much the more valuable, and, on the *ad valorem* mode of taxation, there can be no difference.

The order in the court below is reversed.

This will be certified.

Per curiam.

Reversed.

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(233)

J. T. BACKALAN v. M. S. LITTLEFIELD.

Notwithstanding the provisions of its eleventh section, the act of 1868-'9 ch. 76, Suspending the present Code, is to be construed as requiring *the summons* in cases where the defendant is a *non-resident*, to be returned *to the term* of the court.

That section requires *the warrant* of attachment to *be* returned *before the clerk.*

An attachment which specifies no day or place of return, is irregular, and therefore voidable; but such defect is waived if the defendant appears and gives an undertaking for the re-delivery of the property seized.

MOTION to quash a summons and warrant of attachment for irregularity, made before *Watts, J.*, at Fall Term 1869 of WAKE Court.

The Summons issued August 16th 1869, returnable before Judge of Superior Court in term time; Returned executed on same day; Complaint filed with summons; Affidavit that defendant is a non-resident. The Attachment issued from the Clerk of the Superior Court, commanding the sheriff "to attach and safely keep all the property of the defendant in your county, or so much thereof as may be sufficient to satisfy said demand, with costs and expenses," without any day or place named for a return. The sheriff on 25th of August levied the attachment on certain property. On 16th Aug. order of publication was made for defendant to appear and answer at the regular term of the Court to which the summons was returnable. On the 27th of August, defendant entered into an undertaking according to the C.C.P., and thereupon the Clerk of the Superior Court discharged the attachment. At the regular term of the Superior Court there was a motion to quash the attachment and summons, for irregularity, which was sustained; and also a motion for judgment by default on the complaint, (so we understand it,) which was overruled.

The plaintiff appealed.

Mason for the appellant.
Phillips & Merrimon contra.

RODMAN, J. (After stating the case as above.) The case (234) presents several questions of practice:

1. The summons was properly returnable before the Judge in term time. This was held in *McAdoo v. Benbow,* 63 N.C. 461, and we are not disposed to reverse that case. The provision in sec. 11, of the Act of 1868-9, ch. 76, that the act shall not apply to proceedings by attachment, does not mean that the requirement, in sec. 2, that the summons shall be returnable in term, does not apply to an action in the course of which an attachment may be taken out. To give it that construction, would be to make the suing out an attachment, or not, affect the form of the previous process, which would be a strained one, and is not necessary to give full effect to the exception.

2. The exception means that the act shall not affect the return of the attachment required by C.C.P., S., 190, which remains as therein provided, that is, before the clerk. Any motion to vacate, or modify, may be made before the court or the Judge of the district. This does not imply that the attachment and the summons are proceedings in different actions; on the contrary, they are in one and the same action, and in the same court. In the Code, the clerk and the Judge are but parts of one court, each having his respective jurisdiction. Upon an appeal to the Judge, from any judgment of the clerk, on a motion respecting the attachment, only the particular order or judgment appealed from, would go up.

3. The attachment was irregular, because it did not state when and where it should be returned, S. 203, C.C.P.; and it is contended that it was void, and that the defect could not be cured by any subsequent waiver. It seems to us, however, that the attachment, in this case, was merely irregular, and that the irregularity was waived by the defendants appearing, and giving the undertaking required to have a return of the property. I have not seen, anywhere, an attempt made to draw the line in principle, between process which is void, and that which is only voidable, although the (235) difference is important in its consequences, for the sheriff may justify, under voidable process, but not under void; the books confine themselves to giving illustrations of each. 1 *Tidd, Pr.,* 512, *McNamara on Nullities.* The only object there can be in requiring an attachment to have a certain time and place of return, is, that the

defendant may know when and where to appear, and move in it. In this case, the defendant, through the advertisement, and otherwise, obtained sufficient knowledge, and therefore, was not, in any way damaged by the omission. We think the Judge erred in quashing the attachment, and that the defendant was entitled to plead to the complaint.

Judgment reversed. Let this opinion be certified to the Judge of the Superior Court of Wake County, in order that the defendant may answer or demur, and such other proceedings may be had as are proper.

Per curiam.

Reversed.

Cited: Palmer v. Bosher, 71 N.C. 293.

SMITH & MELTON v. THE NORTH CAROLINA R. R. COMPANY.

Although a common carrier cannot, by a general notice to such effect, free itself from all liability for property by it transported; yet by notice brought to the knowledge of the owner, it may *reasonably qualify* its liability; and, by a special contract with him, it may *relieve itself* from its *peculiar* liability *as common carrier*, and in such case it will remain *liable for want of ordinary care, i.e., for negligence.*

Where a special contract exists, the burden of proof in regard to negligence, is upon the plaintiff.

Where the facts are agreed upon, or otherwise appear, the question of negligence is one for the court; where such facts are in dispute, it is proper for the court to explain the rules as to negligence, upon any particular hypothesis as to the facts, and leave the application to the jury.

Where a railroad company, being unprovided with the means of arresting sparks ("spark-arresters"), gave notice that it would transport cotton *at half rates*, in case it were relieved from risk as to fire, and thereupon an agent of the owner, (who besides, had a special understanding with the company to the same effect, as regards fire risk,) shipped cotton upon the road at half rates: *Held*, that bare proof of destruction by fire whilst being transported by the company, would not entitle the owner to recover damages for such loss.

ASSUMPSIT, tried before *Logan, J.*, at January Special Term 1870 of MECKLENBURG Court. (236)

The cause of action was, the loss by fire of nineteen bales

of cotton belonging to the plaintiffs, whilst being transported by the defendant in 1866.

Upon the trial it was shown that the engines used by the defendant were not prepared for transporting cotton, not being furnished with the "spark-arresters" which are in use to prevent fire; that the company had a regulation, at the time of, and for nine months before, the fire in question, by which it engaged to transport cotton at half the usual rates of freight, upon consideration that the owner would relieve it from risks on account of fire; and that the agent, who contracted for the owner to ship that cotton (as he had some 2,000 other bales, since the summer of 1865), had a special understanding with the company at the time of shipping, that it should not be liable for such risks; also, that half rates were paid upon it. It was also shown that the cotton was destroyed by fire, whilst being transported by the company, near Charlotte, from which point it had been shipped.

No further report of the facts is necessary for the understanding of the Opinion.

Both parties asked for certain instructions, and the court declined to give them.

Among those asked by the defendant, was this: That, upon the evidence, there was no negligence upon the part of the defendants.

Among the instructions given by his Honor, was this: That
(237) it devolved on the defendant to show ordinary care, if the fact was found that the damage was occasioned by its act.

Verdict for the plaintiff, etc., Judgment and Appeal.

Wilson for the appellant.

1. Public carriers may limit their peculiar liability, Pars. Cont., 1, 703 and n. d. Story Bailm. § 549, Pierce, R. R.'s 420.

2. If so limited, they are not responsible for want of ordinary care, but only for gross negligence, Story Bailm. § 570 etc., 2 Green. Ev. § 218.

3. The burden of proof in regard to care, was upon the plaintiff. Story Bailm. 573 etc. Angell, Carriers, § 61 n. 5, § 276, 2 Green. Ev. § 8.

Dowd contra, cited *Glenn v. R. R. Co.,* 63 N.C. 510; *Ellis v. R. R. Co.,* 24 N.C. 138; *Backhouse v. Sneed,* 5 N.C. 173; *Harrell v. Owen,* 18 N.C. 273; *Boner v. Merchant's Etc., Co.,* 46 N.C. 211; *Scott v. R. R. Co.,* 49 N.C. 432; *Woodard v. Hancock,* 52 N.C. 384; *Avera v. Sexton,* 35 N.C. 247; *Heathcock v. Pennington,* 33 N.C.

640; *Byles v. Holmes, Id.* 16; *New Jersey Nav. Co. v. Merchant's Bank,* 6 How. 344; *Platt v. Hibbard,* 7 Con. 500, Redf. R. R.'s 272, Angell Carr. § 47 and § 45, Pars. Cont. 1, 711, 2 Green. Ev. 133; *Chaffin v. Lawrence,* 50 N.C. 179.

READE, J. The questions involved in this case are of such general interest, and so frequently arise, and it is so important that there should be uniformity in the decisions upon these questions in States traversed, as are those of this country, by *systems* of railroads extending through many or all of these States — that we have carefully examined the authorities. Starting with the well known rule that common carriers are liable for all losses, except such as result from the act of God or the public enemy, we find the (238) following corollaries or variations thereof well established:

1. They cannot by general notice, free themselves from liability; as for example, by a general notice of "All baggage at owner's risk." The owner may disregard such notice; and the baggage, notwithstanding the notice, will be at the risk of the carrier. But they may, by notice brought to the knowledge of the owner, *reasonably qualify* their liability — as, if the notice be, that they will not be liable for glass in a box, or for articles of unusual value, unless informed of the facts.

2. They may, by special contract, be relieved from their peculiar liability as common carriers; as by that in the case before us, That they will not be liable for loss from fire.

3. When they are relieved as above, by special contract, they are still bound to ordinary care, notwithstanding the special contract.

4. When there is such special contract, the burden of proving the want of ordinary care, or what is the same thing, of proving negligence, is upon the owner.

5. When the facts are agreed upon, or otherwise appear, what is ordinary care, is a question for the court. When the facts are in dispute, the proper course for the Judge is, to explain what would be ordinary care under certain hypotheses as to facts, and leave the jury to apply the law to the facts as they may find them.

In the case before us, it appears that the defendant was not prepared to transport cotton with safety, as against fire, not being provided with *spark arresters,* to guard against this danger. Hence the stipulation for a *fire release* was taken. The plaintiff must show other evidence of a want of ordinary care, to render the defendant liable for the cotton in question.

The learning upon this interesting subject, is well digested in 1

Pars. Cont., 1, 704, *N. J. Steam Nav. Co. v. Merchant's Bank,*
(239) 6 Howard 344.

There is error.

Per curiam.

Venire de novo.

Cited: Bryan v. Fowler, 70 N.C. 598; *Capehart v. R. R.,* 81 N.C. 444; *Pleasants v. R. R.,* 95 N.C. 203; *Wallace v. R. R.,* 98 N.C. 498; *Emry v. R. R.,* 109 N.C. 592; *Mason v. R. R.,* 111 N.C. 498; *Mitchell v. R. R.,* 124 N.C. 248; *Miller v. R. R.,* 128 N.C. 27; *Thomas v. R. R.,* 131 N.C. 591; *Extinguisher Co. v. R. R.,* 137 N.C. 283; *Kime v. R. R.,* 160 N.C. 461.

M. E. CARTER, ASSIGNEE, ETC. v. W. M. COCKE.

A deed in trust to pay debts, which reserves to the grantor's wife *dower* in the land conveyed is, so far, inoperative, but the invalidity of such reservation does not avoid the deed.

Where such deed set forth that the grantor had a life estate in a certain fund of $8,500, which, upon his death would go to his issue, and that he had made use of such fund, and therefore provided that the trustee should pay the $8,500 immediately to such issue, [making no abatement for the life estate.] *Held,* that as the deed furnished the means for correcting the mistake into which the grantor had fallen, the provision, in effect, amounted to no more than that the trustee should pay to such issue *the value of their reversionary claim.*

Nor is a provision for satisfying a creditor *in case he should pay "liberally" for certain property,* invalid, in a case where the fund applicable to the grantor's debts is, in proportion, small, and such *liberal* bidding will turn to the benefit of the fund, and not of the grantor; *Therefore,* where, in such a case, the deed provided in the first place for the payment of two specified debts by a sale of property to the highest bidder for cash, and afterwards (having referred to a third debt as one he wished to pay) directed that the trustee "instead of selling the said mountain lands as hereinbefore provided, is hereby fully authorized and empowered to adjust said debt, provided a portion of said mountain lands would be taken at liberal prices in full satisfaction of the same." *Held,* that the provision was valid.

ACTION for the possession of land, tried before *Henry, J.,* at Spring Term 1870 of BUNCOMBE Court.

The plaintiff was assignee in bankruptcy of Robert H. Chapman,
who had been adjudicated a bankrupt in December 1868; and
(240) the defendant was trustee for the purpose of paying certain

debts of said Chapman, under a deed of conveyance from him, dated February 8th 1867. The lands in question were included in the deed, and the plaintiff claimed that, as against creditors, this deed was fraudulent upon its face, and void.

The features in the deed which were impeached by the plaintiff as fraudulent, were:

1. *A reservation of dower* to the grantor's wife, in case she survived him, etc., followed by a direction to the trustee to sell the lands conveyed to him, *subject* to said right of dower, etc.

2. A direction to pay to certain issue of the grantor, a sum of $8,500, whereas previous clauses of the deed alleged that they were entitled to such sum only after the grantor's death, he being entitled to a life estate therein.

3. A direction to the trustee, in the last part of the deed, that "instead of selling the said mountain lands as hereinbefore provided," he should also adjust a certain debt not theretofore mentioned, "provided a portion of such mountain lands would be taken at liberal prices in full satisfaction of the same": the former part of the deed having provided that such lands and others mentioned, should be sold at public auction to the highest bidder for cash, and the proceeds applied to the payment of two debts therein specified.

It was admitted that the grantor was entirely insolvent, and also that there was no other fraud about the deed than that which the law might infer from the clauses above alluded to.

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

Battle & Sons for the appellant.

The deed is void upon its face, because:

1. Of the provision for the wife.

2. It makes a provision for his children etc., greater in (241) amount than is due.

3. It imposes *terms* upon some of the creditors, not justified by law.

They cited and remarked upon *Hardy v. Simpson,* 35 N.C. 132; *Hardy v. Skinner,* 31 N.C. 191; *Hafner v. Irwin,* 23 N.C. 490; *Johnson v. Murchison,* 60 N.C. 292; *McCorkle v. Hammond,* 47 N.C. 444; *Jessup v. Johnston,* 48 N.C. 335; *Rea v. Alexander,* 27 N.C. 694; *Kessin v. Edmondston,* 36 N.C. 180; *Cunningham v. Freeborn,* 11 Wend. 240; *Waterbury v. Sturtevant,* 18 Ib. 353; *Fielder v. Day,* 2 Sand. S.C. 594; *Robinson v. Stewart,* 10 N.Y. 189; *Collomb v. Cald-*

well, 16 Ib. 486; *Barney v. Griffin,* 2 Coms. 365; also *Palmer v. Giles,* 40 N.C. 75; *Hoke v. Henderson,* 14 N.C. 12.

Bragg contra.

The attempt to *reserve* dower to the wife is entirely *inoperative;* all passes to the trustee.

He cited and commented upon Sheph., Touch. pp. 78 and 80, 2 Thos. Co., App. Harg. n n. 791, 792, Sand. U. & T. 319 to 324, 4 Kent. 296 *et seq., Davenport v. Wynne,* 28 N.C. 128; *Jackson v. Sebring,* 16 John. 515, and *Wickham v. Hawker,* 7 M. & W. 63.

RODMAN, J. We assume, in this case, that the plaintiff is entitled to represent the creditors of Chapman, and to recover possession of the lands, if the deed from Chapman to the defendant is fraudulent and void as to the creditors of Chapman.

We will examine the objections to the deed, in order:

1. It is said to be void because the grantor attempts to secure an unlawful benefit to his wife.

It is conceded that every conveyance by an insolvent, for the benefit of his family, to the detriment of his creditors, is fraudu-
(242) lent and void; and therefore, that the provision in this deed in trust, that his wife may have dower, whatever might be the effect of it simply as between the parties and independent of any question arising out of the claims of creditors, under the present circumstances, is ineffectual and void. The provision for the wife is fraudulent in law and void, because it attempts, unlawfully, to withdraw some portion of the estate of the insolvent from the just claims of his creditors, in favor of a volunteer. But does this attempt infect the whole conveyance, and avoid it, not only so far as the disposition in favor of the wife is concerned, but altogether? It is admitted that the debts of Milliken and to Summey are just, and that the debt to the child and grandchildren is also just, though as to the last it is alleged that its immediate payment is provided for, although the grantor has an estate in the fund during his life; this circumstance respecting the latter debt will be considered hereafter, as will also be the provision in the deed respecting the debt to Summey. It has been held that where any part of an entire consideration of a deed is illegal, the whole deed is void; but if the consideration, and some only of the conditions or declarations of trust in the deed be illegal, which are capable of being separated from the others, then only those which are illegal will be avoided, and the others will be sustained. *Brannock v. Brannock,* 32 N.C. 428. It may be a little difficult to reconcile the

decision in *Stone v. Marshall,* 52 N.C. 300, with the principle of the above cited case. The distinction between the two cases on which the court proceeded, is obvious enough; in the latter the grantor was guilty of a direct and intentional fraud for his own benefit, and the court held that the fraudulent intent entered into and affected the consideration; whereas, in *Brannock v. Brannock,* although some of the debts secured in the trust deed were illegal as being usurious, there was no fraud intended by the grantor for his personal benefit. It is certain that *Stone v. Marshall* did not intend to modify *Brannock v. Brannock,* as it cites it, and quotes its language with approval. In the last named case it is said: "Here the con- (243) sideration which raised the use for the purpose of the conveyance, is merely nominal. The debts secured are distinct, due to different individuals, and in no way connected with, or dependent on one another: the deed is valid so far as respects the good debts." So, in this case, the consideration is nominal, the attempted provision for the wife is unconnected with the other trusts declared, and naturally separated. Void itself, we think it does not avoid the whole deed.

2. It is objected that the grantor attempts to secure his child and grand-children the immediate payment of a sum in which he has a life estate. We do not consider the deed either as altogether fraudulent by reason of this provision, nor do we consider this declaration of trust fraudulent. The grantor states that he has a life estate in the fund, and the facts showing how his life estate, and the estate of the reversioners arose.

If he makes an error, in providing for the immediate payment of the full amount to which the reversioners were entitled only *in futuro,* he also supplies the means by which the error can be corrected. When the defendant shall sell the property, and apply the proceeds to the satisfaction of the trusts declared, he will pay the reversioners only the present value of their debt; that is, such a sum as, at the death of the grantor, will be equal to the sum due them. This sum can be calculated from the tables of annuity.

3. The provision for paying the debt to Summey, executor etc., only in case he shall give a liberal price for certain lands.

It is conceded that any provision by which a grantor requires of a creditor any concession for his personal benefit, would be void; but in this case, whatever benefit the trust fund may derive from the liberal price to be paid by Summey, will not enure to the benefit of the grantor, but to that, primarily, of the other creditors secured in the deed, and secondarily, of the other creditors of the grantor.

It follows from these views, that the plaintiff has no right (244) of possession.

Per curiam.

Judgment affirmed.

Cited: Morris v. Pearson, 79 N.C. 261.

E. T. BRODNAX AND OTHERS *v.* ZACHARIAH GROOM AND OTHERS, COMM'RS. ETC.

The act of 1868-'69, c. 102, "To authorize the Commissioners of Rockingham County to levy a special tax" etc., is constitutional.

By comparing the Act of 1864-'65, c. 32, with that of 1868-69, c. 74, § 20, as well as from the principle involved therein, — injunctions to restrain the collection of taxes, will be allowed only where a question of the existence of Constitutional power is involved, and not where the question is as regards matters only of detail, *ex. gr.* the *valuation* of property, the sufficiency of a Sheriff's bond, etc.

Whether a law authorizing the Commissioners of a particular County to levy taxes for the purpose of building bridges, is a Private or a Public-local law, *quaere?*

If a Private act be certified by the presiding officers of the two branches of the Legislature as duly *ratified,* it is not competent for the judiciary to go behind such *record,* and enquire collaterally *(ex. gr.)* whether the thirty days notice of an application therefor, required by the Constitution, have been given.

An act giving the *special approval* of the Legislature to county taxation for *special purposes* (Const. Art. V, Sect. 7,) need not specify the sum to be raised by such taxation, nor a limit beyond which it cannot be carried; *details* are not proper in such statutes, — these should be left to the Commissioners.

It is doubtful whether it be practicable for the Courts to give effect to regulations imposed by Constitutions upon the *exercise* of the taxpower: Whether the *power* to tax do or do not exist, is a proper subject of judicial enquiry: Whether the exercise of a conceded power in any particular case were proper, is to be left to the constituents of the body which imposed the tax?

Where an injunction was sought against levying a tax, on the alleged ground that it was to be applied to build a particular bridge which was to be constructed at an inconvenient place, was connected with no public road, was upon a plan too costly, and was therefore, unconstitutional: *Held,* that, as the general head of repairing and building bridges came under "the necessary expenses" of the county, it was not competent for the Court to review a decision of the County Commissioners, as to what particular bridge, as regards either location or description, is, or is not necessary.

BRODNAX *v.* GROOM.

INJUNCTION, before *Tourgee, J.*, November 27th 1869, at Chambers, ROCKINGHAM Court. (245)

An order of restraint had been made in the action by *Watts*, J., October 5th 1869, and the matter came before Judge Tourgee, upon a motion to vacate, made after due notice etc.

The plaintiffs were tax payers, who sued for themselves and all other tax payers of the county of Rockingham, and the defendants were the commissioners of that county.

The complaint sought an injunction against a tax alleged to have been levied by the defendants under an Act (1868-'69, c. 102, ratified April 1st 1869,) which provided, "That the commissioners of the county of Rockingham be and they are hereby authorized to levy and collect a special tax for the purpose of building and repairing bridges in said county."

The objections were as follows:

1. That the said Act was *Private*, and was passed without the *thirty* days notice of application required by the Constitution, Art. 2, Sec. 4.

2. That the Act did not specify the amount to be collected, or the particular bridges to be built.

3. That the tax had not been approved by a majority of the voters in the county, as required by the Constitution, Art. 7, Sec. 7.

4. That the Revenue Act of March 13 1869, required the Assessors to value the property of the tax payers, and provided that such valuations were to be revised by the commissioners, but that, in violation thereof, the commissioners had made new valua- (246) tions, by taking the valuations of 1860, and, *in every case*, subtracting 25 per cent. from them.

5. That of the $12,000 levied, the commissioners had appropriated $10,000 to build a bridge, where none had ever been before, connected with no public road, and otherwise unnecessary, inconvenient and extravagantly expensive.

6. That the Sheriff who was to collect the tax, was insolvent, and that the bond he had given had no condition covering the collection of this tax.

Upon the application before Judge Tourgee the defendants filed an affidavit in reply to the above objections, in which they denied the truth of the allegations numbered above 4 and 5, and stated that the mistake in regard to the Sheriff's bond referred to in 6, had been corrected before the serving of the injunction in this case; etc.

The Judge, after consideration, vacated the order theretofore made; and the plaintiffs appealed.

Battle & Sons, Graham and Bragg for the appellants.
Phillips & Merrimon contra.

PEARSON, C.J. This is a proceeding by the plaintiffs, who are taxpayers, in behalf of themselves, and of the other taxpayers of the County of Rockingham, to call in question the validity of an Act of the General Assembly, which authorizes the County Commissioners to levy a tax for "repairing and building bridges."

His Honor, in the court below, discharged the order of restraint, and the case is before us, by appeal from that ruling.

In *Worth v. Comm'rs of Fayetteville,* 60 N.C. 617, while entertaining a bill in the name of a few, for all, of the taxpayers, to enjoin the collection of the taxes of a municipal corporation, the court felt it to be a duty to intimate a doubt as to whether bills of this kind could be allowed in respect to State and county taxes,
(247) because of the public mischief that might ensue by suspending the means of support upon which the governments of the State and of the county depend for existence.

Therefore, an act of the Legislature was passed, by which the "writ of injunction is allowed in all cases against the collection of taxes illegally imposed or assessed". Acts 1864-5, ch. 32.

Special legislation is objected to by many; but at all events, in construing the statute, the courts are to take into consideration the supposed mischief which the act was intended to remedy, and to construe it in reference to the mischief.

Upon this rule of construction, we think the act includes only cases which involve the constitutional power to impose the tax, or to authorize it to be done, and that the remedy by injunction against the collection of State and county taxes, does not embrace questions as to the mode of valuing property, the sufficiency of the Sheriff's bond, and the like, which may be called "matters of detail."

In this conclusion we are confirmed by the Act, 1868-9, ch. 74, sec. 20: "If any person shall complain before the Commissioners that his property has been improperly valued, or that he is charged with an excessive tax, he shall, etc., and may appeal to the Superior Court."

This is a legislative construction of the Act, 1864-5, or it has the effect of repealing that act, so far as the words might seem to extend beyond furnishing a mode of testing the power, under the Constitution, to impose a tax, or to authorize it to be imposed.

We do not think it necessary to enter into the question; whether this is a *public local* act, or a mere *private* act, in regard to which thirty days notice of the application must be given; for taking it to be a mere private act, we are of opinion, that the ratification certified

by the Lieutenant Governor, and the Speaker of the House of Representatives, makes it a "matter of record," which cannot be impeached before the courts in a collateral way. Lord Coke says, "a record, until reversed, importeth verity." (248)

There can be no doubt that acts of the Legislature, like judgments of Courts, are matters of record, and the idea that the "verity of the record" can be averred against in a collateral proceeding, is opposed to all of the authorities. The courts must act on the maxim, "*Omnia presumuntur,*" etc. Suppose an act of Congress is returned by the President, with his objections, and the Vice-President and the Speaker of the House certify that it passed afterwards by the constitutional majority; is it open for the courts to go behind the record, and hear proof to the contrary?

1. "The taxes laid by the Commissioners, etc., shall never exceed the double of the State tax, except for a special purpose, and with the special approval of the General Assembly." Art. 5, sec. 7.

It is conceded that the tax, in our case, did exceed the double of the State tax, but it is averred, it was for a special purpose, and had the special approval of the Legislature; and reference is made to the Act ratified 1st day of April 1869, entitled "An Act to authorize the Commissioners of Rockingham County to levy a special tax for the purpose of building and repairing bridges, in said county."

There is a *special purpose,* to-wit: building and repairing bridges in the County of Rockingham, and it has the special approval of the General Assembly. True, it does not set out what amount will be required to repair the old bridges, or to build new ones.

We do not consider it necessary, that the act should set out the *precise sum,* in order to meet the words, "for a special purpose," it is easy enough to say "the extra tax is required for building and repairing bridges." The statute must not go into details and estimates, — what bridges need repair, or in what cases new ones are to be built, and if so, whether it is to be on a cheap plan, or one that will cost more, and last longer. It belongs to the county authorities to settle matters of this kind.

The truth is, when the *power* of taxation is conferred, it is difficult, if not impossible, for the courts to enforce restraints, (249) which the constitution vainly attempts to impose upon its *exercise.*

Can this court say, to a co-ordinate branch of the Government, "your Act, either from ignorance or design, is not framed with a sufficient degree of precision, and therefore we declare it void?"

The reply would be, "The General Assembly has the *power,* and its *evasion* or *abuse* is *not a matter for the courts,* but for our constituents."

2. Art. 7, sec. 7: "No county, city, etc., shall contract any debts, pledge its faith, or lend its credit, nor shall any tax be levied or collected by any officers of the same, *except for the necessary expenses thereof,* unless by a vote of a majority of the qualified voters therein."

In regard to contracting debts, pledging its faith, or lending its credit, there is an absolute prohibition, and this section is *cumulative,* and adds another restraint to that of Sec. 7, art. 5, which we have been considering. When the prohibition is absolute, so as to take away the power, the Courts can handle the subject.

But the power to tax is assumed, and an attempt is made to restrain its exercise, "except for the necessary expenses of the county." Who is to decide what are the necessary expenses of a county? The county commissioners; to whom are confided the trust of regulating all county matters. "Repairing and building bridges" is a part of the necessary expenses of a county, as much so as keeping the roads in order, or making new roads; so the case before us is within the *power* of the county commissioners. How can this court undertake to control its *exercise?* Can we say, such a bridge does not need repairs; or that in building a new bridge near the site of an old bridge, it should be erected as heretofore, *upon posts,* so as to be cheap, but warranted to last for some years; or that it is better policy to locate it a mile or so above, where the banks are good abutments, and
(250) to have *stone pillars,* at a heavier outlay at the start, but such as will ensure permanence, and be cheaper in the long run?

In short, this court is not capable of controlling *the exercise* of power on the part of the General Assembly, or of the county authorities, and it cannot assume to do so, without putting itself in antagonism as well to the General Assembly, as to the county authorities, and *erecting a despotism of five men;* which is opposed to the fundamental principles of our government, and the usages of all times past.

For the exercise of powers conferred by the constitution, the people must rely upon the honesty of the members of the General Assembly, and of the persons elected to fill places of trust in the several counties.

This court has no power, and is not capable if it had the power, of controlling the exercise of power conferred by the constitution, upon the legislative department of the government, or upon the county authorities.

We see no error. Order in the court below affirmed.

Per curiam.

Judgment affirmed.

Cited: Patterson v. Hubbs, 65 N.C. 122; *Wilson v. Charlotte,* 74 N.C. 759; *Satterthwaite v. Comrs.,* 76 N.C. 154; *London v. Wilmington,* 78 N.C. 111; *Ashcraft v. Lee,* 79 N.C. 35; *Scarborough v. Robinson,* 81 N.C. 425; *Cain v. Comrs.,* 86 N.C. 17; *Cromartie v. Comrs.,* 87 N.C. 139; *Evans v. Comrs.,* 89 N.C. 158; *Barksdale v. Comrs.,* 93 N.C. 476; *Carr v. Coke,* 116 N.C. 235; *Vaughn v. Comrs.* 117 N.C. 434; *Williams v. Comrs.,* 119 N.C. 522; *Comrs. v. Snuggs,* 121 N.C. 408; *Mayo v. Comrs.,* 122 N.C. 9; *Herring v. Nixon,* 122 N.C. 422; *Tate v. Comrs.,* 122 N.C. 814; *Greenleaf v. Comrs.,* 123 N.C. 33; *Stratford v. Greensboro,* 124 N.C. 132; *Hornthall v. Comrs.,* 126 N.C. 30; *S. v. Hay,* 126 N.C. 1003; *S. v. Higgs,* 126 N.C. 1029; *S. v. Hill,* 126 N.C. 1146; *Black v. Comrs.,* 129 N.C. 125; *S. v. New,* 130 N.C. 740; *Wadsworth v. Concord,* 133 N.C. 594; *Wilson v. Markley,* 133 N.C. 620; *Trustees v. Realty Co.,* 134 N.C. 45; *Brown v. Stewart,* 134 N.C. 362; *Graves v. Comrs.,* 135 N.C. 53; *Bank v. Comrs.,* 135 N.C. 245; *Bray v. Williams,* 137 N.C. 390; *Jones v. Comrs.,* 137 N.C. 599; *Glenn v. Comrs.,* 131 N.C. 418; *Crocker v. Moore,* 140 N.C. 433; *Wharton v. Greensboro,* 146 N.C. 360; *Ward v. Comrs.,* 146 N.C. 536; *Cox v. Comrs.,* 146 N.C. 585; *R. R. v. Comrs.,* 148 N.C. 239; *Rosenthal v. Goldsboro,* 149 N.C. 134; *Bd. of Ed. v. Comrs.,* 150 N.C. 124; *Hightown v. Raleigh,* 150 N.C. 572; *Jones v. N. Wilkesboro,* 150 N.C. 653; *Burgin v. Smith,* 151 N.C. 567; *Howell v. Howell,* 151 N.C. 578; *Comrs. v. Bonner,* 153 N.C. 68; *Newton v. School Committee,* 158 N.C. 188; *Lenoir v. Crabtree,* 158 N.C. 359; *Mercantile Co. v. Mount Olive,* 161 N.C. 126; *Davenport v. Comrs.,* 163 N.C. 149; *Luther v. Comrs.,* 164 N.C. 242; *S. v. Lawing,* 164 N.C. 494; *Wood v. Land Co.,* 165 N.C. 370; *Munday v. Newton,* 167 N.C. 656; *Hargrave v. Comrs.,* 168 N.C. 629; *Key v. Bd. of Ed.,* 170 N.C. 125; *Wilson v. Holding,* 170 N.C. 356; *Bennett v. R. R.,* 170 N.C. 392; *Edwards v. Comrs.,* 170 N.C. 451; *Corp. Comm. v. R. R.,* 170 N.C. 571; *Jackson v. Comrs.,* 171 N.C. 382; *Cobb v. R. R.,* 172 N.C. 61; *Moose v. Comrs.,* 172 N.C. 429; *Lucas v. Belhaven,* 175 N.C. 127; *Power Co. v. Power Co.,* 175 N.C. 676; *Woodall v. Hwy. Comm.,* 176 N.C. 386; *Dula v. School Trustees,* 177 N.C. 431; *Parvin v. Comrs.,* 177 N.C. 509; *Bd of Ed. v. Bd. of Comrs.,* 178 N.C. 313; *S. v. Vanhook,* 182 N.C. 834; *S. v. Scott,* 182 N.C. 881; *Davenport v. Bd. of Ed.,* 183 N.C. 575; *Peters v. Hwy. Comm.,* 184 N.C. 30; *Person v. Watts,* 184 N.C. 506; *Lee v. Waynesville,* 184 N.C. 568; *R. R. v. McArtan,* 185 N.C. 204; *Parks v. Comrs.,* 186 N.C. 498; *School Committee v. Bd. of Ed.,* 186 N.C. 648; *R. R. v. Reid,* 187 N.C. 324; *Cameron v. Hwy. Com.,* 188 N.C. 94; *Lassiter v. Comrs.,* 188 N.C. 383; *Bd. of Ed. v. Comrs.,* 189 N.C. 652; *Coburn v. Comrs.,* 191 N.C. 74; *Day v. Comrs.,* 191 N.C. 781; *Newton v. Hwy. Comm.,* 192 N.C.

60; *Bizzell v. Goldsboro,* 192 N.C. 360; *Carlyle v. Hwy. Comm.,* 193 N.C. 47; *Hayes v. Benton,* 193 N.C. 383; *Frazier v. Comrs.,* 194 N.C. 53; *Yarborough v. Park Com.,* 196 N.C. 291; *Barbour v. Wake County,* 197 N.C. 317; *Crabtree v. Bd. of Ed.,* 199 N.C. 650; *Glenn v. Comrs.,* 201 N.C. 238; *Harrell v. Comrs.,* 206 N.C. 228; *Grimes v. Holmes,* 207 N.C. 300; *Matthews v. Blowing Rock,* 207 N.C. 451; *Castevens v. Stanly County,* 209 N.C. 81; *Reed v. Hwy. Com.,* 209 N.C. 652; *Bowles v. Graded Schools,* 211 N.C. 38; *Palmer v. Haywood County,* 212 N.C. 291; *Messer v. Smathers,* 213 N.C. 189; *Green v. Kitchin,* 229 N.C. 460; *LeLoach v. Beamon,* 252 N.C. 759.

WILLIAM J. AND JOSEPH C. HOGAN v. MARTHA KIRKLAND.

The defendant, by a decree in the Supreme Court, had recovered of the plaintiffs, a sum of money; whilst the execution was in the hands of the sheriff, the plaintiffs recovered from the defendant, by judgments before a magistrate, a like amount, — being for items in their account not allowed in the case in the Supreme Court; these latter judgments were docketed, and executions were taken out upon them and returned *nulla bona;* the plaintiffs then asked for an order to have the amount of the decree in favor of the defendant *applied* to their judgments, (C.C.P., § 264): *Held,* that they were entitled to such relief.

Objections, — that the judgments were obtained *subsequently* to the decree, and, — that the latter was rendered in *Equity* — as also, in a *Supreme* Court, are not material.

MOTION heard by *Tourgee, J.,* at Fall term 1869, of ORANGE (251) Court.

The plaintiffs' affidavit stated the existence of Justice's judgments, dated July 2d 1869, in favor of the plaintiffs against the defendant, amounting to about $1,181.00; that they had been docketed, and executions had issued thereupon and been returned without satisfaction; also, that at June term 1869, of the Supreme Court, a decree had been rendered in favor of the defendant against the plaintiffs, for some $1,000 and interest, and that execution therefor is in the hands of the sheriff, and has been levied etc.; that the defendant refuses to allow of an application of the plaintiffs' claim to that held by her.

An order was asked for an application, and in the meantime for a restraint of the sheriff from selling under the decree.

His Honor granted a preliminary order of restraint, etc.

At Fall term, the defendant filed an affidavit, stating that her de-

mand (under the decree) was for *a legacy* in the plaintiffs' hands as executors etc.; that the claims now sought to be applied, had been brought forward in the equity suit by the plaintiffs, and were then rejected, etc.

Thereupon, on motion by the defendant, his Honor vacated the order of restraint, and also dismissed the proceedings.

The plaintiffs appealed.

Phillips & Merrimon and Argo for the appellants.
Graham contra.

PEARSON, C.J. The defendant, if well advised, would have applied for a re-hearing before the Justice, according to the provisions of section 508, C.C.P., and relied as a defence, on the decree in *Hogan v. Hogan,* 63 N.C. 222, and upon the fact that her debts, which had been paid off by the officious acts of the plaintiff, were extinguished. She failed to do so. The judgments were docketed in the office of the Superior Court Clerk for the county (252) of Orange, and thus became "judgments of the Superior Court in all respects;" C.C.P., Sec. 503. The matter is *res adjudicata,* and any defence she might have made before the Justice, is excluded.

So we have this case: The plaintiffs hold judgments against a defendant for $1,181, upon which executions are returned "nothing found." The defendant holds a decree against the plaintiffs for $1,000, upon which execution has issued. Thereupon, the plaintiffs, by proceedings in the nature of a judicial attachment, according to the provisions of section 264, C.C.P., ask for *"an application"* of the decree to their judgments, and for a provisional remedy to restrain execution on the decree, until the rights of the parties are decided. His Honor granted the injunction, but, afterwards, on affidavits, "ordered and adjudged that the order of restraint heretofore granted be vacated, and that the motion for application made in and by the complaint of the plaintiffs, be dismissed."

No sufficient ground to support the ruling of his Honor was suggested on the argument, nor are we able to conceive of one. The Code makes provisions for applying debts due to the debtor, in discharge of a judgment against him. Why should not this be done in our case? The plaintiffs owe her, and she owes them—a clear case for application, except so far as she may be entitled to have a part assigned to her as exempted from execution, which question is not now before us.

Mr. Graham, on the argument, made the following points, which we will notice *seriatim,* because of the earnestness with which he pressed them:

1. "A Superior Court of Equity will not permit its decrees to be defeated in execution, by any inferior Court."

Under the old mode of procedure, it was of every day occurrence for a defendant, after a judgment at law, to set up by bill, some equity, and in the meantime to restrain the plaintiff from en-
(253) forcing collection until the equity was adjudicated: no one ever imagined that it made any difference whether it was a judgment of a Superior Court, or of the Supreme Court, for the Court of Equity did not presume to act upon the courts of law, but acted only upon the parties. In our case, his Honor in making the order of restraint was by no means obnoxious to the charge of insubordination or of presuming "to defeat in execution a decree of a Superior Court," for his action fully admits the validity and binding force of the decree of the Supreme Court, and was merely subsidiary to the right of the plaintiffs to have *an application,* under the Code. If his Honor vacated the order of restraint on the ground of a want of a due subordination, he labored under an entire mistake.

2. "Leave was reserved to the defendants in the suit of *Hogan v. Hogan, and Kirkland* to show, if they could, any equities which should defeat the plaintiff's right to execution. No such showing was attempted."

The expression in the opinion delivered in that case: *"If he has paid the legacy to her,* he will be entitled to have the payment allowed when the execution shall be moved for," has reference to a suggestion made on the argument, and is not noticed in the decree. The present proceeding is not based on the idea of a payment of the legacy, but on the ground that by the Code a chose in action, whether the evidence of it be a note, judgment or *decree,* is subjected to the payment of judgments.

"A set-off at law must exist when the plaintiff's action is brought; in equity, every set-off, or counter-claim must be shown before decree, and this is also the case under the Code of Civil Procedure, Sec. 101. In case of a mistake, or newly discovered evidence, there is the right of petition to rehear, or bill of review; but the decree otherwise is a final determination. The plaintiff might sue out an attachment to enforce it, instead of the milder course of *fi. fa.,* which has been adopted. The claim in our case is not one of set-off at
(254) law or in equity, or a set-off or counter-claim under the Code, but is a proceeding in the nature of a judicial attachment for the purpose of making an application of the amount due to the defendant, to the judgments of the plaintiffs.

4. "No cases of application can be made of a claim or a judgment subsequently acquired."

We see nothing in the Code which forbids the doctrine of "applica-

tion on the ground that the claim or judgment was subsequently acquired — that is, as we understand the position, after the decree in favor of the defendant was made. Suppose, after the decree against the plaintiff, they bought up debts against Mrs. Kirkland, obtained judgments before a Justice, and had them docketed as judgments of the Superior Court, which remained unsatisfied and unreversed: after executions against Mrs. Kirkland returned "nothing found," why should not the plaintiffs have the right to attach the decree in her favor, and have it applied under C.C.P., § 264? The original creditors had this right, and we can see no reason why the plaintiffs, as assignees, may not enforce it.

Mrs. Kirkland has no ground of complaint, if she is thus compelled to pay her debts.

There is error. Order in the Court below reversed. This opinion will be certified, etc.

Per curiam.

Order reversed.

Cited: Lee v. Eure, 93 N.C. 9; *Puffer v. Lucas,* 112 N.C. 382; *Edgerton v. Johnson,* 218 N.C. 301.

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(255)

THE STATE v. WILLIAM P. LYTLE.

In an indictment for forgery (upon a Statute which included *all bonds),* the forged instrument was described as a "certain bond and writing obligatory, which was placed as a prosecution bond upon the process in a suit etc., in which M. P. Lytle was plaintiff, and Mary L. Lytle, defendant, which said forged bond is as follows, that is to say, "We and each of us promise to pay the defendant in the within petition all such costs" etc.; and it appeared that such suit was for divorce, by husband against wife, and that the *bond* had been written upon a paper which contained the prisoner's affidavit for instituting the suit, which paper was attached to the petition having the Judge's *fiat* endorsed) by being pasted to it at one corner: *Held,*

1. That the description of the bond, as *placed upon the process,* although unnecessary, became matter of substance, and in this case was not made out;

2. That the writing described as a bond (being given by husband to wife) was binding on no one; so that it could not be the subject of forgery.

The provision for a *prosecution bond* in divorce cases (Rev. Code, c. 39, § 5) applies only where the wife, by her *next friend,* is plaintiff.

STATE *v.* LYTLE.

Where the wife is defendant her costs are to be paid in advance (unless *indulged* by the officers) by the husband, as his own are; and this will be enforced by order of court.

FORGERY, tried before *Cannon, J.*, at Fall Term 1869 of BUNCOMBE Court.

The defendant had brought suit against his wife, M. L. Lytle, for divorce, and in the course of such suit had given as a prosecution bond, the instrument for the forgery of which he was indicted.

The points upon which the decision of the case turns, render it necessary to state only that the indictment contained two counts, and charged that the defendant:

1. Did forge "a certain bond and writing obligatory, which was placed as a prosecution bond, upon the process in a suit in the Superior Court of Law of said county, in which M. P. Lytle was plaintiff and Mary L. Lytle defendant, which said forged bond is as follows, that is to say:

"We and each of us promise to pay the defendant in the within petition all such costs and damages as may accrue on ac-
(256) count of the within suit not being prosecuted with effect. Given etc., A.D. 1866.

M. P. LYTLE, [Seal.]

his
MILLINGTON (X) LYTLE, [Seal.]
mark.

Test: T. L. LYTLE.

with intent to defraud the said Millington Lytle, against the form of the Statute" etc.;

2. Did forge a certain bond as above; varying the statement by charging the *suit,* as "commenced or to be commenced,"—and the *intent,* to be, "to defraud the said Mary L. Lytle."

It appeared in evidence that the writing in question was placed upon the paper containing the defendant's affidavit for instituting the suit; and that there was nothing else in the said paper except the said writing and affidavit; and that the paper was attached to the petition, (on which latter was also endorsed the Judge's *fiat,*) by being pasted together at one corner, but no other paper in said cause was so attached to it.

The defendant was convicted.

Rule for a new trial etc.; Judgment, and Appeal.

Phillips & Merrimon for the appellant.
Attorney General contra.

STATE *v.* LYTLE.

1. A paper may be attached in point of law, although not so in fact. Such is the case here. *Long v. Magistre,* 1 John. Cas. 202.

2. Although, ordinarily, a husband cannot give a bond to his wife, yet if a Statute expressly authorize it, he may. Such is the case in divorce suits, by Rev. Code, c. 39, § 5.

RODMAN, J. In every indictment for forgery the instrument alleged to be forged must be set forth according to its tenor, in order that the court may see that it is one which (if the in- (257) dictment be under a statute, as in this case) is within the statute. Our statute (Rev. Code, ch. 34, sec. 59) embraces all bonds. The indictment in this case, in the first count, describes the forged instrument as "a certain bond and writing, obligatory, which was placed, as a prosecution bond, upon the process in a suit in the Superior Court of Law of said county, in which M. P. Lytle was plaintiff, and Mary L. Lytle defendant, which said forged bond is as follows, that is to say: "We, and each of us, promise to pay the defendant in the within petition, all such costs, etc."

In the second count the indictment charged that the prosecution bond was placed upon the process "in a certain suit commenced, or to be commenced, in the Superior Court, etc., in which M. P. Lytle was plaintiff, and Mary L. Lytle was defendant, which said forged bond is as follows, etc.," setting it forth as in the first court.

On the evidence, it appeared that the alleged forged bond "was placed (probably meaning, written) upon the paper containing the affidavit for instituting the suit, and there was nothing else in said paper, except the said writing and affidavit, and the said paper appeared to be attached to the petition (on which latter was also endorsed the Judge's said fiat) by being pasted together at one corner," etc. The petition is stated to have been for divorce, by the defendant, against Mary L. Lytle, his wife.

A comparison of the indictment with the evidence, will enable us to decide this case, on a consideration of two only of the numerous exceptions to the judgment below:

1. There is clearly a variance between the allegations and the proof: the bond was not "placed upon the process," for no process had been prepared in the action. There may have been no necessity for this averment in the indictment, but being matter of description, it cannot be considered surplusage, and must be proved as laid.

2. But there is another objection to the indictment, which goes more to the root of the matter. The forged writing must be one which, if genuine, would have been valid and binding on (258) some one; otherwise no one can be defrauded by it.

It seems to us that any prosecution bond, given by a husband on a suit for divorce brought by him against his wife, and payable to the wife, is void. By the common law any bond from husband to wife, of course, is void. Then, is there anything in the nature of a prosecution bond, or in the statutes respecting them, making it otherwise in this case? The object of a prosecution bond is not to secure the payment of any costs which a plaintiff may incur to witnesses, or to the officers of the court: these he must pay in advance, unless indulged; but to secure the defendant, in case of a failure to prosecute, the reimbursement of costs which he may have paid. Probably, if the defendant, through the indulgence of officers, etc., was indebted for their fees, the judgment would be considered as in trust for them, but it would be in the name of the defendant — in this case in the name of the wife against the husband. But until the husband obtains his divorce, he is liable to all the necessary expenses of his wife, which would include the costs in defending herself against his action, and he must be supposed to pay them as they accrue; thus *she* incurs no costs; they are all *his;* and she can never recover, therefore, any judgment for costs against him. The provision for a prosecution bond, in Rev. Code, ch. 39, sec. 5, must be construed as being intended to apply only where the wife is plaintiff, and sues by her next friend: in that case the husband would not be bound by her acts, and might recover on the prosecution bond. It may be said that this view of the rights of a wife who is sued by her husband for a divorce, might preclude her from obtaining the necessary services of the officers, etc., in making her defence: her remedy would be to apply to the court for an order upon the husband to pay into court such sum as may be proper for her use in the action.

There is error.

Per curiam.

Venire de novo.

Cited: S. v. Helms, 247 N.C. 743.

(259)

R. W. H. FEIMSTER v. R. W. JOHNSON AND W. D. HALL.

A whiskey still was hired for the season, to parties who set it up, encased in masonry, upon the lands of one of them; during the season, it was sold by the owner to the plaintiff; shortly afterwards it was levied upon, and, after the close of the season, and whilst it was still encased as above, was sold, by one of the defendants as a constable, at the instance of the other (who became purchaser,) under a judgment against the former owner: *Held,*

1. That the defendants were liable to the plaintiff in an action of *trover.*

2. That the doctrine of *fixtures* had no application, under the circumstances.

TROVER, tried before *Mitchell, J.,* at Fall term 1869, of IREDELL Court.

The facts were; that the defendant Johnson, and one Long, intending to distil whiskey, hired a still from one Guy, its owner, for the Winter and Spring of 1866; they removed it to the land of Johnson, and set it up encased in masonry, in the usual way; there it remained until the *conversion* complained of; on the 27th of February 1866, the plaintiff bought the still from Guy, and notified the bailee Long, that he had done so; in April 1866, the defendant Hall levied on the still, as the property of Guy, by virtue of an execution in favor of the other defendant Johnson; in May, Long and Johnson ceased their operations as distillers; in June, the still was sold under the execution, and bought by Johnson, the plaintiff being present and forbidding such sale, and demanding possession, which was refused.

The defendant asked his Honor to instruct to jury:

1. That as the still was then affixed to the realty, the sale by Guy to Feimster was void under the Statute of Frauds.

2. That, for the same reason, it was not subject to be sold in the manner that it was, by the constable.

The Court instructed the jury, that if they believed the evidence, the plaintiff was entitled to their verdict.

Verdict for the plaintiff; Rule etc.; Judgment, and Appeal.

Furches for the appellant. (260)
Clement and W. P. Caldwell contra.

SETTLE, J. The still in controversy was hired by Long and Johnson from the owner Guy, for the purpose of distilling whiskey during the Spring of 1866. This was a contract of bailment, and gave the bailee the possession and temporary use of the still, but did not divest the owner of his title, or prevent him from selling the property. In a

short time after this transaction, Guy sold the still, for a valuable consideration, to the plaintiff. This sale transferred the title to the plaintiff, and authorized him to take possession of the still, when the temporary bailment was ended. The plaintiff, soon after his purchase, notified Long of the fact, who made no denial of his claim. In April 1866, the still was levied upon by the defendant Hall, at the instance of the defendant Johnson, and sold at public sale to the defendant Johnson, after the time of the bailment had expired; the plaintiff being present, and forbidding the sale. This sale was an unlawful conversion of the property of the plaintiff, and gave him a good cause of action against the defendants.

It was insisted by the defendant, that, as the still was encased in masonry on the land of Long, it was a fixture; and the sale by Guy to the plaintiff was void, because the contract was not in writing, as required by the Statute of frauds. The doctrine of fixtures has no application to the case. Long, the owner of the land upon which the still was placed, makes no such claim; but if he did, it could not be maintained. A and B rent the still of C, to be used for a short time; they set it up on the land of A, and then B turns around and says that it is now affixed to the freehold of A and therefore C has lost all of his interest therein, and that *he,* who owns neither land nor still, can assert it. This carries the doctrine of fixtures to a greater extent than has ever been claimed for it before. As a general rule, whatever is attached to land is understood to be a part of the realty; but
(261) as this depends, to some extent, upon circumstances, the rights involved must always be subject to explanation by evidence.

Whether a thing attached to land be a fixture or chattel personal, depends upon the agreement of the parties, express or implied. *Naylor v. Collins,* 1 Taunt. 19; *Pervy v. Brown,* 2 Stark. 403; *Wood v. Hewitt,* 55 E.C.L. 913.

A building, or other fixture which is ordinarily a part of the realty, is held to be personal property when placed on the land of another by contract or consent of the owner: 1 Greenl. Cruise 46.

There certainly was an understanding between the lessor and the lessee, that the still should not become a part of the realty, but should retain its character as personalty, and remain the property of the lessor.

The first position of the defendant is only surpassed in boldness by his second, which is, that the still was not the subject of sale by a constable. It is difficult to treat the matter gravely, when we remember that the still was levied on by the defendant Hall, at the instance of the defendant Johnson, and that the defendant Johnson became the purchaser at the sale, when the plaintiff was present, doing all in his power to prevent it.

There is no error in the charge of his Honor, and the judgment must be affirmed.

Per curiam.

Judgment affirmed.

Cited: Overman v. Sasser, 107 N.C. 436; *Electric Co. v. Power Co.,* 122 N.C. 601; *Springs v. Refining Co.,* 205 N.C. 447; *Haywood v. Briggs,* 227 N.C. 115; *Ingold v. Assurance Co.,* 230 N.C. 145; *S. v. Hicks,* 233 N.C. 517; *Stephens v. Carter,* 246 N.C. 320.

(262)

ANSON CRITCHER v. ADDISON McCADDEN.

The law favors trials *upon the merits: Therefore,* where a judgment by a Justice of the Peace, was given against the petitioner, in his absence, and without his knowledge, and he was deprived of an appeal on account of the irregularity of his proceedings therefor; where, besides, he made an affidavit setting forth merits, and was not chargeable with unreasonable delay in applying for such relief: *Held,* that he was entitled to a *Recordari.*

PETITION for a *Recordari,* heard by *Watts, J.,* (April 29th 1869,) at Chambers, GRANVILLE Court.

The petition (filed March 6th 1869) alleged that a warrant against the petitioner was returned before Justices Paschall and Satterwhite of Granville county, on the 10th of February 1869; that the same was dismissed by them for want of jurisdiction; that on the 14th, in his absence, and without his knowledge, the matter was reconsidered by Justices Satterwhite and Cross, and judgment rendered against him for some $74.00; that upon hearing of it, he took an appeal, which he afterwards found to be *irregular,* because taken in the *old* form, and not under the provisions of the Code; that he had merits (setting them forth) etc.

Justice Paschall made affidavit confirming the statements of the petition in regard to what had occurred at the first trial of the warrant.

His Honor made an order for a *Recordari,* as prayed for, on the 11th of March, but afterwards (April 26th 1869,) upon a written affidavit being filed by McCadden, he recalled the same, and the petitioner appealed.

Rogers & Batchelor for the appellant.
C. M. Busbee contra.

If the appeal failed through the fault or negligence of the petitioner, he is not entitled to a *recordari. Satchwell v. Respass,* 32 N.C. 365; *Baker v. Halstead,* 44 N.C. 41; *Elliott v. Jordan,* Ib. 298.

(263) RODMAN, J. We are not informed for what reason the Judge below reversed his order for a *recordari.* A *recordari* is a substitute for an appeal from a judgment of a court not of record, where the appeal has been lost by fraud or accident. It is contended in this court, that the plaintiff lost the benefit of an appeal through his own laches. It does not appear so to us. The plaintiff swears that the judgment was taken in his absence and without his knowledge, and after he had been informed by two Justices, Satterwhite and Paschall, that the action was dismissed for want of jurisdiction in the magistrates; he also swears that he has a meritorious defence, and that as soon as he heard of the judgment he took an appeal, which he afterwards discovered was irregular, and he soon thereafter applied for a *recordari.* The judgment was on Feb. 10th, and the application for a *recordari* on March 6th. This statement is confirmed in the most important part, by the Justice, Paschall. We think it sufficiently appears that the petitioner always intended to appeal, and that he was not guilty of unreasonable delay. The law favors trials upon the merits, if applied for in reasonable time. We think there was error in the order appealed from. Upon the petitioner's entering into the proper undertakings, the Clerk of the Superior Court of Granville will put the action of *McCadden v. Critcher* upon the docket of his court, when the defendant therein shall be allowed to plead, and the action will be tried according to the course of the court. The Clerk of Granville Superior Court will cause this order to be notified to the parties. Order reversed. Let this opinion be certified.

Per curiam.

Reversed.

Cited: Howell v. Harrell, 71 N.C. 163; *S. v. Griffis,* 117 N.C. 714.

(264)

E. D. CLEMMONS v. E. D. HAMPTON AND W. B. MARCH.

A contract made during the recent war, — a part of the consideration for which was the carrying of the mail of the Confederate States by the defendants, cannot now be enforced, being against the public policy of the government.

Obiter, That the contract being void, property purchased by the defendant in the course of it, may be recovered, or *damages* had for its conversion.

ASSUMPSIT, tried before *Cloud, J.*, at Fall term 1869 of FORSYTH Court.

The Pleas were, General issue, Failure of consideration, Illegality of consideration.

The plaintiff declared upon two notes given to him by the defendants in February 1865, for $1,565.00, payable in *gold*, or its equivalent.

It was shown that the notes were given for coaches, horses, etc., with which the plaintiff was then carrying the mail for the Confederate States' government, between High Point and Salem, and that a part of the consideration was, that the defendants should take his place in that contract; and that accordingly this was done.

The plaintiff introduced evidence, showing that his contract with the Confederate States did not require that he should carry the mail in coaches, but that he might carry it on horseback, the coaches being used merely to accommodate travellers, also that the contract between defendants and himself, did not require them to carry the mail in coaches; that mail carriers during the war were exempt from military service; and that plaintiff surrendered the contracts in question, with a view to leave the Confederacy, and have an operation performed for deafness.

The defendants requested the Judge to instruct the jury, that the consideration of carrying the mails of the Confederate States was against public policy, and unavoidably infected and vitiated the contract in question, no matter what other purposes and considerations may have entered into the transaction. (265)

The judge declined this request, and instructed the jury, "That if the illegal use to be made of the property sold, entered into the contract, and formed the motive or inducements in the mind of the plaintiff, he could not recover."

Verdict for the plaintiff; Rule, etc.; Judgment, and Appeal.

Masten and Clement for the appellants.

T. C. Wilson and Scott contra.

It is enough for the purposes of the defendants in this case, that the plaintiff sold the property, knowing what use the defendants were about to make of it; here, however, the plaintiff sold them for that object; Benjamin on Sales, 380 etc., 404: *Cannon v. Boyce,* 3 B. and Ald. 179; *Langton v. Hughes,* , 593; *Martin v. McMillan,* 63 N.C. 446.

RODMAN, J. It is unnecessary to cite here the several recent cases in this court, in which the subject of illegal considerations has been discussed. A part of the consideration of the notes sued on, was that the defendants would take the place of the plaintiff, in his contract with the Confederate States, to carry the mail, and perform that service. The plaintiff alleges that the agreement of the defendants in that respect did not at all affect the amount of the notes sued on, which was fixed entirely by the value of the property sold; that as mail contractors were exempt from military service, it was easy to find persons who would carry the mail without other compensation. But it is impossible not to see that the agreement by the defendants to carry the mail entered as an inseparable element into the consideration, and affected, in one way or another, the price which the defendants agreed to pay. We think, therefore, the contract sued on is void.

But it does not follow that the plaintiff is obliged to lose the (266) property which he sold to the defendants, or that they, being *in pari delicto* with the plaintiff, can retain it without compensation to him. The law is not so unjust. The whole transaction, being for an illegal purpose, is void, and the plaintiff has his remedy to recover the property or damages for its conversion.

Per curiam.

Venire de novo.

Cited: Cronly v. Hall, 67 N.C. 11; *Lance v. Hunter,* 72 N.C. 179; *Covington v. Threadgill,* 88 N.C. 190.

ROBERT N. JOHNSON GUARD'N, ETC. v. JOHN T. FARRELL, EX'R. AND OTHERS.

A testator died in 1864, leaving lands, and a sufficiency of personal estate to pay debts and legacies; by Emancipation the latter afterwards became insufficient; after giving some money legacies, and devising certain lands etc., to his wife for life, the testator had given to others "all my real and

personal estate not heretofore disposed of": Upon a question between the claimants of the money legacies, and those who claimed the land under the last provision, *Held*, that the loss subsequent to the death, fell upon the legatees, and not upon the devisees.

ACTION for a legacy, tried before *Tourgee, J.*, at Fall Term 1869 of CHATHAM Court.

The facts were that one James C. Burke, the defendant's testator, died in 1864, leaving a will by which he gave to his wife two slaves and other personalty, also some land for life; then, to one grandchild, $400, and to others, among them, $500; and afterwards, to his four living children, naming them, "all my real and personal estate not heretofore disposed of, to be equally divided between the four." At the time of his death the testator owned six slaves, of average value, besides other personal property, and lands.

The slaves were emancipated by the results of the war before the estate had been settled, and, after paying the debts, etc., there remained in the hands of the executor, for the satisfaction of (267) the money legacies above, about $292.00.

The legatees claimed that the land given by the residuary clause was to be sold, and their legacies paid out of the proceeds, before the residuary devisees could take. This was resisted by the residuary devises.

His Honor ordered that the land be sold, and its proceeds applied as prayed for by the plaintiffs; and the defendants appealed.

Phillips & Merrimon for the appellants.

1. It is doubtful how far the doctrine of *mixed or blended residues* of realty and personalty applies in North Carolina; as in England it seems to be a corollary from a proposition not received here: See *Robinson v. McIver*, 63 N.C. 645; also dissenting opinion in *Biddle v. Carraway*, 59 N.C. 95; *Dunn v. Keeling*, 13 N.C. 283; *Knight v. Knight*, 59 N.C. 134; *Graham v. Little*, 40 N.C. 407; *Harris v. Ross*, 57 N.C. 413. As all devises are still specific, even where found in a residue *(Hensman v. Fryer*, Law Reps., 3 Ch. Ap. 420) the language in *Knight v. Knight etc.*, as to funds *primary* liable, is still law.

2. Where the deficiency in the personalty results from some accident after the testator's death (as here), there seems to be no reason why devisees of land (upon whom it devolves immediately, *Patton v. Patton*, 60 N.C. 572, and not *through* the executor,) should refund, in consequence of a charge alleged to have arisen *after they received* their portions, *Lupton v. Lupton*, 2 John. Ch. 614 (p. 626).

This is upon a principle different from that in *Dyose v. Dyose,* (Wms. Ex'rs, 2d 1167), which has been overruled in England; and never was accepted in North Carolina, *Cloud v. Martin,* 22 N.C. 274. There, the whole fund remained with the representative of the testator: Here, the part sought to be subjected has gotten
(268) *home.* At the time when the land reached the devisees, there was no pretence that it was subject to diminution. The devisees of the land are not to share in a calamity which has fallen upon the claimants of the personalty.

(3.) Again, so far as the personalty has been taken to pay debts, these claimants are not entitled to be made whole: See *McBee, ex parte,* 63 N.C. 332; *Knight v. Knight* 59 N.C. 134.

Manning contra.

This is a case of *a mixed residue of realty and personalty,* within the principle laid down in *Robinson v. McIver,* 63 N.C. 645. He cited also 1 Red. Wills, p. 279, §§ 15 and 18, *Graves v. Howard,* 56 N.C. 302, 1 Rop. Leg. 675, 2d Red. Wills, 370 and n., *Bray v. Lamb,* 17 N.C. 372.

PEARSON, C.J. In *Robinson v. McIver,* 63 N.C. 645, it is said: "When land and personal estate are made a mixed fund in a residuary clause, the land, as well as the personalty is subject to the payment of pecuniary legacies. This, however, is not on the footing of a *charge on land,* like the annuities in this case, but on the ground that, in order to ascertain what is embraced in the residuary fund, it is necessary to take out the specific legacies, and then to deduct the pecuniary legacies, and only what remains is 'the rest or residue of the estate.' The residuary legatee (and devisee) takes only what is left."

In the will under consideration, all of the real and personal estate, "not heretofore disposed of," is given to the four living children of the testator. In order to ascertain what is embraced under this clause, according to a well settled rule that the personal estate is the *primary fund* for the payment of debts and pecuniary legacies, it is necessary to take out of the personal estate enough to pay debts. Then take out the specific legacies to the widow; then deduct enough to
(269) satisfy the pecuniary legacies; and the rest passes under the description, "personal estate not heretofore disposed of."

By a like process, take out what land is given to the widow, and the rest passes to the devisees, under the description, "real estate not heretofore disposed of." If there had been a deficiency of personal

estate to satisfy the pecuniary legacies, it may be that it would have been necessary to deduct from the land enough for that purpose, "not on the footing of a *charge on the land,*" but as a means of ascertaining what land was embraced by the description.

In this case the personal estate was ample to pay debts, to set apart the specific legacies, and to satisfy the pecuniary legacies, leaving four slaves of average value, which, subject to these legacies, passed under the residuary clause. So the land, other than that given to the widow, was embraced by the description, and vested in the devisees, *free of any charge.*

It so turned out that afterwards the four negroes were lost to the fund by civil death. The question is, shall this loss fall on the pecuniary legatees, or have they a right to resort to the land which had already vested in the devisees. We can see no principle on which to make the land liable. Herein lies the significance of the distinction taken, in *Robinson v. McIver, supra,* between a *charge* on land, and the process by which to ascertain what land is embraced by the description. If these legacies had been charged on the land, like the annuties in the case referred to, as the devisees would have taken *cum onere,* the loss would fall on them. But as the land vested in them free of the charge, the loss by a subsequent event, that is the emancipation of the slaves, must fall on the pecuniary legatees, in which loss the widow, in respect to her two negroes, and residuary legatees in respect to their interest in the other four, must be common sufferers.

His Honor being of opinion that the land in the hands of the residuary devisees was liable for the pecuniary legacies, made an order of sale, and directed so much of the proceeds of sale (270) as should be necessary, to be applied to the satisfaction thereof.

In this there is error.

Let this be certified.

Per curiam.

Order reversed.

Cited: Little v. Hagar, 67 N.C. 139; *Hill v. Toms,* 87 N.C. 495; *Litaker v. Stallings,* 200 N.C. 7.

THE STATE v. REUBEN DEAL.

A prominent feature in that *Felonious intent* which distinguishes Robbery or Stealing from Forcible Trespass, is, *an intent to evade the law*, as, *ex. gr.* by *concealing* from the owner of the thing taken, *the person who took it, i.e.*, the person who *might be sued*, or, *might be indicted;* such, are the familiar instances of taking goods etc., by persons *in masks*, or, *with faces blacked*, or, *on the highway.*

Artifice in getting possession of the thing, is to be distinguished from *artifice in concealing the fact that the taker has it in possession:* It is the latter that shows a *felonious intent.*

Cases in which persons *concealed* "shawls" etc., which they had previously *found*, are excepted from the general rule, because of the *temptation* to which they were subjected by *circumstances rarely occurring.*

Where the maker of a note who had complained of the manner in which he had been treated in the transaction in which he had given it, went to the holder, and after proposing to pay it in a certain way which was refused, asked to see it, upon one pretext or another, and upon having it delivered to him by the holder, kept possession of it, saying "you wont get it again;" and upon a struggle ensuing, snatching up an axe, retreated to his horse, and then rode off, adding "Tom (the holder's son, and a surety to the note) sent me word to get this note as I could:" *Held*, to be no case of either Robbery or Larceny.

(*State v. Sowls*, Phil. 151, cited and approved; Roper's Case, 3 Dev. 473, cited commented upon, and approved.)

Per RODMAN, J., (Dissenting.) In the case of the maker of the note above stated, there is no error in the instructions to a jury: that *if they should find* that the defendant went to the holder with a felonious purpose, to get possession of it, and resorted to a fraudulent trick, to effect that purpose, he is guilty of *larceny.*

An *open manner* of taking, although *evidence* of Forcible Trespass only, is yet not *proof* of it, but may consist with larceny; the distinction is, that in the latter case, there must be, *an asportation, and an intent to deprive the owner of his property with a view to some advantage to the taker.*

LARCENY, tried before *Jones, J.*, at Spring Term 1869 of
(271) EDGECOMBE Court.

The indictment contained also a count for Robbery.

The facts were that Deal had given a note (with sureties) to one Anderson, for the price of land sold by Anderson in 1867, as administrator of his son. A deed had been made to him, but, some year after, he complained of some defect in it, whereupon Anderson procured another deed to be made. Afterwards Deal complained again, that the second deed did not secure him against the right of its maker's wife to dower. Subsequently, he went to Anderson's place and proposed to sell him cotton in payment of his note; this was de-

clined; Deal then asked to see the note, and being told that it was at the house, insisted on seeing it; Anderson asked, *Why?* and Deal said, *to see what sort of currency it is payable in;* Anderson replied, that made no difference, as *he* would be obliged, when Deal was ready to pay, to take the currency it called for; Deal still insisted, and they went to the house, Deal sitting down outside of it. Anderson brought the note out and showed it to Deal, who took it, saying: "Now I have got it, and you won't get it again." Anderson told him to give it back, and seized his hand; Deal broke loose and jumped at an axe, and catching it up, kept possession of it until he reached his horse, saying that Anderson's son Tom, who was one of the sureties to the note, had sent him word to get the bond as he could or might. He then rode away, carrying the bond, and saying that if Anderson would make him a title, he would pay for the land.

The defendant was acquitted of Robbery, under the instructions of the court.

In regard to the count for larceny, the court instructed the jury, that if they should find that the defendant went to An- (272) derson's house with a felonious purpose to get possession of the note, and resorted to a fraudulent trick or device to effect that purpose, — he was guilty of larceny.

Verdict, guilty of the larceny etc.; Rule etc., Judgment, and Appeal.

Howard for the appellant.

This is a case of *Forcible Trespass* only, according to *State v. Sowls,* Phil. 151.

As the law of evidence, and the remedy stand at present, a man cannot steal *his own note.*

He also relied upon *Regina v. Holloway,* 61 E.C.L. 943.

Attorney General contra.

Getting possession by a trick, accompanied by a fraudulent purpose of depriving the owner of his entire interest, is *larceny.* Arch. Cr. Pr. 182 and cases (cited by Roscoe, Cr. Ev. pp. 573, 577), *Rex v. Rodway* and *Rex v. Small.*

There was here no fair *color* of claim to the note, by the defendant: See Arch. 178, Roscoe 590.

PEARSON, C.J. The distinction between a mere trespass and a forcible trespass on the one side, and simple larceny and robbery on

the other, when the two, like light and shade run into each other, is hard to draw, and it requires clear discrimination to mark the dividing line. I attempted, with the aid of Mr. Justice Foster, whose prominence as a criminal lawyer all admit, to mark the line in *State v. Sowls,* Phil. 151. It seems I was not fortunate enough to make my meaning clear, and I will "run and mark the line over again."

If one takes the property of another, it is a mere trespass,
(273) for which an action lies: if *manu forti,* the owner being present, it is a forcible trespass, for which an action lies, and also an indictment. If the taking be with a felonious intent, the act is larceny, either stealing, or robbery. So it turns upon the felonious intent; and the question is, what is meant by a felonious intent.

A prominent feature of it is, that the act be done in a way showing an intention to "evade the law," that is, not to let the owner know who took his property, and, against whom to bring his action; or who is to be indicted. If one takes property slyly, — by stealth — he steals: if he takes the property forcibly, under a mask, or with his face blacked as a disguise, or when he supposes the owner cannot identify him, as on the high-way, he commits robbery. So the prominent feature of a felonious intent is "an attempt to evade justice." Such is the doctrine laid down by Foster as the common law, and such I know was the opinion of Chief Justice Henderson; whose power of reflection exceeded that of any man who ever had a seat on this bench, unless Judge Haywood be considered his equal in this respect. Judge Henderson used to ask: "What is the difference between trespass and larceny? Reply: "A felonious intent." "What is meant by a felonious intent?" Reply: "An intent to conceal from the owner, who took his property, so that he may not know against whom to bring his action, or, whom to indict." If a man takes my property openly and above board, I know whom to sue, and, if force is used, I can also have him indicted. So, such acts are not apt to occur, and the public needs no special protection against them: Beccaria on Crimes. But where there is an attempt to do the thing slyly, or do it by force under circumstances of disguise, the community needs protection, and these acts are treated as being done with a felonious intent, and are punished accordingly: *Id.*

Again, when the act is done under color of right, or some seeming excuse for it, provided there be no fraudulent concealment of
(274) the person doing the act, there is no felonious intent, and the act is not larceny: *Regina v. Holloway,* 61 E.C.L. 941.

In our case there was no attempt to conceal; the party knew who had his note, and against whom to bring his action: so there was no effort to "evade the law," and there was some color of right, or seeming excuse for the act. The defendant alleged that the title

to the land for which he had executed the note, was not good, for that it was subject to a dower right, and, being dissatisfied with this state of things, he resorted to a trick to get hold of the note, for the purpose of cancelling it. This is the "head and front of his offending:" his conduct was reprehensible, but it does not make him guilty of *stealing.*

There is no one feature of a felonious taking in the face of this transaction; no attempt to "evade the laws;" and there is a *seeming* excuse for the artifice by which he got possession of the note. The distinction is between artifice to get possession of the note, and artifice to conceal the fact that he had gotten it in possession. This would have made the taking felonious. But no concealment was attempted in regard to his having gotten the note into his possession. It is strange to me that gentlemen of legal science cannot see the distinction between artifice to get hold of the note, and artifice to conceal the fact of his having gotten it into possession. On this distinction, new, it is true, in our cases, rests the question of taking with a felonious intent.

This case has no feature of larceny. It is the trick of an ill-advised man, who, thinking he had been imposed on in a trade, thought, if he could get hold of the note and cancel it, he would be thereby relieved from all further obligation. The law does not visit rare instances of this kind, with the infamy of the crime of larceny. Indeed, if this act has any feature of larceny, it would fall under the head of *robbery,* and not of stealing; so the man was convicted upon the wrong count. This shows that the distinction between trespass and larceny was not understood either by the Judge or the jury. If one finds a shawl that has been lost, (275) and, *tempted by the opportunity,* conceals the fact, and appropriates to his own use, it is not stealing, the books say, *because* there was no wrongful taking: See *Roper's* Case, 14 N.C. 473; but the reason of the law goes deeper into human nature. It is because of the *temptation,* to which many a man may yield who would not steal. "Lead us not into temptation," is a prayer enjoined by One who knew the frailty of human nature. The defendant was held not guilty of stealing, *because* of the temptation, to which many a man may yield, who would not steal, and because such occasions are rare, and society needs no special protection against them. A man finds the pocket-book of a stranger; after several years, the owner not appearing, the man uses the money; the owner then appears; the man denies all about it; the facts are proved: The man is not guilty of stealing; the books say, *because* the taking was not wrongful; but the philosophy of the law is, *because* such cases rarely occur, and the man was "led into temptation."

In *Rex v. Webb and Moyle,* 1 W.C.C. 4 31, it is held that "it is not larceny for miners to bring ore to the surface, and, when paid by the owner according to the quantity produced, to remove from the heaps of other miners ore produced by them, and add it to their own, in order to increase their wages, the ore still remaining in the possession of the owners." This case was put upon ground that the owners are not deprived of their property, and as between the miners, the fraud is one not of frequent occurrence, and which may be easily guarded against; so the public needs no special protection against the offence.

We are satisfied the facts do not make out a case of stealing, or of robbery. There is error. This will be certified.

RODMAN, J. *(dissentiente.)* The following exceptions are taken to the conviction of the defendant:

1. The taking was open, and not sly or clandestine, and
(276) he did not attempt to flee justice; therefore the taking was a trespass only, and not larceny. The Judge told the jury that "if the defendant went to the prosecutor's house with a felonious purpose to get possession of the note, and resorted to a fraudulent trick or device to effect that purpose, he would be guilty of larceny." So the question of felonious intent was left to the jury upon the evidence, and found by them. If therefore an open manner of taking be only a circumstance tending, as matter of evidence, to negative a felonious intent, and subject to be out-weighed by other circumstances in evidence, it seems to me there can be no exception to the instructions on this point. If however, an open taking is in law conclusive of the non-existence of the felonious intent, and a sly and clandestine manner of taking be always a necessary ingredient in the offence of larceny, the instructions were erroneous. But I cannot think that this last proposition can be sustained. Lord Hale says: "If A takes away the goods of B openly, before him or other persons (otherwise than by apparent robbery) this carries with it *an evidence* of only a trespass, because done openly in the presence of the owner, or other persons that are known to the owner." The instances he gives, are of persons taking things under circumstances from which the permission of the owner might be not unreasonably, supposed, and after using them a while, returning them; and he adds: "But in cases of larceny the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to prescribe all the circumstances evidencing a felonious intent, or the contrary, but the same must be left to the due and attentive consideration of the Judge and jury; wherein the

best rule is, *in dubiis,* rather to incline to acquittal than conviction." From which, it seems to me that Lord Hale did not think an open manner of taking, inconsistent with larceny, but only a circumstance from which the jury might infer the absence of a felonious intent. The following is the definition of a felonious taking by the English Cr. Law Com., cited in Roscoe Cr. (277) Ev. 5 69: "The taking and carrying away are felonious, when the goods are taken against the will of the owner, either in his absence or in a clandestine manner, or where the possession is obtained either by force or surprise, or by any trick, device, or fraudulent expedient, the owner not voluntarily parting with his entire interest in the goods; and when the taker intends, in any such case, fraudulently to deprive the owner of the entire interest in property against his will."

Vaughn's case, 10 Grattan 758, resembles this as closely as a case can, and is a positive authority against the prisoner. A number of cases too numerous to be particularly cited, may be found referred to in Roscoe, Cr. Ev. 572-580, in which the taking was as open as in this case, but the parties were held guilty of larceny; See especially *R. v. Aikles,* 2 East, P. C. 675; *R. v. Wilkins,* 2 E. 673; *R. v. Williams,* 6 C. & P.; 390, (25 E.C.L.)

It may be asked, if an open manner of taking be consistent with larceny, wherein does larceny differ from a forcible trespass. The answer is; — in larceny there must be an asportation, and an intent to deprive the owner of his property, with a view to some advantage to the taker; whereas an indictable trespass may consist in a forcible injury to the goods without taking them away, and from some other motive than, advantage to the trespasser.

2. The taking was under a claim of right. It is of course admitted that if the taking was under a *bona fide* claim of right, it would not be felonious, and consequently, not larceny: Roscoe Cr. Ev. 592. But if the claim were a mere pretence, not really believed in, it would have no such effect: Roscoe, *ub. sup.* It will be sufficient to say of this point that it does not appear to have been taken on the trial, or that any special instruction upon it was requested. It has been repeatedly held that it is not error in a Judge to omit to give particular instructions, unless prayed for: *State v. O'Neal,* 29 N.C. 251; *Arey v. Simpson,* 34 N.C. 34. I do not see any positive error in the instruction given. (278)

3. Inasmuch as the prisoner was one of the obligors in the note, he could not be guilty of larceny in taking it.

I do not see any weight in this, but it is fully answered in *Vaughn's* case, above cited.

4. That the taking was by force, and was therefore robbery, not larceny.

But the jury have negatived the force; and if they had not, it seems to me that it would not lie in the prisoner's mouth to say, he took by force, and being guilty of robbery, could not be convicted of larceny any more than, if indicted for petit larceny in stealing under the value of 12 d., he could say the goods were of greater value, and thus escape conviction of the inferior offence: Haye, P.C. 530. On an indictment for grand larceny, the prisoner may be convicted of petit larceny: *Ibid;* and, on an indictment for robbery, of larceny, since every robbery includes a larceny: *Harman's* case, Hale, P.C. 534.

For these reasons I think the judgment should be affirmed.

Per curiam.

Judgment reversed.

Cited: S. v. Jackson, 65 N.C. 306; *S. v. Henderson,* 66 N.C. 628; *S. v. Powell,* 103 N.C. 427; *S. v. Bradburn,* 104 N.C. 882; *S. v. Foy,* 131 N.C. 806; *S. v. Holder,* 188 N.C. 563; *S. v. Delk,* 212 N.C. 633; *S. v. Lawrence,* 262 N.C. 165.

JOS. M. S. ROGERS v. B. W. GOODWIN.

When a verdict upon issues sent for trial from this court to a Superior Court, is, in the opinion of the Judge who presided, contrary to the weight of the evidence; or in case of any other miscarriage by the court, or the jury, such Judge has full power to grant a new trial.

Cases in equity pending at the adoption of the present constitution, cannot now be *transferred* for trial to this court; they must be heard below, and can only be constituted here *by appeal.*

MOTION for a new trial of *issues,* made before *Watts, J.,*
(279) at Fall Term 1870 of NORRTHAMPTON Court.

The issues had been sent for trial from this court.

No statement of the facts is necessary.

Bragg for the motion.
Peebles contra.

PEARSON, C.J. His Honor was of opinion, that the verdict was against the weight of the evidence; but he doubted his power to set

aside the verdict and order a new trial, and on that ground refused the motion.

On the argument before us, it was properly conceded that his Honor had the power, and the only question was upon the construction of the words used by him in sending up the issues.

We are satisfied that he would have ordered a new trial, but for his doubt in regard to the power to do so on the "trial of issues" sent from this court.

Upon the trial of issues of fact sent down by this court, the Judge in the court below has full power to correct any miscarriage of the jury or any error that may have been committed by himself, in respect to the admission or rejection of evidence, or in his charge, by granting a new trial. In these respects his power is the same as on the trial of actions: *Peebles v. Peebles,* 63 N.C. 656. The English precedents in regard to issues sent by a Court of Equity, are not applicable. Ours is a new system which rests on the provision of the constitution, "No issue of fact shall be tried before the Supreme Court." Art. 4, sec. 10.

We take occasion to say that the statute allowing cases in equity to be transferred to the Supreme Court for trial, is repealed, by the effect of the constitution creating this court as a "Court of Appeal."

Equity cases pending before the adoption of the constitution, must be heard and disposed of below, and can only be constituted in this court by appeal. (280)

The verdict must be set aside, and a new trial of the *issues* ordered.

Per curiam.

Ordered accordingly.

Cited: Ferrall v. Broadway, 95 N.C. 556.

JULY TODD AND OTHERS v. S. S. TROTT, ADMINISTRATOR, ETC.

Testator died in 1869, leaving a will, made in 1858, by which he directed "all my negroes, July," etc., (naming them — *seven)* "to be removed and settled in some free State"; and to meet the expenses of removal, bequeathed to his executors $800, and in same clause provided: "Should there be any balance of the trust fund herein created, remaining, after paying the expenses of the removal of my slaves, as aforesaid, then to pay over such balance to my said slaves, to be equally divided among them".

Two of the slaves died, unmarried and without issue, before the testator: *Held*,

1. Notwithstanding the slaves were emancipated in a way other than that anticipated by the testator, and were not compelled to *remove*, they are entitled to the legacy.

2. The legacy being to the individuals of the class *nominatin*, and not to the class as such, the shares of the two who died before the testator, did not survive to the others, but lapsed.

ACTION for a legacy, submitted upon facts agreed, to *Cloud, J.*, at Fall Term 1869 of ROWAN Court.

The testator, Thomas Todd, died in August 1869, leaving a will, published January 16th 1858, and duly admitted to probate etc., and the defendant was thereupon appointed administrator *cum testamento* etc. Two of the slaves mentioned in the will died before the testator. The legacy in question was given in the following terms:

"It is my will and wish that all my slaves be emanci-
(281) pated and released from servitude, but knowing that this cannot be accomplished without their removal from this State, I declare it to be my will, and I hereby expressly direct my executors, that as soon after my death as it can conveniently be done, they cause all my negroes, to-wit: July etc. (naming seven), to be removed and settled in some free State or States etc.; and for the purpose of enabling my executors to carry out my will in regard to my slaves, I will and bequeath to them eight hundred dollars, to be raised out of my personal estate etc., to be applied in the removal of my said slaves etc.; and if there should be any balance of the trust fund herein created, remaining after paying the expenses of the removal of my slaves as aforesaid, then to pay over said balance to my said slaves, to be equally divided among them" etc.

The questions in difference were:

1. Whether the plaintiffs were entitled to any part of the eight hundred dollars; and

2. Whether, if so entitled, to the whole amount, or only to *five-sevenths thereof.*

His Honor gave judgment for the plaintiffs, for *five-sevenths* of the money.

Appeal by the defendant.

Clement for the appellant.
Boyden & Bailey contra.

1. Upon the first question, they cited *Hayley v. Hayley,* 62 N.C. 180; *Shannonhouse v. Whedbee, Ib.* 283; *Robinson v. McIver,* 63 N.C. 645.

2. The legacy of the *balance* is "to my said slaves, to be equally divided between them," *i.e., to a class. Simms v. Garrett,* 21 N.C. 293; *Mebane v. Womack,* 55 N.C. 293; *Whedbee v. Shannonhouse,* (above), *Knight v. Gould,* 2 My. & Ky. 295, 2d (282) Redf. Wills, 499, etc., 1 Jarm. Wills, 304.

The naming of the slaves occurs only in a preceding part of this item of the will.

SETTLE, J. Two questions are raised by the pleadings:

1. Whether the plaintiffs are entitled to the whole or any part of the legacy or trust fund of $800, specified in item 2, of the last will and testament of Thomas Todd.

2. Whether the plaintiffs are entitled, if entitled at all, to only five sevenths, there having been seven slaves named in the will, and two of the seven having died before the testator.

We think that both questions are determined beyond doubt, by the adjudications of this Court.

It is evident that the primary object of the testator was to liberate his slaves, and to make such provision for them, in their new and changed condition, as would enable them to make a support.

It is immaterial how they obtained freedom. Although it was accomplished in a manner not contemplated by the testator, when he published his will, it would be a work of supererogation, after the decisions in *Hayley v. Hayley,* 62 N.C. 180, *Shannonhouse v. Whedbee, Id.* 283, and *Robinson v. McIver,* 63 N.C. 645, to adduce arguments to show that the plaintiffs are entitled to recover *something* in this suit.

Are they entitled to the entire trust fund, to-wit: $800, or only to five sevenths of that amount?

The important portions of the will, so far as this question is involved, are as follows: "I declare it to be my will and I hereby expressly direct by Executors, that as soon after my death as it conveniently can be done, they cause all my negroes, to-wit: July, etc., (naming seven) to be removed and settled in some free State or States, etc." For the purpose of enabling his Executors to carry out his will in regard to his slaves, he says, "I will and bequeath to them ($800) eight hundred dollars to be held by them in (283) trust, and applied in discharge of their expenses in the removal of my said slaves to a free State or States, or to Liberia, as the case may be, and if there should be any balance of the trust

fund herein created, remaining after paying the expenses of the removal of my slaves as aforesaid, then to pay over such balance to my said slaves, to be equally divided among them."

Two of the persons named in the will, to-wit, Bob and Parker died unmarried and without issue, in the life time of the testator.

It will be observed that he not only names the objects of his bounty *seriatim*, but directs his executors to pay over the balance to his said slaves, "to be equally divided among them." Had this fund been given to his slaves as a class without naming them, they would undoubtedly have been entitled to the whole; but by naming them they become legatees individually. Suppose after publishing his will, the testator had purchased other slaves. Would they have been entitled to any part of this fund? The argument was that the slaves were entitled as a class; if so, the bequest to July, Bob, Tom, Lennon, Eliza, Rachel and Parker, must have opened in the case supposed, to receive the newly purchased slaves.

The statement carries its own answer. Persons named specifically in a will do not take as a class, but individually; therefore the legacies to Bob and Parker lapsed, and must go to the next of kin.

The clerk will tax the costs in this action against the defendant.

Per curiam.

Judgment affirmed.

Cited: Heyer v. Beatty, 83 N.C. 290; *Wooten v. Hobbs,* 170 N.C. 214.

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(284)

J. A. McCONNAUGHEY v. JOSEPH F. CHAMBERS AND W. R. FRALEY.

Where two persons hold debts against each other:—in the absence of any understanding between them, that the one debt shall be applied to the other, — there is no lien or equity to prevent one party from making an honest assignment of his claim, even if thereby the other is prevented from recovering *his:* This is so, even in cases of entire mutuality of debt, *therefore;*

Where there was not such entire mutuality, and A had assigned his note without endorsement to a trustee to pay debts, and afterwards, judgments were obtained upon both notes: *Held,* that there was nothing, in the relation of the original parties at the time of the assignment, which gave B a right to claim that the trustee took A's note, subject to off-set by *his.*

Therefore, a motion by B, to have judgments as above, set off against each other, was denied.

MOTION, to set one judgment off against another, heard by *Cloud, J.*, at Fall Term 1869 of ROWAN Court.

The plaintiff, as surviving partner of the firm of J. J. & J. A. McConnaughey, had obtained judgment, upon a note given in 1857, for $1,278.86 etc., against the defendant Chambers at the above term; and at the same term, the defendant Fraley, as trustee of Chambers, for the purpose of paying debts, had recovered judgment, upon a note given in 1863, for $1,756.00 etc., in the name of Chambers, to his use, against several parties, of whom the plaintiff, personally, and as an executor of J. J. McConnaughey, was principal. The motion was made in relation to these.

It was admitted that the one debt was due *to the firm of* McConnaughey, and that the other was due *by it*, as principal; that both were for valuable consideration; that Chambers, on the 9th of February 1867, had, by deed, conveyed the note due to him, (unendorsed) to Fraley, as trustee, to pay his debts, and was now entirely insolvent.

His Honor granted the order as applied for, and the defendants appealed.

Blackmer and McCorkle for the appellant. (285)
Boyden & Bailey contra.

Fraley is not a purchaser for value, and besides, took the note when past due; he is therefore to stand in Chambers' shoes as regards all defences that McConnaughey might have urged against the latter. *Turner v. Baggerley*, 33 N.C. 331; *Little v. Dunlap*, 44 N.C. 40; *Harris v. Horner*, 16 N.C. 455, *Holderby v. Blum*, 24 N.C. 51.

PEARSON, C.J. In the absence of an agreement between the parties, that the one debt should be applied to the discharge of the other, we can see no principle of law upon which the Court can make the application, *to the prejudice of third persons*. The question is narrowed to this: At the time Chambers executed the deed of trust to Fraley, did McConnaughey have any lien or any equity which attached to this debt, so as to make it against conscience for Chambers to appropriate the debt to the benefit of other creditors, to the exclusion of McConnaughey?

The case is simply this: A holds a note on B; B holds a note on A for about the same amount; A sues B at common law, B had no

right to plead the debt to him in bar of the action, but by statute he is allowed to do so. Still, he is under no *obligation* to plead the set-off; suppose he does not elect to do it, and assigns by deed of trust this debt and other debts, to pay other creditors, what principle of law forbids it? We know of none. This is putting the case as if the set-off might have been pleaded, if the defendant had elected to do so, and the case is certainly no stronger where, as here, it could not have been used as a legal set-off.

In short, although it seems singular that two debts should be allowed to stand without some understanding that the one should be applied to the other, still, as there was no such understanding, each party had the control of his own debt, and neither had (286) a lien, either in law or equity, which prevented the other from making an assignment for an honest purpose, in the exercise of the right to prefer creditors.

There is error.

This will be certified.

Per curiam.

Reversed.

Cited: Neal v. Lea, 64 N.C. 679; *Martin v. Richardson,* 68 N.C. 258.

WILLIAM F. McKESSON AND OTHERS v. C. P. MENDENHALL AND OTHERS.

Where lessors sued lessees for rent; *Held*, that the latter were entitled, as a counter-claim, to show that the lessors had no right to make the lease, and that the real owners thereof had brought suit against one of the lessees, and would recover damages for its use during such lease.

In such case the persons claiming as real owners, should be made parties to the action.

ACTION for money, tried before *Mitchell, J.*, at Fall Term 1869 of BURKE Court.

The complaint set forth as the ground of action, a note, of which the following is a copy:—

"$4,000.

Two years after date we promise to pay McKesson & Hunt four thousand dollars for that portion of the McDowell land we have

rented; the same to be paid in the current funds of the country when due; this 14th of November 1863.

Jones, Mendenhall and Carter."

The answer alleged that the land for which the note was given, belonged, at the time of lease, and ever since, to certain persons, who are now bringing suit against one of the defendants for damages, in having occupied the land under such lease, and that he is advised that they will recover; and that they deny that the plaintiff ever was their agent lease, as he claimed to be etc.; other allegations were made in reference to the right of the defend- (287) ants to *the scale,* but the course of the opinion renders it unnecessary to state them.

No replication was filed.

Upon the trial before the jury, the Court refused to allow the defendants to go into evidence upon the subject of the title; or to show, that at the time of giving the note, it was agreed that it might be discharged in Confederate money.

From these rulings, the defendants appealed.

The Court, however, allowed evidence to be given by the defendant as to the value of the rents of the land in question.

From this ruling the plaintiffs appealed.

Verdict, and Judgment, below, for $871.17, etc.

Folk for the plaintiffs.
Clement contra.

Dick, J. The defendants, in their answer, allege that the note upon which the action was brought, was given for the rent of a tract of land, which the plaintiffs had no power to demise. They further allege, that an action has been commenced against one of them by the owners of the land, to recover damages, for the unlawful possession held under the lease of the plaintiffs.

These allegations in the answer, if true, constitute a good counter-claim, as it is a cause of action arising out of the transaction which induced the contract set forth in the complaint as the foundation of the plaintiff's claim: C.C.P., sec. 101. As these allegations of new matter in the answer, constituting a counter-claim, are not controverted by a reply, they are to be taken as true for the purposes of the action; C.C.P., sec. 127, and his Honor, upon motion, might have given judgment for the defendants.

His Honor heard the counter-claim set up in the answer, as upon demurrer, although a demurrer was not filed. The new rules of pleading ought not to be strictly enforced in this case, as

(288) the action was commenced so soon after the adoption of the Code of Civil Procedure; and we take it for granted that his Honor, in the exercise of his ample discretion, will allow the pleadings to be supplied and amended. We will consider the case as if the pleadings were regular, and presented the true issues between the parties.

The lease, for which the bond was given, implied an obligation on the part of the plaintiffs to secure the defendants the possession and enjoyment of the demised premises, and to indemnify them against the demands which a paramount owner might claim as damages for unlawful occupation. The rent is dependent upon this implied obligation, and ought not to be collected until full indemnity is secured to the defendants. If our old system of jurisprudence were now in existence, the defendants could obtain adequate relief in a Court of equity. Their remedy now, is to set up their equity as a counter-claim to the action of the plaintiffs. The Superior Courts have ample jurisdiction to adjust and determine the legal and equitable rights and liabilities of the parties to the action, and all other persons interested in the subject matter of the controversy.

The defendants held possession of the land in question, and are liable for rent to the plaintiffs, accroding to the terms of the bond, —or to the owners for damages; but not for both. It is evident that a complete and equitable determination of the controversy cannot be had without the presence of the owners of the land, and the Court below should cause them to be brought in before another trial: C.C.P., sec. 65. It may hereafter appear that the owners authorized the plaintiffs to lease the land; and then there would be another contract to construe and determine. His Honor can direct the proper issues, to ascertain all the facts in the case, and then determine the rights and liabilities of the parties. If the plaintiffs had no authority to demise the land, they ought not to recover rent, and the bond sued on, ought to be cancelled. The owners cannot recover on the bond, as they are not privies to the con-
(289) tract, but they are entitled to recover such damages as a jury may assess, for the trespass of the defendants.

If his Honor had ruled correctly upon the questions presented by the defendants, the question as to the kind of currency in which the bond sued on was solvable, might not have arisen. The appeal of the plaintiffs must therefore, be dismissed, as the question presented is not properly before us for adjudication.

His Honor errer in refusing to allow the defendants to sustain their counter-claim by proper evidence, and there must be a *venire de novo*.

Let this be certified.
Per curiam.
Venire de novo.

Cited: S.c., 64 N.C. 502; *Mathtews v. McPherson,* 65 N.C. 191; *Dewey v. White,* 65 N.C. 230; *Dunn v. Tillery,* 79 N.C. 500; *Sims v. Goettle,* 82 N.C. 272; *Dempsey v. Rhodes,* 93 N.C. 127.

FIDELIO SLUDER v. MINERVA ROGERS AND OTHERS.

The minor heirs of one who died before the adoption of the Constitution of 1868, are not entitled to the Homestead provided therein.

Note. A conveyance in trust to pay debts, made before the adoption of the Constitution, gives to the creditors secured, a lien superior to the Homestead.

PETITION by an administrator to sell lands, etc., heard by *Henry, J.,* at Fall Term 1869 of BUNCOMBE Court.

The intestate died before 1866, and the defendants, who were minors, and his heirs, claimed that they were entitled to a Homestead in the lands to be sold, under the Constitution.

His Honor gave judgment according to such claim, and the petitioner appealed.

Boyden and Bailey for the appellant. (290)
Phillips & Merrimon contra.

READE, J. It has been decided that the Homestead exemption is applicable to debts existing before the adoption of the constitution, *debts* not being a lien upon the debtor's property: *Hill v. Kessler,* 63 N.C. 437.

At this term it has been decided that the exemption is not applicable when the land had been *levied on* before the adoption of the constitution, the levy creating a lien etc. *McKeithan v. Terry, ante* 25. In an application to me at Chambers a few days ago, in the case of *Harshaw v. Henderson,* in Rowan Superior Court, for an injunction to restrain a trustee from selling land to pay debts under a deed executed before the adoption of the constitution, I decided against the application, upon the ground that the conveyance was a *lien* to the amount of the debts secured, and that the

Homestead exemption did not apply. In this I had the concurrence of my associate Justices of this Court, whom I consulted.

These cases seem to be decisive of the case before us. Upon the death of the father before the adoption of the Constitution, his lands descended to his children, his heirs, *cum onere,* — charged with the father's debts, to the extent of such debts after the personal property was exhausted. They had no power to sell it, and it was *assets,* which might be applied by the administrator: Rev. Code.

These heirs, minor children, are not entitled to a Homestead in the land descended to them from their father, as against their father's debts. They would be as against their own debts. So they would be as against their father's debts, if he had died *after* the adoption of the Constitution.

This will be certified.

Per curiam.

Judgment reversed.

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(291)

PARKER & GATLING v. W. H. SMITH.

A judgment by default, in an action for goods sold and delivered, operates as an admission by the defendant of a cause of action, and that the plaintiff is entitled to nominal damages; but it does not relieve the plaintiff from the necessity of proving the delivery of the things alleged to have been sold and delivered, and their value.

Therefore, in such case the defendant may prove that such things never were delivered.

ASSUMPSIT, for goods sold and delivered, tried before *Watts, J.,* at Fall Term 1869 of HALIFAX Court.

Judgment had been taken by default against the defendant, and upon the *inquiry* by the jury as to the damages, the defendant offered to prove that none of the goods charged had ever been delivered.

The plaintiffs excepted.

His Honor being of the opinion, that, although the defendant could contest the amount of damages, he was estopped by the judgment, from disputing that the articles had been delivered, excluded the evidence.

Verdict for the plaintiffs, Rule etc., Judgment and Appeal.

Barnes and Walter Clarke for the appellant.
Rogers & Batchelor contra.

DICK, J. When a defendant suffers a judgment to go by default, he admits the cause of action. If the action is on a single bond, a covenant for the payment of money, bill of exchange, promissory note, or a signed account, the judgment is *final,* and the Clerk ascertains the interest due by law, without a writ of inquiry: Rev. Code, ch. 31, sec. 91.

When the action sounds in damages, as in assumpsit, covenant, trespass, etc., a judgment by default is only *interlocutory,* and the amount of damages must be ascertained by a jury, upon a writ of inquiry: 1 Tidd. Pr., 573, 580.

If the plaintiff's claim for damages is precise, and fixed by an agreement of the parties, or can be rendered certain (292) by mere computation, there is no need of proof, as the judgment by default admits the claim: *Garrard v. Dollar,* 49 N.C. 175. In actions where the measure of damages is to be given by the jury, the assessment must be made upon the proofs introduced by each party, and the *onus* of proof as to the *amount* of the damages, is upon the plaintiff; as a judgment by default admits something to be due, but not the amount.

The case before us is an action of assumpsit, for goods, wares and merchandise sold and delivered, and the specific articles are not set forth in the declaration. The judgment by default admitted the cause of action, and the plaintiffs were entitled to nominal damages without introducing any proof; but in seeking substantial damages they were not relieved from the necessity of proving the delivery of each article, and the value thereof: 3 Chit. Gen. Pr., 673; 2 Burr. 907.

Upon this inquisition the defendant was at liberty, by cross-examining the plaintiffs' witnesses, and by other evidence in reply, to disprove anything which was necessary for the plaintiffs to establish, in order to ascertain their damages. On the trial "the plaintiffs introduced evidence to prove the sale and delivery of the goods, etc.," and his Honor erred in refusing to allow the defendant to introduce evidence in reply. The plaintiffs were only entitled to such damages as the jury would assess, after hearing the proofs of both parties to the action.

There must be a *venire de novo.*

Let this be certified.

Per curiam.

Reversed.

Cited: Parker v. House, 66 N.C. 376; *Merwin v. Ballard,* 66 N.C. 400; *Adrian v. Jackson,* 75 N.C. 538; *Wynne v. Prairie,* 86 N.C. 77; *Rogers v. Moore,* 86 N.C. 87; *Roulhac v. Miller,* 90 N.C. 176; *Anthony v. Estes,* 101 N.C. 546; *Williams v. Lumber Co.,* 118 N.C. 936; *Osborn v. Leach,* 133 N.C. 432; *Junge v. Macknight,* 137 N.C. 290; *Scott v. Life Assoc.,* 137 N.C. 522; *Blow v. Joyner,* 156 N.C. 142; *Graves v. Cameron,* 161 N.C. 550; *DeHoff v. Black,* 206 N.C. 689.

(293)

GEORGE W. SWEPSON v. A. T. SUMMEY.

Where the terms of a contract are certain, their construction is for the Court, — not for the jury.

Where a negotiation was pending for the settlement of a debt of about $30,000, and a question arose as to what would be the exact balance after applying certain payments, etc., — such balance having been *assumed* by the parties to be a certain amount, it was also agreed that if it were more than that — *a few hundred dollars either way should not matter; Held,* that, considering the amount of the whole debt, $2160.00 might be included in the expression *a few hundred dollars.*

ASSUMPSIT, tried before *Henry, J.,* at December Special Term 1869 of BUNCOMBE Court.

The facts appear sufficiently in the Opinion of the Court.

There being a dispute as to what the parties meant by the verbal contract between them, as to the *expression* of which there was no dispute; His Honor left it to the jury to say what that meaning was.

Verdict for the defendant, etc., and appeal by the plaintiff.

Phillips & Merrimon for the appellant.
No counsel contra.

READE, J. Where the terms of a contract are certain, and there is no evidence that the terms were used in any other than their ordinary sense, the construction or legal effect, is for the Court, and not for the jury.

It was error therefore to leave the construction of the contract to the jury. This error could be cured, however, if the jury had found correctly: but such is not the fact.

The defendant having paid to the plaintiff all of a certain debt, supposed to be $30,000, except a supposed remainder of $5,500, it was agreed that the supposed remainder should be paid with $2,-500, in such notes — currency — as the pliantiff's attorney would receive. It was then suggested that the remainder might be more than $5,500, and thereupon, it was agreed that a few hundred dollars either way would make no difference, and it should be settled on the same basis as the $5,500. It turned out (294) that the remainder was $2,160 more than was supposed, and then the defendant said that his promise did not embrace so large a remainder, and declined to pay more of the excess than $350, but offered to pay ten cents in the dollar upon the excess of the remainder over the $350.

It is evident that the agreement was, that the remainder of the debt, *whatever it might be,* was to be paid: there is nothing to indicate that any portion of the debt was to remain unpaid. But then it is said that the defendant's promise was only of "a few hundred," and that $2,160 are beyond that.

The answer is that the sum was purposely left indefinite in order that it might embrace the whole. And why may not "a few hundred" embrace *twenty-one* hundred, when dealing with so large an amount as *three hundred* hundred? It is only as two is to thirty. If the parties had been settling a three hundred dollar debt, and the promise had been that an uncertain remainder of a few dollars should be paid, would it be pretended that a few dollars would not embrace twenty-one dollars, especially when the remainder is to be paid at the rate of fifty cents in the dollar?

There is error.

Per curiam.

Venire de novo.

Cited: Lee v. Knapp, 90 N.C. 174.

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(295)

DOE EX DEM. OF H. E. MELTON v. WILLIAM MONDAY.

In a grant to one Blount, there was an exception of "13735 acres of land, entered by persons, whose names are hereunto annexed;" among such names was that of "Gabriel Ragsdale, 100 acres"; it was shown that this 100 acres was afterwards surveyed, and granted to one Williams, under whom the plaintiff claimed, *Held,* that thereby the exception in the

Blount grant, as regards the 100 acres, became as certain as if set out by metes and bounds.

EJECTMENT, for 100 acres of land, tried before *Henry, J.*, Spring Term 1869 of BUNCOMBE Court.

The plaintiff made title by a grant from the State to one Williams, describing the land, and referring to an entry of the same by Gabriel Ragsdale.

The defendant claimed under an older State-grant, to one Blount.

The plaintiff showed that the Blount grant excepted from its operation "13735 acres of land entered by persons whose names are hereunto annexed," and among those names was that of "Gabriel Ragsdale, 100 acres"; and that this was the entry under which Williams obtained his grant.

The defendant submitted that such exception was void for uncertainty.

His Honor being of this opinion, there was a verdict for the defendant, and the plaintiff appealed.

F. H. Busbee for the appellant.
Phillips & Merrimon contra.

PEARSON, C.J. We are of opinion that the exception in the grant to Blount is valid in respect to the land set out in the declaration. The grant has this *exception,* — "13735 acres of land, entered by persons whose names are hereunto annexed." Among the list of names is that of "Gabriel Ragsdale, 100 acres." This 100 acres is described in the entry according to the statute, with
(296) certainty to a certain intent in general. A survey is afterwards made, by which the land is described with "certainty to a certain intent in every particular," and a grant issues therefor to Williams, which refers to it as the one hundred acres entered by Ragsdale.

By these references the exception of the one hundred acres in controversy, is made as certain as if the land had been set out in the grant to Blount, by metes and bounds. In *Waugh v. Richardson,* 30 N.C. 470, it is held that an exception of 5000 *acres,* in a large grant, is void for uncertainty. In *McCormick v. Monroe,* 46 N.C. 13, is held that an exception of 250 acres *previously granted,* the former grant not being offered in evidence, is void for uncertainty. But it is said the exception might have been aided and made valid by means of the former grant, had it been produced. In our case all uncertainty is avoided by direct reference to the entry of

Ragsdale, and the subsequent survey and grant to Williams: so it is the same as would have been the case in *McCormick v. Monroe,* had the exception been of 250 acres previously granted to——, *setting out the name of the grantee.*

His Honor erred in setting aside the verdict, and entering judgment for the defendant. That ruling is reversed, and judgment will be entered for the plaintiff, upon the verdict.

Per curiam.

Reversed.

Cited: Robeson v. Lewis, 64 N.C. 738; *Gudger v. Hensley,* 82 N.C. 485; *Scott v. Elkins,* 83 N.C. 426; *Brown v. Rickard,* 107 N.C. 644; *Mfg. Co. v. Frey,* 112 N.C. 161; *Hemphill v. Annis,* 119 N.C. 519; *Lumber Co. v. Cedar Co.,* 142 N.C. 422.

DOE EX DEM. ISAAC S. LINKER v. J. A. LONG.

A freehold estate in lands, once vested by deed, cannot be divested by a subsequent re-delivery of such deed to the vendor, even where such re-delivery is accompanied by an (here, unsealed) endorsement, signed by the vendee, to the effect, "I transfer the within deed to W. F. T. again."

Such endorsement furnishes evidence of an agreement to reconvey, which might be enforced *by a Court of equity,* upon a proper application in any case which (like the present) was *pending* at the time that the C.C.P. was adopted.

EJECTMENT, tried before *Logan, J.,* at Fall Term 1869 of CABARRUS Court. (297)

The lessor of the plaintiff claimed under a deed to himself, executed November 6th, 1852, by one W. F. Taylor. It was shown that this deed was re-delivered by Linker to Taylor, May 11 1853, with an endorsement, signed by Linker, "I transfer the within deed to W. F. Taylor again," and that Taylor, now dead, and those who claimed under him, had remained in possession to the time when this action was brought, April 4th 1860. It also appeared that the defendant had been compelled, by order of the Court, November 27th 1869, to file said deed with the Clerk, so as to enable the lessor of the plaintiff to have it registered — which was done.

His Honor excluded the deed as evidence of title in the plaintiff. The plaintiff excepted, and submitted to a nonsuit; and appealed.

Wilson for the appellant.
R. Barringer contra.

PEARSON, C.J. "His Honor refused to let the deed be read to the jury as evidence of title in the lessor of the plaintiff." There is error.

This ruling is based upon the idea, that, as it appears from the endorsement upon the deed that it had been redelivered by the bargainee to the bargainor, the legal effect of this writing on the back was to nullify the deed, and make it as if it had never been executed. By force of the deed, and the operation of the statute 27 Hen. VIII, an estate of *freehold of inheritance* was vested in Linker on the 6th day of November 1852. The question is, has that estate been divested by any conveyance, or means, known to the law.

Suppose that deed, upon the 11th day of May 1853, had been cancelled, torn up, or burnt, by consent of both parties; the estate would not have been thereby revested in Taylor; for, by the (298) common law, a freehold estate in land, can only pass by livery of seizin—under the Statute of Enrollments, by "deed of bargain and sale indented and enrolled," — and under the act of 1715, by "deed duly registered:" so, the freehold having passed to Linker, could only be passed from him, either to a third person or to Taylor, by some kind of conveyance known to the law. A Will, being ambulatory, may be revoked by cancellation: a Covenant or agreement, being *in fieri*, a thing to be done, — by cancellation or by deed of defeasance, which may be executed after the covenant. But a Conveyance of a freehold estate of inheritance, being *a thing done*, cannot be *undone* by cancellation, or in any other mode, and the estate can only be revested by another conveyance; unless a condition or deed of defeasance executed *at the same time* and as a part of the conveyance, be annexed to the estate, giving to it a qualification by which it may be defeated. For illustration, a mortgage is a conveyance on condition. If the money be paid at the time fixed, the estate is revested in the mortgagor, but if the condition be not performed by payment at the day, the estate becomes absolute, and although the money be paid and accepted afterwards, the estate can only be revested by another conveyance.

It was properly conceded on the argument, that the writing upon the face of the deed did not amount to a conveyance. But it was said (and in this conclusion we presume his Honor concurred) that the writing on the deed shows that the parties did not look upon the matter as closed at the time of the execution of the deed, and the subject was left open for future arrangement.

The question, can a freehold estate be divested by a deed of de-

feasance executed *after* the estate has vested, is settled. But, in our case the question is not presented, for the writing on the back of the deed was not sealed or delivered as a deed; and a defeasance by which to defeat a deed, must be *by deed; eo ligamine quo ligatur.* The only effect that can be allowed to this writing is, that it furnishes evidence of an agreement to reconvey, which a court of equity would enforce by a decree for specific perform- (299) ance, provided it be supported by a valuable consideration.

Under the operation of the Code of Civil Procedure, it may be that this equity can be enforced in an action for the land, under the rule: "Equity considers that to be done which ought to be done:" but as this action was commenced under the old mode of procedure, that short hand way of doing justice does not apply, and his Honor erred, in not leaving the defendant to work out the equity by a bill for specific performance, and an injunction restraining the plaintiff from taking out a writ of possession: *Gaither v. Gibson,* 63 N.C. 93.

On first impression, it occurred to us that possibly the ends of justice would have been met and circuity of action avoided, had his Honor refused to allow the deed to be registered; that course would have been better than to refuse to let the deed be read to the jury after it had been registered, and the legal title had, by relation, vested in Linker from the sale of the execution of the deed.

After reflection we are satisfied it was best to give both sides a fair showing, by allowing the deed be registered, as the ceremony of registration will not at all impair the presumption arising from the long possession of Taylor, and the silent acquiescence of Linker.

Per curiam.

Venire de novo.

Cited: S.c., 67 N.C. 150; *Hare v. Jernigan,* 76 N.C. 474; *Whorton v. Moore,* 84 N.C. 481; *Browne v. Davis,* 109 N.C. 26; *Tunstall v. Cobb,* 109 N.C. 327; *Hodges v. Wilkinson,* 111 N.C. 63; *Hargrove v. Adcock,* 111 N.C. 169; *Herring v. Warwick,* 155 N.C. 348; *Williams v. Lewis,* 158 N.C. 577; *Supply Co. v. Nations,* 259 N.C. 684.

ELIJAH WINSTON v. EDWARD DALBY.

A covenant *not to prosecute the suit to judgment* against him, given to one of two makers of a promissory note, upon consideration of his having, pending such suit, paid a part of the note sued upon, does not extinguish the debt as to the other maker.

DEBT, tried before *Watts, J.*, at Fall Term 1869 of GRAN-
(300) VILLE Court.

The suit was upon a promissory note, signed "Dalby & Bullock," which was the name of a firm in which the defendant and one John D. Bullock, were partners. The suit was originally against both, but whilst it was pending, Bullock paid one-half of the principal, and a *nol, pros.* was taken as to him, and an instrument under seal executed by the plaintiff to him, acknowledging the receipt of the money, and, in consideration thereof, covenanting with him — "that I will not prosecute to judgment, a suit now pending in the Superior Court of Granville county against him upon a promissory note," etc., — being that in suit.

The question was, whether the effect of such instrument was to discharge the defendant.

His Honor was of opinion that the defendant was discharged, and gave judgment accordingly; and the plaintiff appealed.

Rogers & Batchelor for the appellant.
No counsel contra.

SETTLE, J. We are of the opinion that the instrument given by the plaintiff to Bullock, does not amount to a release.

It operates in the nature of a covenant not to sue.

Upon an examination of the authorities, it will be found, that the Courts have been slow to adopt the doctrine, that a covenant not to sue, may operate as a release, and have only permitted such covenants to have that effect, in order to avoid circuity of action.

In *Dean v. Newhall,* 8 T.R. 168, it is held that the obligee, who had *covenanted not to sue* one of two joint and several obligors, might sue the other, although a *release* to one would have been a bar as to both.

The same point is decided in *Hutton v. Eyre,* 1 E.C.L. 385,
where the debt was a joint one, and not joint and several;
(301) and Gibbs, C.J., says "we think the rule that a covenant not
to sue, operates as a release, applies only to cases where the covenantor and covenantee are single."

Upon the authority of these cases, and of *Walmsly v. Cooper,* 39 E.C.L. 51, the text writers lay it down, that a covenant not to

sue has not the effect of a release, in discharging a co-contractor: 1 Archb. N.P. 191; 1 Tidd. 10.

No question was raised before us as to whether this debt was joint or several, nor do we think there could have been, for our statute provides that "in all cases of joint obligations or assumptions of co-partners in trade or others, suits may be brought and prosecuted on the same, against all or any number of the persons, making such obligations, assumptions or agreements;" Rev. Code, ch. 31, sec. 84.

The judgment of the Superior Court is reversed, and judgment entered here in favor of the plaintiff, according to the case agreed.

Per curiam.

Judgment reversed, etc.

Cited: Evans v. Raper, 74 N.C. 645; *Sandlin v. Ward,* 94 N.C. 496.

JOHN P. H. RUSS v. W. B. GULICK AND OTHERS.

Where a complaint charges that money used in a certain transaction, was that of A, and not (as A and B claimed it to be) that of B; answers by A and B, that the money advanced by the latter was "money *under his control, and was not the money of A,*" were held to be evasive and unsatisfactory; in not stating whether or not such money *was placed under the control of B through any agency of A.*

The *transaction* being, the contribution of their respective proportions of a debt, by two co-sureties, of whom A was one, and the plaintiff the other: *Held,* that an admission by A and B of their purpose to compel the plaintiff to pay the whole debt, was an *equity confessed,* and their setting up, as their justification therefor, an agreement by said co-surety, made after their engagement as sureties, whereby the plaintiff was to pay the whole, was matter *in avoidance* of such equity, and so, not to be noticed at this particular stage of the proceedings, viz: a motion to vacate an injunction.

INJUNCTION, before *Watts, J.,* upon a motion to vacate, at Fall Term 1869 of WAKE Court. (302)

The action sought an injunction, etc., against a judgment and execution; and alleged,

1. That the plaintiff and one High had executed a note payable to the defendant Gulick, as Cashier, etc., in the character of sureties for one Hutchings.

2. That after judgment had been obtained and execution taken out upon such vote, the sureties above named paid, each, January 2 1869, one half of the same, excepting costs, and that plaintiff paid besides, one-half of these; thus satisfying the judgment, except as to one-half of such costs.

3. That High, who paid *after* the plaintiff had paid his part, procured Gulick to convey the judgment to one York, who claims that the money advanced to pay High's proportion, was really *his,* and now, as purchaser of such judgment, is endeavoring to compel the plaintiff to pay the other half *to him.*

4. That the money advanced by York was really High's, and the transfer to York was unauthorized in Gulick, whose judgment had been *satisfied,* etc.

High answered, denying that he had paid, or that York with his money had paid, the one-half of the judgment mentioned in the complaint; and stated, that at his request York had purchased the judgment, by paying for it money of which he, York, had control, and which was not High's; and that this was done in order to compel Russ to carry out an agreement between himself and High, by which the former was to pay *the whole* of the note given by them as sureties.

York also answered, and his account of the purchase of the judgment, was in the same language as that used by High.

Thereupon, on motion by the defendants, his Honor vacated the order for an injunction theretofore made; and the plaintiff appealed.

Rogers & Batchelor for the appellant.

When an answer admits the equity charged in the bill, (303) but brings forward new facts in avoidance of it, the injunction will be continued to the hearing: *Lindsay v. Etheridge,* 21 N.C. 36; *McNamara v. Irwin,* 22 N.C. 13; *Lyerly v. Wheeler,* 38 N.C. 170; *Kerns v. Chambers,* 38 N.C. 576.

When there is a reasonable probability, from the facts stated in the bill, and not denied by the answer, that the plaintiff will sustain his claim for relief, the injunction will not be dissolved. If reasonable doubt exist, whether the equity is fully answered, injunction will be continued. *Sherrill v. Harrell,* 36 N.C. 194; *James v. Lumley,* 37 N.C. 278; *Strong v. Menzies,* 42 N.C. 544; *Miller v. Washburn,* 38 N.C. 65.

When the answer is apparently deficient in frankness, candor, or precision, or is illusory, the injunction will be continued to the hearing. *Little v. Marsh,* 37 N.C. 18; *Parks v. Spurgin,* 38 N.C.

153; *Thompson v. Mills,* 39 N.C. 390; *Allen v. Pearce,* 59 N.C. 309; *Deaver v. Eller,* 29 N.C. 24; *Jones v. Edwards,* 57 N.C. 257.

Allegations in the bill not responded to, are taken as true. *Wilson v. Hendricks,* 54 N.C. 295; *Rick v. Thomas,* 39 N.C. 71.

York, the defendant, who claims to have purchased the judgment at High's request, must "stand in High's shoes." *Wilson v. Hendricks,* 54 N.C. 295; *Allen v. Pearce,* 59 N.C. 309.

Fowle & Badger contra.

PEARSON, C.J. The answer of York is not ingenuous and frank, but is unsatisfactory and evasive. He admits that he advanced the money at the instance of his co-defendant High, but he says "the money was *under his control, and was not the money of High:" Non constat,* that he did not get the money which was under his control, through the agency of High. But be this as it may, the plaintiff has a clear equity on the matter confessed. It (304) is admitted, that *at the first,* the plaintiff and High were *co-sureties,* and that the plaintiff has paid his own half of the debt, and that the assignment to York, was made with notice, and for the purpose of enabling York, by means of the legal title in the judgment, standing in the name of Gulick, whose legitimate business it was to receive the proceeds, and not to assign the judgment, to force the plaintiff to pay the other one-half of the debt.

So we have a case of combination and confederacy, to adopt means, whereby the burden of the payment of the whole debt, is to be put on *one of the sureties.* This contrivance is justified on the ground that, by an arrangement between the plaintiff and High, made after they had entered into the relation of co-sureties, Russ was to pay the whole debt. In other words, new matter is alleged in avoidance of the original liability of High to pay one half of the debt; but this allegation, in the stage of the case now presented, is not supported by proof, and allegation without proof is like proof without allegation — the Court cannot take notice of it.

There is error. Decretal order below reversed.

This will be certified.

Per curiam.

Order reversed.

(305)

THE STATE v. WYATT PERRY.

A *"pasture-field"* is not *"cleared ground under cultivation,"* within the meaning of the Statute, (Rev. Code, c. 48, § 1,) requiring planters to keep around such ground, a fence at least *five* feet high.

INDICTMENT, *for an unlawful fence,* tried before *Cannon, J.,* at Fall Term 1869, of ASHE Court.

No other statement is required, than is to be found in the opinion.

Verdict, Guilty; Rule etc.; Judgment and Appeal.

Malone Clement for the appellant.
Attorney General contra.

SETTLE, J. "Every planter shall make a sufficient fence about his cleared ground under cultivation, at least five feet high," etc.: Rev. Code, ch. 48, sec. 1.

"All persons neglecting to keep and repair their fences during crop time, in the manner required by law, shall be deemed guilty of a misdemeanor:" Rev. Code, ch. 34, sec. 41.

The indictment is founded upon the above enactments. It was in evidence that the fence in question enclosed "a pasture field," and it was admitted that it was not five feet high; but it was insisted that the statute did not embrace this case, as the land was not cultivated.

His Honor instructed the jury that "if the land enclosed had been sown in grass by the defendant, and used by him exclusively for his own stock, and to the exclusion of other people's, it would be such a cultivation as was intended by the statute, and the defendant would be guilty." We are unable to see any evidence tending to show that the land in question had ever been sown in grass, and therefore there is nothing to support the charge.

Passing by this objection, however, we do not think that a *pasture field* is "ground under cultivation" within the mean-
(306) ing of the statute. It cannot be contended that a planter would be indictable for a failure to make a fence five feet high around a woods' pasture, for the statute only requires him to keep such a fence around his "cleared ground under cultivation." Why should a cleared pasture be a greater favorite in the eye of the law than a woods' pasture? Our conclusion is, that the statute does not embrace mere pastures of either kind.

Pastures of both kinds are protected by the Rev. Code, ch. 34, sec. 103, which enacts that, "if any person shall unlawfully and wilfully burn, destroy, pull down, injure or remove, any fence, wall or other enclosure, or any part thereof, surrounding or about any yard, garden, cultivated field or *pasture,* etc., every person so offending shall be deemed guilty of a misdemeanor." It will be observed that the law makes a distinction between tearing down, and, not building up, fences, and is much more exacting when it treats of the one than of the other. In the first instance, the unlawful removal, by *any person, of fence, or any part thereof,* surrounding or about *any* yard, garden, cultivated field, or pasture, or about any church, grave-yard or factory, or other house in which machinery is used, is made a misdemeanor. In the second instance, the injunction is only to every *planter,* to make a sufficient fence about his *cleared ground, under cultivation,* and his failure to do so, subjects him to the payment of all damages which may be recovered against him, *before a Justice of the Peace,* for injury done to stock while trespassing upon his enclosed ground, when his fence shall be adjudged insufficient by two freeholders, who shall also ascertain and assess the damages. A neglect to keep and repair fences, "during crop time," is alone made a misdemeanor punishable by indictment. This view does not conflict with *State v. Allen,* 35 N.C. 36, which was an indictment for removing a fence around the cultivated land of the prosecutor. It is there held that it was not necessary to the conviction of the defendant that there should be something (307) actually growing in the field at the time of the removal of the fence; the fact that the field was in due course of cultivation, was sufficient.

The present system of fence-laws has been upon our statute-book for many years, and yet it is a notorious fact that it has entirely failed to carry out the purposes for which it was designed. The experience and observation of every one teaches him that not more than one planter in every hundred pays any attention to the law requiring him to make a sufficient fence around his cleared farm under cultivation.

It is a rare thing to see an indictment for this offence in our courts, without finding a cross-indictment upon the prosecutor: for, in ninety-nine cases out of every hundred they are *in pari delicto.* A system which has failed after a long and fair trial to make its impress upon the country, must be defective.

Per curiam.

Venire de novo.

Cited: S. v. Cornett, 199 N.C. 635.

ISAAC WHITESIDES v. W. W. GREEN, ADM'R. ETC.

A suit had been brought to Spring term 1867, and the docket at that term showed that an *incipitur* was required by the defendant, before pleading; upon the docket was also this entry, "Plaintiff charges for keeping his mother-in-law;" no pleas were entered until the case was called for trial, at Fall term 1869; *Held*, that, as the Court could not tell whether the entry, "Plaintiff charges" etc., at Spring term 1867, was the *incipitur* required, or was, by its vagueness, the occasion of calling for an *incipitur*, and also, considering the subsequent action of the parties respectively, it could not be said that the defendant had impaired his *right* to plead at Fall term 1869, and therefore, that it was erroneous in the Judge below, to restrict him in the exercise of such right, *ex gr.* by refusing to allow him to plead the General-issue.

An administrator, upon an issue in regard to assets, cannot testify to a transaction betwixt himself *and his intestate*, whereby a *prima facie* indebtedness of his own to the estate, was discharged; he may, however, testify as to transactions by himself, *after the death*, which relieve him from the charge of having assets in hand.

ASSUMPSIT, tried before *Logan, J.*, at Fall term 1869, of (308) CLEVELAND Court.

The action had been brought to Spring term 1867, and at that term, an *incipitur* was demanded by the defendant before pleading, and an entry was made upon the docket, "Plaintiff charges for keeping his mother-in-law." No other steps were taken by either party, until Fall term 1869, when the cause was called for trial. At that time the plaintiff asked for judgment for want of a plea, which the Court refused. The defendant proposed thereupon, to plead the General-issue, but the Court would not permit it. The pleas put in, were in denial of assets.

As part of his proof upon these issues, the plaintiff showed by one Lattimore, that the latter had seen among the papers of the intestate, after her death, a receipt for $200.00, given to her by the defendant. In reply, the defendant offered to testify, that he had repaid this money to his intestate, before her death; and also, that after her death, as administrator, he had exhausted the assets, by such and such payments. His Honor excluded this testimony upon both points, and the defendant excepted.

Some other points were made, which the opinion renders it unnecessary to state.

Verdict for the plaintiff; Rule etc.; Judgment, and Appeal.

Bynum for the appellant.
Phillips & Merrimon contra.

RODMAN, J. The difficulty of deciding the first point made in this case, arises, partly from the indefinite way in which the facts are stated, and partly from the uncertainty which always attends a question of, how far parties have waived or lost their (309) rights, by omitting, through courtesy or indulgence to claim them in due time or manner.

The act of 1868-9, ch. 112 § 80, by its terms, is confined to cases in which administrators had already pleaded; we think therefore it has no application in this case. We must determine this case by inquiring what were the rights of the parties according to the course of practice in the Superior Courts, before the Code; and then how far those rights had been waived by not being asserted in due time. The law (previous to the C.C.P.) required a plaintiff to file his declaration within the first three days of the appearance term, and on his failure, the defendant might move to dismiss the action for want of prosecution. The defendant might dispense with a written declaration altogether, and the course among the bar was to consider that he did so, unless he gave the attorney of the plaintiff some notice to the contrary. As the defendant could require a formal declaration, it follows that he could also require a declaration, which, while stating the plaintiffs' case with sufficient fullness to be intelligible to the defendant, need not be formal: and this is what we understand to be meant by an *"incipitur."*

But while the defendant might move to dismiss the action for want of a declaration, he was not bound to do so. He might give the plaintiff a longer time to file it in, but unless he dispensed with one, expressly or by presumption, he was not bound to plead until it was filed. The writ in this action was returned to Spring Term 1867, and at that term the record shows the following entry on the docket in the case: "charges for keeping his mother-in-law," who was the intestate of the defendant. The case states that at the appearance term, *"an incipitur* in writing was required and placed upon the docket." The difficulty is, in saying whether the entry shown on the docket, was placed there after the call for an *incipitur,* and was accepted by the defendant as a satisfactory response to his demand; or whether the demand for the (310) *incipitur* was made after the entry on the docket, and by reason of the vagueness of that entry, and was meant to require a fuller statement of the cause of action, in the nature of a bill of particulars. Unless the defendant accepted this entry in lieu of a declaration, he was not bound to plead. As to whether he did accept it, no decisive inference can be drawn from the conduct of the parties, at the appearance term, or afterwards. The defendant did

not distinctly object to the entry, and require a further statement, nor did the plaintiff move for judgment for want of a plea until Fall Term, 1869, when the defendant offered to plead. We do not think that the mere delay to plead by the defendant, is such a clear proof of his having waived his right to a fuller statement of the plaintiff's cause of action, as to deprive him of the right to plead, and to entitle the plaintiff to a judgment for want of a plea, at Fall Term 1869. If the defendant had then right to plead at all, the right existed unimpaired, and the Judge had no right to put him on terms, or to limit the exercise of his right by any conditions, as he would have had, if the defendant had lost his right, and was asking for an indulgence. We think therefore, that upon this ground, the defendant is entitled to a *venire de novo,* and to be allowed to plead the general issue.

As, probably, the questions respecting the mode of proving the contents of the alleged receipt, and the certificate from Clerk of York district, will not be raised upon another trial, it is unnecessary to say any thing upon them.

The question however respecting the competency of the defendant as a witness, is of a different character, and as the question may be of frequent occurrence, and we think it clear, we see no objection to expressing an opinion. It was said at the bar that there appeared to be a repugnance between ch. VI and ch. VII of Title XIV in the Code of Civil Procedure. It does not appear so to us. The provisions of ch. VI authorize one party to a suit, to examine the adverse party, and a plaintiff or defendant, to examine a (311) co-plaintiff or a co-defendant, and are confined to cases of that sort. Ch. VII provides for a party becoming a witness for himself. Section 343, in the first sentence, confers the power generally: the proviso (omitting all the words that do not bear on this case) may be read as follows: Provided, that no party to an action shall be examined in regard to any transaction with a person since deceased, as a witness against the administrator, etc., of the deceased, when the witness has, or has had an interest to be affected. But when the administrator shall testify in his own behalf (meaning of course in behalf of the estate) in regard to such transactions, then all other persons not otherwise incompetent may do so. When thus read, stripped of the verbiage inserted in order to make the rule applicable to a large member of analogous cases, it seems sufficiently clear and reasonable. No interested party shall swear to a transaction with the deceased, to charge his estate, because the deceased cannot swear in reply. If however the representative of

the deceased will swear to such a transaction, to benefit the estate, fair play requires the rule to be altogether dispensed with.

Let us apply the rule to this case. The plaintiff sought to charge the defendant with assets, by proof of the accountable receipt for $200. The defendant, under the proviso could not discharge himself by testifying to any transaction or communication with the deceased, because he had an interest to be affected, although he was not swearing against the estate of the deceased, which meets the spirit and meaning of the provisio.

As far as the defendant offered to testify for that purpose, his evidence was properly excluded. But there is no prohibition against the defendant testifying as to any matter other than a transaction or communication with the deceased, and although the mode of taking an administration account by an examination of the administrator before the jury is inconvenient, and the judge might have ordered a reference, yet it is not illegal or unprecedented.
The only objection which ever existed to an administrator (312) testifying as to his assets in his own behalf, was his interest, and that the statute has removed.

There must be a *venire de novo*. Let this opinion be certified.

Per curiam.

Venire de novo.

Cited: Meroney v. Avery, 64 N.C. 313; *Peoples v. Maxwell,* 64 N.C. 315; *Halyburton v. Dobson,* 65 N.C. 90; *Gray v. Cooper,* 65 N.C. 184; *Andrews v. McDaniel,* 68 N.C. 386; *Ballard v. Ballard,* 75 N.C. 193; *Lockhart v. Bell,* 90 N.C. 504; *Watts v. Warren,* 108 N.C. 522; *In re Bowling,* 150 N.C. 510; *Brown v. Adams,* 174 N.C. 494; *In re Mann,* 192 N.C. 250; *In re Brown,* 203 N.C. 349; *Hardison v. Gregory,* 242 N.C. 327.

T. J. MERONEY v. ALPHONSO C. AVERY, EXECUTOR, ETC.

Objections to the competency of testimony, must be taken in due time, if not, they are waived; *Therefore*, where a party was allowed to testify upon examination in chief, to a conversation between himself and the defendant's testator, and during the cross-examination, the defendant objected to the competency of such testimony, and asked that it might be excluded; *Held*, that although incompetent, the objection to its reception came too late.

PEOPLES *v.* MAXWELL.

ASSUMPSIT, tried before *Cloud, J.*, at Fall Term 1869 of ROWAN Court.

Upon the trial, the plaintiff was introduced and testified, without objection, as to a conversation between himself and the testator in regard to the cause of action; upon his cross-examination he was asked if he were not plaintiff, and if Isaac T. Avery, the testator of the defendant, were not dead. Upon his answering in the affirmative, the defendant objected to the competency of his evidence as to the conversation.

His Honor held that all objection had been waived, and refused to exclude it.

Afterwards the defendant testified in regard to the same conversation.

Verdict for the plaintiff. Rule, etc. Judgment and Appeal. (313)

Craige and Bailey for the appellant.

Boyden, Blackmer & McCorkle and Clement contra.

RODMAN, J. The plaintiff was an incompetent witness to any transaction or communication with the testator of the defendant: C.C.P. § 343; *Whitesides v. Green, Admr., ante* 307: but the objection was waived, by not being taken in due time. An objection must be taken as soon as its existence becomes known: 1 Stark. Ev. 114; 1 Greenl. Ev. 461. The introduction of the defendant afterwards cannot affect this case.

Per curiam.

Judgment affirmed.

Cited: S. v. Outerbridge, 82 N.C. 621; *McCay, Ex parte,* 84 N.C. 66; *Armfield v. Colvert,* 103 N.C. 155; *Quinn v. Lattimore,* 120 N.C. 433; *Andrews v. Smith,* 198 N.C. 36; *Hayes v. Ricard,* 244 N.C. 324.

THE STATE EX REL. H. H. PEOPLES v. J. J. MAXWELL, ADM'R. ETC., AND OTHERS.

The plaintiff in a suit is (by C.C.P., § 343) incompetent to prove that the intestate of the defendant actually *signed* a particular paper, although he is competent to prove his *hand-writing.*

What was once said by the plaintiff to the administrator, in relation to acts or words of the deceased, (introduced to get the benefit of *admissions,* deducible from a failure to deny, by the administrator,) when such

acts or words were not within the personal knowledge of the administrator, — is also incompetent.

DEBT, tried before *Logan, J.*, at Fall Term 1870, of MECKLENBURG Court.

The action was upon the official bond of the intestate, as constable, for failing to pay over money collected for the plain- (314) tiff, etc.

Upon the trial, the relator was introduced to prove the execution of the receipt in question, by the intestate.

He was objected to by the defendants as incompetent, but, being admitted by his Honor, testified, — "that he knew the hand-writing of the deceased, and that the signature in question was his, — that he saw the deceased sign the paper, etc., also, that he had a conversation with the defendant, J. J. Maxwell, the father and administrator of the deceased, and told him that the deceased had admitted to him, that he had collected the debts named in the receipt, etc., — and thereupon, that the defendant Maxwell had a partial settlement with him, and it would have been in full, but for want of time, Maxwell wishing to look at a certain paper connected with the settlement," etc.

The defendants excepted.

Verdict for the plaintiff; Rule, etc., and Judgment.

The defendants appealed.

Wilson for the appellants.
R. Barringer contra.

RODMAN, J. The relator was introduced as a witness on his own behalf, to prove the signature of the deceased constable to a memorandum, or receipt, for the claim in respect to which the breach was assigned. The Judge admitted him to prove "any acts of the deceased, which it would be competent to prove by any other witness, but not to prove the declarations of the deceased to him, nor any acts of the deceased between himself and the deceased alone." The relator then testified that the deceased signed the receipt for the claims; he also testified that, in conversation with the defendant, J. J. Maxwell, the administrator of the deceased, he told the administrator, that the deceased had admitted to the witness, that he had collected the debts mentioned in the receipt, and had made a partial payment, (315) etc."

We had occasion, at this term, in *Whitesides v. Green, ante* 307, to discuss pretty fully the competency of parties to actions, and others interested, "to testify in regard to any transaction or communication between such witness and a person, at the time of such

examination deceased:" C.C.P., sec. 343. We think it was not competent for the relator in this action, to prove that the deceased constable signed the receipt in question. He might have proved the hand-writing of the deceased from his general knowledge of it; but to prove that the deceased signed the particular paper, was to prove a "transaction" between the witness and the deceased, which was forbidden by section 343.

Our opinion on this point would entitle the defendants to a *venire de novo,* but as the competency of the subsequent testimony would probably again be a question, we think it our duty to consider that. The only ground upon which the competency of the conversation between the relator and the administrator of the deceased can be defended, is, that it amounted to an admission by the administrator of the truth of the statements made in it by the relator. Admissions of parties are of course always competent. If one party to an action asserts a fact in the presence of the other, under circumstances calling for a reply, and it is not denied, the silence must in general be taken as an assent. *Qui tacet videtur consentire:* 1 Greenl. Ev. 107a. But this principle must be limited to those assertions which relate to some part of which the opposite party may be supposed to have some knowledge. He might not believe the assertion, but if absolutely ignorant concerning the fact, he could not, in general, be called on to deny it. For this reason we do not think the omission of the administrator on the occasion mentioned, to deny the statement made to him by the relator, can be considered an admission of its truth. The evidence of the conversation would therefore, be incompetent, even if given by a disinterested witness, and apart from the objection that it came from a party, and pur-
(316) ported to relate a transaction and communication between the witness and the deceased. It was evidently an attempt by the relator to evade the prohibition contained in section 343, and indirectly to get in his statement not under oath. How can his evidence of such a statement be admitted to prove the truth of the facts stated, when his testimony on oath to the same facts would be rejected?

There must be a *venire de novo.*

Per curiam.

Venire de novo.

Cited: Halyburton v. Dobson, 65 N.C. 90; *Gray v. Cooper,* 65 N.C. 184; *Ballard v. Ballard,* 75 N.C. 192; *March v. Verble,* 79 N.C. 23; *Rush v. Steed,* 91 N.C. 228; *Hussey v. Kirkman,* 95 N.C. 65; *Bright v. Marcom,* 121 N.C. 87; *Johnson v. Cameron,* 136 N.C.

244; *Hicks v. Hicks,* 142 N.C. 233; *Brown v. Adams,* 174 N.C. 493; *Satterthwaite v. Davis,* 186 N.C. 571; *In re Mann,* 192 N.C. 250; *Wilder v. Medlin,* 215 N.C. 547; *Lister v. Lister,* 222 N.C. 560.

THE STATE v. BENJAMIN F. SPENCER.

Where the defendant in an indictment requested the Judge to instruct the jury:

"1. That it is the peculiar province of the jury to judge of the credibility of the witness, and they may take into consideration the manner of the witness upon the stand, and also the unreasonableness of his statements;

2. That if the jury are satisfied that the witness made a false and corrupt statement in part, they ought to discard his testimony altogether;"

And the Judge gave the first instruction, but refused to give the second, adding: "I will, for the benefit of the defendant's attorney, go further, and say to the jury, that they have no more right to discard entirely the testimony of the witness, than they have to commit perjury"; *Held,* that whatever might be said of the *propriety* of the latter remark, — taking the instructions altogether, there was no error.

ASSAULT and Battery, tried before *Jones, J.,* at Fall Term 1869, of HYDE Court.

The only statement necessary is to be found in the opinion.

Verdict, guilty; Rule, etc. Judgment and appeal.

No counsel for the appellant.
Attorney General contra.

SETTLE, J. The defendant's counsel asked his Honor to instruct the jury: (317)

1. "That it is the peculiar province of the jury to judge of the credibility of the witness, and that they may take into consideration the manner of the witness upon the stand, and also the unreasonableness of his statement."

2. "That if the jury are satisfied that the witness made a false and corrupt statement in part, they ought to discard his testimony altogether."

The first instruction asked for, was given, and the second refused; and His Honor added: "I will, for the benefit of the defendant's attorney, go further, and say to the jury, that they have no

more right to discard entirely the testimony of the witness than they have to commit perjury."

Does this expression of his Honor to the jury, which he says was intended for the benefit of the defendant's attorney, entitle the defendant to a new trial? Standing alone it would unquestionably do so, but taken in connection with the charge, which his Honor had just given, it means nothing more than a declaration that the maxim, *falsum in uno, falsum in omnibus,* is not a rule of evidence in courts of common law. We must consider the whole charge together. His Honor had but a moment before instructed the jury that it was their peculiar province to judge of the credibility of the witness, and that they might consider his manner, and also the unreasonableness of his statement. In replying to the prayer for the second instruction, his Honor was unfortunate in his language, but it can not be fairly construed to mean, that he took back all that he had just said in answer to the first prayer, and passed, himself, upon the credibility of the witness. His language was in reply to, and must be understood as having reference to, the second prayer of the defendant's counsel, subject to what he had said in answer to the first.

It may be observed that the first and second instructions prayed for are inconsistent and contradictory. If "it is the peculiar province of the jury to judge of the credibility of the witness,"
(318) why should a Court be asked to lay down a rule of law which would cut them off from their peculiar province.

The propriety of the language under consideration may well be questioned. From this point of view it affords a fair ground for criticism. But counsel should remember that it is not their province to annoy a Court by asking for instructions which they know cannot be given. It would be a reflection upon counsel to suppose that they were ignorant of the decisions of this Court, declaring the maxim, *falsum in uno, falsum in omnibus,* is not a rule of evidence in the Courts of this State. There is no error.

Let this be certified, etc.

Per curiam.

No error.

Cited: S. v. Little, 174 N.C. 802.

GEORGE BLACK v. REUBEN JONES.

Where a horse was taken from a private citizen of Randolph County, about the 2nd of May 1865, (it did not appear by whom,) and afterwards (July 26th 1865,) was sold at a public government sale held in Raleigh, by an A. Q. M. of the U. S. Army, being then branded as United States property: *Held*, that the title of the original owner was not thereby extinguished.

TROVER, for a horse, tried before *Tourgee, J.*, at Fall Term 1869, of RANDOLPH Court.

The horse had been taken from the owner, a private citizen of Randolph county, about the 2nd of May 1865; and, upon the 26th of July thereafter was purchased, at a public Government sale of horses in Raleigh by one A. W. Garoutte, A. Q. M. in the U. S. Army. It was at that time branded, as the property of the United States, and a bill of sale was given by Garoutte. The defendant claimed under the purchaser at this sale.

The defendant asked the Court to instruct the jury, that the property in the animal was changed by the formal sale, under the authority of the United States. (319)

His Honor declined to do so.

Under the instructions of the Court, the jury returned a verdict for the plaintiff, etc., and the defendant appealed.

No counsel for the appellant.
Scott and Mendenhall contra.

SETTLE, J. The defendant has no just ground of exception to the charge of his Honor. Conceding, for the sake of the argument, that the government of the United States had the right to take horses without compensation, during the existence of hostilities, from any citizen, loyal or disloyal, of the rebellious states, there can be no pretence of right to do so after the cessation of hostilities. Of course we are not considering the right or power of the government to confiscate property for the crime of rebellion. It is true, the government had, and exercised the right of taking any property, wherever found, which belonged to the Confederate authorities; for upon their surrender, it became the property of the government.

The armistice between Generals Sherman and Johnston was proclaimed on the 17th day of April 1865. This was followed by the surrender of Johnston to Sherman on the 25th day of the same month. So, hostilities ceased, and the war virtually ended, on the day of proclaiming the armistice.

In the case before us, the horse in question had never belonged to the Confederate authorities, but was taken, about the 2nd day

of May 1865, from the possession and ownership of the plaintiff, a private citizen, without his consent. It does not appear who took the horse from the possession of the plaintiff. All that we know is, that the horse was purchased at a government sale in the city of Raleigh, on the 26th day of July 1865, properly branded as property of the United States, and a bill of sale in due form given by A. W. Garoutte, Captain and Assistant Quarter Master, U.
(320) S. Army, to a purchaser under whom the defendant holds.

How often this horse was sold and re-sold, captured and re-captured, from the time he left the possession of the plaintiff until he came into the possession of Capt. Garoutte, we do not know; nor is it material to inquire, for any number of transfers would not affect the rights of the plaintiff.

But the defendant insists, that, if the horse were sold at an auction held under the authority of the government of the United States, and conveyed to a person under whom he claims, for the price set forth in the bill of sale, then the plaintiff cannot recover. Whatever may be the rights of the government in time of war, it certainly cannot, in time of peace, take private property without compensation: and we are unable to see how the wrongful possession of Captain Garoutte could ripen into the rightful possession of a third party as against the plaintiff, by a simple transfer.

It is suggested that there may be a distinction between a public sale by the government, and a sale by a private individual, but it is a distinction without a difference, so far as the true owner is concerned. It is a general rule of the English law that sales of vendible articles, made in market overt, are good, not only between the parties, but also as to all who have any property therein; but that rule has never been recognized in any of the United States: 10 Pet. 161. *Wilson v. Franklin and Burleson*, 63 N.C. 259, is in point. It may perhaps be said that the defendants, in that case, occupied better ground than can be claimed for the defendant in this, for Franklin was an officer and Burleson a private in the army of the United States, and they acted under the express orders of a superior officer; and yet it was held that they were guilty of a trespass, in taking horses from a citizen after the cessation of hostilities.

The judgment of the Superior Court is affirmed.

Per curiam.

Judgment affirmed.

Cited: Franklin v. Vannoy, 66 N.C. 152.

(321)

W. T. ERWIN v. J. M. LOWERY AND OTHERS.

Courts will not readily decide an answer to be *"frivolous":* One by which it is *intended* to raise *a serious question, ex. gr.,* the effect of an endorsement by three out of four executors, of a note payable to their testator, is not frivolous.

Perhaps, *no notice of a motion* is required, where cases come on regularly for trial at a term of the Court.

CIVIL action, tried before *Henry, J.,* at December Special Term 1869 of BUNCOMBE Court.

The defendant Lowery was maker of the note sued upon, and the three defendants were three out of four of the executors of James R. Love deceased, the payee of such note. These executors had endorsed the note, and there was another executor, who had not joined in such endorsement.

The answer of such of the executors as were sued, relied upon the fact that all of them had not joined in the endorsement, as a defense to the action.

Upon the filing of such answer, the plaintiff moved for judgment, 1. against the executors sued, *as executors;* and, upon that being refused, 2. against them, *personally.* This motion also was refused.

The plaintiff appealed.

Phillips & Merrimon for the appellant.
Battle & Sons contra.

RODMAN, J. In this case the plaintiff, considering the answer frivolous, moved the Court for judgment, under S. 218, C.C.P. That section requires five days notice, which was not given. No objection was made on that account, and we would be inclined to hold that there is no necessity for notice when the case comes on regularly for trial at a term of the court.

Was the answer frivolous? What is meant by a "frivolous" answer in the Code, is, one which is manifestly impertinent, as alleging matters which, whether true or not, do affect the plaintiff's right to recover. In *Linwood v. Squire,* 5 *Exch.* (322) *(W. H. & G.)* 234, Parke, Baron, says, "I do not say that the plea is a good plea, as it is not necessary to decide that question, but a plaintiff has no right to sign judgment, if the plea raises a serious question, and one which is fit for discussion." In such a case the plaintiff, if he is willing to admit the allegations of the plea, should demur, in order that their effect may be determined. A general practice to determine the sufficiency of an answer on a

motion for judgment *non obstante placito,* would be prejudicial to a defendant. Where the answer is put in good faith, and is not manifestly impertinent, he is entitled to have the facts alleged in it, either admitted by a demurrer, or passed on by a jury. To hold the contrary, would be to give the plaintiff an advantage. In this case the plaintiff must be deemed, according to S. 127, C.C.P. to have denied the new matter alleged in the answer, and the defendant may have had witnesses in attendance to prove them; if the judge should, before an ascertainment of the facts, decide the answer insufficient, and err in that decision, the expenses of another attendance by the witnesses, would be necessary, and perhaps, in the meantime their testimony might be lost. In this case we think the answer was not manifestly impertinent or frivolous. It was meant to raise a serious question, *viz:* the effect of an endorsement by three out of four executors of a promissory note payable to their testator.

We think the Judge was right in refusing both of the plaintiff's motions, at that stage of the case, and we think, instead of stopping the case on the appeal of the plaintiff, he should have gone on, and tried the issue made by the answer, under S. 127, C.C.P. If the verdict had been for the defendant, the plaintiff might still have moved for judgment, *non obstante veredicto,* and neither party would have been prejudiced.

As the case goes back for trial, it may be well for the plaintiff to consider the sufficiency of his Complaint.

(323) Several defects were suggested on the argument — 1. That it is uncertain whether the defendants are sued in their personal, or in their representative character: 2nd. It does not state whether the endorsement was before or after the maturity of the note: or 3rd, any consideration: 4th, any demand of payment: 5th, or make any allegations of a will.

We do not mean to intimate any opinion on the sufficiency of the complaint. The Courts are required by the Code to be liberal in allowing amendments, when the object is a fair and full statement of the grounds of action and defence.

Let this opinion be certified.

Remanded, at the costs of the appellant.

Per curiam.

Ordered accordingly.

Cited: Swepson v. Harvey, 66 N.C. 437; *Bolin v. Barker,* 75 N.C. 46; *Womble v. Fraps,* 77 N.C. 100; *Chasteen v. Martin,* 81 N.C. 55; *Dail v. Harper,* 83 N.C. 7; *Johnston v. Pate,* 83 N.C. 112; *Hull v. Carter,* 83 N.C. 250; *Brogden v. Henry,* 83 N.C. 275; *Wil-*

liams v. Whiting, 94 N.C. 483; *Allison v. Whittier,* 101 N.C. 494; *Zimmerman v. Zimmerman,* 113 N.C. 435; *Campbell v. Patton,* 113 N.C. 483; *Bank v. Duffy,* 156 N.C. 88; *Hardware Co. v. Banking Co.,* 169 N.C. 746.

DOE ON DEM. OF MARGARET McLENAN v. K. C. CHISHOLM.

An abstract of a grant, as follows: "Sampson Williams 300 acres, Anson, on Mountain Creek, beginning at a pine, etc., [bounding it.] May 24th 1773, (signed) Jo Martin," — shows with requisite certainty, that there is a grantor, Martin; a grantee, Williams; a thing granted, 300 acres; and that a grant was executed on the 24th of May 1773.

Although, a party offering a grant in evidence, do not connect his own title with that of the grantee, still he may be interested in proving the title out of the State, *ex gr.* in order to shorten the period which ripens a color of title into a good title.

The *immateriality* of an error, on the trial below, must clearly appear, on the face of the record, in order to warrant the Court in treating it as surplusage.

EJECTMENT, tried before *Buxton, J.,* at Fall Term 1869, of MONTGOMERY Court.

The plaintiff claimed under a chain of title, beginning with a grant from the State in 1825. In order to show title out of the plaintiff, the defendant offered in evidence, an abstract (324) of a grant from the State, in the following terms: "Sampson Williams 300 acres, Anson, on Mountain Creek, beginning at a pine [then tracing the boundaries,] May 24th 1773. (Signed) Jo Martin."

The plaintiff objected, and the Court excluded it.

It is not necessary to report the other facts in the case.

The plaintiff had a verdict; Rule, etc.; Judgment and Appeal.

Ashe and Battle & Sons for the appellant.

Blackmer and McCorkle contra, cited and commented upon *Sumner v. Roberts,* 13 N.C. 527; *Warren v. Spivey,* 32 N.C. 182; *Beckwith v. Lamb,* 35 N.C. 400; *Morgan v. Bass,* 25 N.C. 245; *Dancy v. Sugg,* 19 N.C. 515; *Bynum v. Thompson,* 25 N.C. 578; *Loftin v. Cobb,* 46 N.C. 406; *Berryman v. Kelly,* 35 N.C. 269; *Carson v. Mills,* 18 N.C. 546; *Yarbro v. Harris,* 14 N.C. 40.

PEARSON, C.J. His Honor erred in rejecting "the abstract of a grant" (Exhibit A.), which was offered by the defendant. From the abstract it appears, with the requisite certainty, that Sampson Williams was the grantee, Gov. Martin the grantor, the three hundred acres of land therein described, the subject of the grant, and that a grant was executed, May 24th 1773. This is settled: *Clarke v. Diggs,* 28 N.C. 159; *Candler v. Lunsford,* 20 N.C. 19.

It is said, in the argument, that this error did not affect the defendant's case, as he failed to connect his title with the Williams grant. There is no telling how far the defendant's case was affected by this error. Where there is error, its *immateriality* must clearly appear on the face of the record, in order to warrant this court in treating it as surplusage. In order to ripen his title by adverse possession, a party need not connect it with the original grant. That may be offered simply to show title out of the State, in (325) which case seven years adverse possession under color of title, will ripen it; Whereas, a much longer time is required, if title out of the State be not shown: *Reid v. Earnhardt,* 32 N.C. 516.

It is not necessary to enter further into the case. There is error.

Per curiam.

Venire de novo.

Cited: Tolson v. Mainor, 85 N.C. 238; *Strickland v. Draughan,* 88 N.C. 319; *Aycock v. R. R.,* 89 N.C. 324; *Marshall v. Corbett,* 137 N.C. 557; *Bryant v. Bryant,* 178 N.C. 81; *Stanley v. Lumber Co.,* 184 N.C. 306; *S. v. McLeod,* 196 N.C. 546.

M. B. WILLIAMS v. A. M. ROCKWELL.

If a writ of capias ad respondendum (under the former system) were not returned for two years, it lost its vitality: *Therefore,* where such writ was executed returnable to Spring Term 1865 of Johnston Superior Court, and no such Court sat then, or at Fall Term: *Held,* that a judgment by default taken in such suit at Spring Term 1867, was irregular.

A judgment by default *final,* upon a note payable in Confederate money, is irregular.

The proper remedy for the defendant in such case, is by a *motion in the cause.*

WILLIAMS *v.* ROCKWELL.

ACTION, before *Watts, J.*, upon a motion to vacate an injunction, at December Special Term 1869 of WAKE Court.

The facts were, that a writ had been issued by the defendant against the plaintiff, upon a note for $750, given for the price of a steam engine, payable in Confederate money, and dated March 1864. The writ was executed, and was returnable to Spring Term 1865 of Johnston Superior Court. No term of that Court was held in that County, for either the Spring or Fall of that year. A judgment by *default final* was taken in such suit at Spring Term 1867, for the full amount; and having been docketed in Wake, execution was duly issued, etc. (326)

This action was for an injunction, and that the defendant should be required to take the *scale* value for the note, etc.

His Honor made an order for a preliminary injunction, and afterwards, upon the coming in of the answer, refused to grant an order to vacate it.

The defendant appealed.

Bragg and Cox for the appellant.

1. The judgment was regular, and cannot be set aside. *Crawford v. Bank of Wilmington,* 61 N.C. 136; *Davis v. Shaver, Id.* 18; *Sharpe v. Rintels, Id.* 84.

2. If irregular, the defendant's relief is by *motion in the cause,* to the Court that gave the judgment. *Parker v. Jones,* 58 N.C. 276; *Partin v. Lutterloh,* 3 Id. 341.

Battle & Sons contra.

One effect of docketing a judgment in another county than that where the suit was tried, is, that the defendant will be without adequate remedy unless he may apply for an injunction *in the County* where is the judgment which is being enforced against his property. See *Watts v. Bogle,* 26 N.C. 331, and *Lunsford v. McPherson,* 48 N.C. 174.

DICK, J. The statute regulating the terms of the courts, and the issuing and return of process, prescribes that the clerk shall note on a writ the day when it was issued, and the Sheriff, the day when he received it; and makes it returnable to the next ensuing term of the court. If a writ was issued within ten days before a Superior Court, then it is made returnable to the second term after process issued: Rev: Code, ch. 31, sections 39-50.

When a term of a Superior Court was not held, by reason of a non-attendance of the Judge, then all process returnable to
(327) that term was continued in force, and was properly returnable to the succeeding term: Rev. Code, ch. 31, sec. 21.

No provision was made by law for the return of process when a court was not held for the two successive terms. After the writ upon which the present defendant took his judgment by default had passed the second term without being returned, it lost its vitality, and the present plaintiff was not bound to attend the third term. The judgment, therefore, was irregular, as it was not taken according to the course of the courts.

The judgment by default was irregular in another respect. The instrument declared on, was not a note for the payment of money: *Lackey v. Miller,* 61 N.C. 26. The judgment by default was, therefore, not *final,* but interlocutory, and a jury should have assessed the value of the contract, upon a writ of inquiry, before the judgment was made final.

The contract, in express terms, was solvable in Confederate money, or its equivalent, and must be construed as those contracts which are thus solvable by presumption of law. As this note was given for property, the value of such property is the true value of the contract: *Garrett v. Smith, ante* 93.

The remedy of the present plaintiff is a motion in the cause to set aside the judgment by default, for irregularity: *Mason v. Miles,* 63 N.C. 564.

The present proceedings cannot be regarded as such a motion, as they are constituted in a different court from that in which the judgment was rendered. The plaintiff may be able to find adequate relief, in the manner pointed out in the case of *Foard v. Alexander, ante* 69.

There was error in the ruling of his Honor, and these proceedings must be dismissed.

Per curiam.

Error.

Cited: Martin v. Mining Co., 64 N.C. 654; *Erwin v. R. R.,* 65 N.C. 80; *Hutchison v. Symons,* 67 N.C. 163; *Roulhac v. Miller,* 89 N.C. 197.

(328)

THOMAS L. MARTIN v. FRANKLIN CUTHBERTSON.

If a horse be hired, or borrowed, to be ridden to a particular place and returned at a particular time, if he be ridden to another place and kept beyond the time, the bailee is responsible for any injury to the horse which results from his departure from the contract; without regard to any question of negligence.

ACTION, tried before *Logan, J.*, at Fall Term 1869 of CABARRUS Court.

The action was brought for damages, for the loss of a horse, which had been lent by the plaintiff to the defendant, to ride to one Cline's and return the next day — but which was ridden a mile and a half further than Cline's, and in a different direction, and which died during its absence, on the third day after leaving home. It was admitted that the death of the animal occurred from no neglect by the defendant.

The Court instructed the jury that the defendant was bound to use extraordinary care and if he did not, was liable for damages, etc.

Verdict for the plaintiff, etc. Appeal by the defendant.

Wilson for the appellant.
Montgomery contra.

READE, J. Where there is a bailment, as in the case of borrowing or hiring a horse for a specific purpose, as to go to a certain place, or for a certain time, and there is any material departure from the terms of the bailment, the bailee becomes a wrong-doer, and is liable for any injury which results from the departure, without regard to the question of negligence.

In the case under consideration, the horse was borrowed, or hired, to go to a certain place, to be returned at a certain time: he was ridden to another place, and died on the trip. It was admitted that there was no negligence, — that is, as we understand it, no miss-treatment, but that makes no difference. (329)

And *non constat* that the horse would have died but for the departure from terms of the bailment. His Honor's instruction, that the defendant was liable unless he took extraordinary care, was more favorable for the defendant than the law allows, and therefore he cannot complain. He was liable even if he did take extraordinary care: *Bell v. Bowen*, 46 N.C. 316; Redfield on Bailment, Sec. 650.

There is no error.
Per curiam.
Judgment affirmed.

Cited: Cooke v. Veneer Co., 169 N.C. 494; *Trustees v. Banking Co.*, 182 N.C. 305; *Lacy v. Indemnity Co.*, 193 N.C. 182.

FREDERIC H. PENDLETON v. JOHN H. DALTON.

According to the former practice in equity, a plaintiff could not move for an injunction (even where prayed for in the bill) after answer filed, except in term time, and upon the equity confessed in the answer.

This was so even where the answer was excepted to, as being insufficient. In such case the plaintiff could bring on for hearing, his motion for an injunction, and his exceptions, at the same time.

Quœre, Whether under the former system, a Judge had the power to grant in vacation an interlocutory injunction.

MOTION to vacate an injunction, made before *Cloud, J.*, December 18 1869 at Chambers, YADKIN Court.

The case was, that on the 15th of November 1869, the plaintiff presented before Cloud, J., a sworn petition, of which the material statements were as follows, to wit: On October 18th 1862, the defendant Dalton, being executor of one Houston, and authorized as such to sell his lands, contracted to convey the plaintiff a certain tract, and in December 1862 put him in possession thereof; (330) and the plaintiff paid a large part of the purchase money.

The defendant refusing to convey, at Spring Term 1868 of the Court of Equity for Iredell County, the plaintiff filed his bill for a specific performance of the contract, and for injunction against the action of ejectment hereafter mentioned. At the Special Term (July) 1869, the defendant filed an answer to which the plaintiff excepted as insufficient, and the suit was then removed to the Superior Court of Yadkin where it is still pending. Before the filing of the plaintiff's bill, the heirs of Houston, and Dalton (his wife being one of the heirs) instituted an action of ejectment against the plaintiff, and at the Special Term in July 1869, recovered a judgment, and have sued out a writ of possession: and the plaintiff, in his said petition, then prays for an injunction, and that the defendants be summoned to appear at a day and place to be named by the Judge, to show cause, etc.

The Judge issued the injunction, and a summons requiring the defendant to appear before him at the next Term of the Superior Court for Davie. The defendants appeared on the 15th of December 1869, and put in an answer on oath, and moved the Judge to dissolve the injunction, which he declined to do, and the defendants appealed.

W. P. Caldwell and Clement for the appellant.
Boyden & Bailey, and Furches contra.

RODMAN, J., (after stating the case as above.) The question presented is, was the injunction properly granted. It is admitted, that if the proceeding is to be considered as under the Code of Civil Procedure, it is irregular, and cannot be sustained. But the counsel for the plaintiff contend that it is not a new action, but a motion or petition in the Bill for specific performance, which was pending at the ratification of the Code, and hence must be governed by the former rules of equity practice, without reference to the Code. As a general proposition we admit this. *Teague v. James,* 63 N.C. 91. Then, can the proceeding be sustained under the (331) practice referred to?

The injunction prayed for by the plaintiff's bill would be, according to the distinction taken in the English practice, a special injunction; it could be applied for in the first instance—that is before answer, and sometimes even before bill filed, and in vacation. But the Court would grant it only in cases of pressing necessity; otherwise, and especially when the petitioner had himself been guilty of laches, they would leave him to his ordinary remedy, by an application after the time for an appearance on the subpœna had expired, when, in case of default, he could obtain the injunction as a matter of course, or might move for it on the equity confessed in the answer: 3 Daniel Ch. Pr. 1889, 1811; *More v. Lewis,* Jac. 502. The authority of the judges of the Courts of Equity in this State (as distinct from the Courts) to grant injunctions, rested prior to the Code of Civil Procedure, on Rule 8, ch. 32, sec. 3 Rev. Code. But under that Rule no Judge could dissolve or modify an injunction, except in term time. By force of this statute a Judge could grant a preliminary injunction on hearing the bill; but if no injunction were moved for (although prayed in the bill) before answer filed, then it was necessarily moved in term time, and could only be on the equity confessed in the answer. If therefore in this case, the plaintiff at the Special Term 1869, when the answer was filed, had moved for injunction, it could only have been on the equity confessed. To meet this proposition, however, the counsel for the plaintiff says

that the answer was excepted to, and must therefore be regarded as never having been put in. That is a mistake; the rule is, that after exceptions, the defendant cannot move upon his answer, to dissolve an injunction previously obtained; neither can the plaintiff move for an injunction, or for judgment *pro confesso,* as if there were no answer: consequently, in order to avoid delay and prejudice to him, the plaintiff is at liberty to bring on for hearing, his motion (332) for an injunction, and the exceptions to the answer, at the same time: *Edney v. Motz,* 40 N.C. 233. It was the duty of the plaintiff to have taken that course at the Special Term in 1869. Having failed to do so, he was in default, and according to the English practice, could not afterwards have been allowed a special injunction without notice to the adverse party. Indeed it seems that in England, all interlocutory injunctions must be, on notice: 3 Dan. Ch. Pr. 1781. But, independent of the above, it cannot be proved that the Judges of the Courts of Equity in this State, ever had jurisdiction to grant interlocutory injunctions in vacation. Possibly Rule 8 above cited, might have been construed to support such a power; but no instance is reported when it has been so held, and no *dictum* even can be cited in support of such a construction, while it is expressly rejected, as unknown, in *Moore v. Reid,* 36 N.C. 418. Under the circumstances we are not inclined to depart from what seems to have been the received law heretofore. The plaintiff has his remedy, by motion in the Superior Court of Yadkin. The injunction is dissolved, and the petition dismissed. Let this opinion be certified.

Per curiam.

Reversed.

Cited: S.c., 92 N.C. 189.

W. H. CARSON, ETC. v. J. A. CARTER.

An award must have, upon its face, certainty to a common intent, or it will be void:

Therefore, where a suit involving land, was referred to arbitrators to be settled, and their award to be a rule of Court: *Held,* that an award, that the plaintiff "is entitled to his deed for the premises mentioned in the pleadings, *upon the payment of all the purchase money and interest due thereon,*" — where the pleadings in the action showed a difference between the parties in respect to the amount of such purchase money, —

should be set aside, and the parties be at liberty to proceed, as if there had been no reference.

ACTION, before *Henry, J.,* upon exceptions to an award therein, at December Special Term 1869 of BUNCOMBE Court. (333)

The plaintiffs sought an injunction against a writ of possession for land, which the defendant was suing out under a judgment in ejectment. After the coming in of the answer, the cause was referred to two gentlemen, for settlement, with a provision that their award should be a rule of Court. Subsequently they returned an award, directing, amongst other things; that "the plaintiff Greenwood is entitled to his deed for the premises mentioned in the pleadings, upon the payment of all the purchase money, and interest due thereon."

The defendant excepted to this award, among other reasons, because the above direction was uncertain.

His Honor overruled the exceptions, etc., and the defendant appealed.

Phillips & Merrimon cited *Gibbs v. Berry,* 35 N.C. 388; *Patton v. Baird,* 42 N.C. 255; *Cannady v. Roberts,* 6 Id. 422.

Bailey contra cited *Harralson v. Pleasants,* 61 N.C. 365; *Coxe v. Gent,* 1 McMullan (Law) 202; *Preston v. Whitcomb,* 11 Verm. 47; Watson, Awards 202.

DICK, J. The parties to this suit agreed to refer the whole matter in controversy to two arbitrators, "to be settled, and their award to be a rule of court." An award was made, and its enforcement was resisted by the defendant, and its validity impeached by various exceptions. It is unnecessary to pass upon all of the exceptions, as there is one which is decisive of the matter before us: the award must be set aside, as the arbitrators have not declared their decision with sufficient certainty. An award must be certain to a common intent, and this certainty must appear upon the face of the award; so that a judgment can at once be entered upon it, which will finally settle all the matters referred. If sufficient (334) *data* are given, so that mere calculation will render the award certain, it ought to be sustained, as, *id certum est quod certum reddi potest.*

The award in this case declares, "that the plaintiff Greenwood, is entitled to his deed for the premises mentioned in the pleadings, upon the payment of all the purchase money, and interest money due thereon." The amount of the purchase money, and the person

to whom it must be paid, are not set forth; and no *data* are upon the face of the award by which these important particulars can be ascertained.

If we were at liberty to look into the pleadings in construing this award, we could not obtain information which would give the requisite certainty.

The plaintiff, Greenwood, says that he has paid all the purchase money to the persons entitled. This statement is denied in the answer. The defendant admits that he received fifty dollars in Confederate money from the proceeds of sale, and there is still outstanding a small note executed by him; but the date of the note, and the time when said money was received, are not stated. The persons to whom the purchase money is to be paid, are equally uncertain, and the rights of the parties in this matter, have not been ascertained and adjusted.

A judgment cannot be entered upon this award which will finally settle the controversy. The judgment in the Court below was erroneous, and the award must be set aside, and the parties can proceed as if there had been no reference.

Let this be certified.

Per curiam.

Error.

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(335)

SAPONA IRON COMPANY v. JOHN A. HOLT.

That the thing sold was wholly valueless, is no reply to an action upon a specific contract for the price of such thing, in case it were accepted, retained and used by the vendee.

A charter granted by the State Convention of 1861-2 is valid, if included within the terms of the 18th of October 1865.

That such charter required the board of Directors to be "citizens *of the Confederate States*," is immaterial.

ASSUMPSIT, tried before *Cloud, J.*, at Fall Term 1869 of ROWAN Court.

The plaintiff declared upon a special contract for the price of a steam engine, sold by it to the defendant in 1865. There was conflicting evidence whether the price was agreed upon, or was left undetermined; also, whether or not the engine was valuable or worthless. It was shown that the plaintiff's place of business was in

Chatham County, and that the engine whilst there, before it had been seen by him, was sold to the defendant, and afterwards was delivered to, and accepted and used by him.

It was also shown that the plaintiff was a corporation chartered by the State Convention of 1861-2, and that by a provision in its charter its affairs were to "be managed by a board of Directors all of whom should be stockholders of said company, *and citizens of the Confederate States.*"

The defendant submitted that the Convention of 1861-2, could not create a corporation that would be recognized now; and that if it could, then by the terms of this charter it had expired at the Surrender; also that even in case of a special contract, a total failure of consideration would be a perfect defence.

The Court instructed the jury that if there were a special contract, the plaintiff would be entitled to recover, even if the engine were valueless; and there was a verdict and judgment accordingly.

The defendant appealed.

Boyden & Bailey for the appellant. (336)

1. If the engine were valueless, there was a *total failure of consideration,* which is fatal to all agreements by parol. *Withers v. Green,* 7 How. 213; *Van Buren v. Digges,* 11 id. 451; *Winder v. Caldwell,* 14 ib. 434; *Cutter v. Powell,* 2 Sm. L. C. 1, Eng. & Am. Notes; *Brown, Actions* 319.

McEntyre v. McEntyre, 34 N.C. 299, and *Baines v. Drake,* 50 N.C. 153, are distinguishable, as *here* the thing was not seen when bought, and there was no *contemporaneous* delivery.

They also cited *Coggs v. Bernard,* 2 Ld. Ray 909; *Brown v. Ray,* 32 N.C. 72; *Smith,* Cont. 91, 120, etc., and *Wells v. Hopkins,* 5 Id. & W. 7.

2. Charters can be created only by governments *de jure. Ang. & Ames,* Corp. § 22; *Texas v. White,* 7 Wall 732.

3. The language specifying who alone can be directors, suggests that its *purposes* were disloyal, and in aid of the the rebellion.

Blackmer & McCorkle cited and relied upon *McEntyre v. McEntyre,* 34 N.C. 299; *Baines v. Drake,* 50 N.C. 153, and *Hobbs v. Riddick,* 50 N.C. 80.

SETTLE, J. This was an action of assumpsit brought upon a special contract, to recover $325, the price of a grist mill of the Harrison patent. The pleas were *non assumpsit,* and Illegal consideration.

In support of the latter plea it was contended,

1. "That the rebel convention in 1862" had no power to create a body corporate.

2. That if it had, as the charter in its terms provided that its affairs should "be managed by a Board of Directors, all of whom should be stockholders of said company, and citizens of Confederate States," when the rebellion was crushed, the charter necessarily expired.

The reply is, the Ordinance of the 18th of October 1865, declares the act of incorporation in question, among other laws
(337) and ordinances passed since the 20th day of May 1861, to be in full force, unless there be something in it incompatible with the allegiance of the citizens of the State to the government of the United States, and inconsistent with the Constitutions of the State and the United States. We are unable to see how the sixth section of the act of incorporation, relied upon to establish this inconsistency with allegiance, can have that effect.

The words are used merely as a designation of the persons who are to carry on an ordinary and legitimate business, and they are doubtless thus described, not from any desire to aid the rebellion, but only to have them (the directors) accessible at all times, in order more effectually to carry on a business not more illegal than making corn, or leather, or selling goods. While we cannot countenance anything done in aid of the rebellion, we should be careful not to be misled by every suggestion that may be made in that behalf. We concur with his Honor's ruling on that of the case.

It is admitted, that at the time of the sale the mill was in Chatham County, and the defendant in Salisbury, and that it was purchased by the defendant without having seen it. It is also admitted, that it was afterwards delivered to the defendant and used by him. There was conflicting testimony, both as to the fact whether there was a special contract or not, and also as to the value of the mill. Upon this part of the case his Honor instructed the jury, that if, upon the evidence, they should come to the conclusion that there was no special contract, then they should inquire whether the evidence satisfied them that the mill was wholly valueless, and if it did, the defendant would be entitled to their verdict; but if it did not, then they must find a verdict for the value of the mill. He further instructed that if they should be satisfied from the evidence that the mill was sold to the defendant by the plaintiff's agent for a specific price, then they could not consider the evidence tending to show that the mill was valueless, and that the defendant
(338) would have to resort to a cross-action. We do not understand the defendant as objecting to the first part of this charge.

Has he any just ground of exception to the last part?

We think not. If there was a special contract, followed by a delivery of the property, to say nothing of the user, the action for the price agreed upon cannot be defeated, unless there be a total failure of consideration. A mere right to recover damages for a deceit, or a false warranty, can avail nothing by way of defence, where an action can be maintained upon a special contract. Nor can it be shown that the articles sold and delivered, were of inferior quality. The defendant may have been in a better situation, had he remembered the maxim, *caveat emptor.* In *McEntyre v. McEntyre,* 34 N.C. 299, it is said "if the property is retained by mutual consent, or if it is never delivered, or if a counterfeit bill be received, an action for the price agreed to be paid, may be defeated; otherwise, if the property is delivered, although it turns out to be unsound, and of no value; or if the bill be genuine, although upon an insolvent bank. In these cases, the reception of the property, or of the bankbill, is a consideration to support the promise to pay the price agreed on, and the defendant must resort to the warranty, if he had the prudence to require one, or to his action for the deceit, if one was practiced."

The idea of there being such a total failure of consideration as to altogether defeat an action for the price, after the sale, delivery and use of a mill, is not to be entertained. The practice under the Code of Civil Procedure, recognizing counter-claims, will be different, and therefore we need not elaborate the subject further than is necessary for the decision of this case.

The cases cited in the brief of Mr. Bailey convinced us of the justness of the remark in *Hobbs v. Riddick,* 50 N.C. 80, "that the subject is very much complicated by conflicting decisions in the English Courts." But the same remark is not applicable to our decisions. *McIntyre v. McIntyre, Hobbs v. Riddick,* (339) *supra,* and *Baines v. Drake,* 50 N.C. 153, are uniform, and settle the law as charged by his Honor.

Per curiam.

No error.

Cited: Moore v. Hill, 85 N.C. 221; *Guano Co. v. Tillery,* 110 N.C. 31; *Conservatory v. Dickenson,* 158 N.C. 209.

THE STATE v. MARTIN MCAFEE.

A colored person upon trial for crime, has a right to object to any one's sitting in his case as a juror, who "believes that he cannot do impartial justice between the State *and a colored person"; therefore,* where the Court refused to allow a preliminary question to that effect, to be asked, *Held,* to be error.

RAPE, tried before *Mitchell, J.,* at Fall Term 1869 of BURKE Court.

The prisoner was a *colored* man, and among the preliminary questions put to persons who were offered as jurors, he proposed to enquire, whether they believed that they could as jurors, do equal and impartial justice between the State and a colored man.

Upon objection by the Solicitor, the Court excluded the question.

Verdict, *Guilty;* Rule, etc. Judgment and Appeal.

Malone for the appellant, cited and commented upon *People v. Rogers & Valencia,* 5 Cal. 347; *State v. Benton,* 19 N.C. 196; 2 Wharton Cr. Law, § 2997, and *Selfridge's* case.

Attorney General contra.

Personal ill will is good cause of challenge, but suggestions of an antipathy *between races,* cannot be listened to under our present constitution.

SETTLE, J. There are several exceptions to the rulings of (340) his Honor who presided at the trial of this case. We will only notice one, as, clearly, it is well taken, and entitles the prisoner to a *venire de novo.*

The counsel for the prisoner proposed to ask a juror, if "he believed he could, as a juror, do equal and impartial justice between the State and a *colored* man," the prisoner being a colored man. This question was objected to by the Solicitor, and disallowed by the Court.

The causes of challenge to the favor are so numerous as to be described by Lord Coke as "infinite." Any fact or circumstance may be given in evidence, tending to establish bias, partiality or prejudice, on either side. Not only may his declarations to others be shown, but a juror is bound to answer on oath, any question touching his competency, unless it tend to degrade him or render him infamous. It is essential to the purity of trial by jury, that every juror shall be free from bias. If his mind has been poisoned

by prejudice of any kind, whether resulting from reason or passion, he is unfit to sit on a jury. Here, his Honor refused to allow a proper question to be put to the juror, in order to test his qualifications. Suppose the question had been allowed, and the juror had answered, that the state of his feelings towards the colored race was such that he could not show equal and impartial justice between the State and the prisoner, especially in charges of this character: it is at once seen that he would have been grossly unfit to sit in the jury box.

A remarkable case showing the practice on the circuit, as well as the prejudice in respect to color, came under my own observation shortly after the emancipation of the colored race. The evidence showed that the old man had been secretly assassinated in the woods while feeding hogs, which was a part of his daily duty. The Court permitted the Solicitor to ask each juror if he had any feeling which would prevent him from convicting a white man for the murder of a negro, though the evidence should prove him guilty. Strange and discreditable as it may appear, the Court found it necessary, in addition to the regular panel, to order three (341) special writs of *venire,* of fifty each, before twelve men could be found who did not answer that they would not convict a white man for killing a negro.

In *The People v. Rogers and Valencia,* 5 Cal. 347, the defendants, being Mexicans, proposed to ask a juror the following questions, to-wit:

"1. Are you not a member of a secret and mysterious order known as, and called Know-nothings, which has imposed on you an oath or obligation, beside which, an oath administered to you in a Court of justice, if in conflict with that oath or obligation, would be by you disregarded?

"2. Are you a member of any secret association, political or otherwise, by your oaths or obligations to which, any prejudice exists in your mind against Catholic foreigners?

"3. Do you belong to any secret political society known as, and called by the people at large in the United States, Know-nothings; and if so, are you bound by an oath or other obligation not to give a prisoner of foreign birth, in a Court of Justice, a fair and impartial trial?"

The Court refused to allow the questions, but, upon appeal, the Supreme Court reversed the judgment of the Court below; holding the question to be proper in a cause where foreigners were parties.

Per curiam.

Venire de novo.

Cited: S. v. Boyle, 104 N.C. 835.

(342)

DOE ON DEM OF JOHN McCONNELL, ETC. v. ABNER McCONNELL.

A paper writing purporting to be a will, *proved* before the proper tribunal, in 1810, by the oath of *one* witness, is *color of title* for the lands disposed of therein.

(A sketch given of the history of the doctrine of *color of title*, in this State.)

EJECTMENT, tried before *French, J.*, at Spring Term 1861 of the Superior Court of IREDELL.

The plaintiff made title through a paper-writing, purporting to be the will of one John McConnell, which had been admitted to probate at February Term 1810, of the Court of Pleas and Quarter Sessions of Iredell County. The entry of probate, upon the record of that term, is: "Tuesday February 20th 1810; Present, James Crawford, Joseph Gray, A. Torrence, M. Matthews and George Robison, Esquires. Last will of John McConnell, proven by Andrew Hart. Letters issued to Jane McConnell, and qualified."

The *will* was: "In the name of God, Amen! I, John McConnell, of the county of Iredell, etc., being of sound and perfect mind and memory, etc., do, this November 16th 1808, make and publish my last will, etc., [going on to devise all his property, including the land in question.] Witness whereof, I the said John McConnell have to this, my last will and testament. Witness whereof, I have put my hand and seal, the day and year above written.

(Signed,) JOHN his (X) mark McCONNELL.

Test: Andrew Hart, *(jurat.)*

Signed, sealed, published and delivered by the said John McConnell, the Testator, as his last will and testament in the
(343) presence of us, who were present at the signing and sealing thereof." [No other subscribing witnesses.]

The plaintiff claimed that such paper-writing, as proved, constituted color of title.

His Honor intimated an opinion that it did not.

Verdict for the defendant, etc.; Appeal by the plaintiff.

Boyden & Bailey and Wilson for the appellant.
W. P. Caldwell contra.

RODMAN, J. The precise question here presented has never been decided in this State that we are aware of. It has been held

that a writing, purporting to be a will of lands, which has but one subscribing witness, and *which has never been proved as a will,* is not color of title: *Callender v. Sherman,* 27 N.C. 711: and so of a copy of such a writing taken from the book of records of wills in a county: *Sutton v. Westcott,* 48 N.C. 283. Those cases obviously differ from this, as here the writing was proved as a will. The difficulty is, that in 1810 a will of personalty was good if attested by one witness, whereas a will of realty was required to be attested by two.

Realty might be devised by a holographic will, with one or no attesting witness, but then the hand-writing of the testator was required to be proved by those witnesses.

So that, unless we assume, as we cannot, that something more was done than the record sets forth, we cannot hold that this will was proved so as to pass realty, and consequently the title of the devisor did not pass to the devisees.

That, however, is not the question. Was it color of title? In *Grant v. Winbourn,* 3 N.C. 220, it was said that it was the intent of the act of 1716, "that where a man settled upon and improved lands, upon the supposition that they were his own, and continued in the occupation for seven years, he should not be subject to be turned out of possession: hence arises the necessity for color of title, for if he has no such color or pretense of title, he cannot suppose the lands are his own, and he settles on this in (344) his own wrong."

Afterward, it was held that, whether or not the writing was color of title, did not depend on the belief of the grantee at the time, for even if he knew that the land was the property of another person than his grantor, it might still be color: *Riddick v. Leggett,* 7 N.C. 539; *Rogers v. Mabee,* 15 N.C. 180; but, on its professing to pass a title, which it fails to do, either from want of title in the person making it, "or from the defective mode of conveyance employed: but it must not be so obviously defective that no man of 'ordinary capacity' could be misled by it:" *Tate v. Southard,* 10 N.C. 119; *Dobson v. Murphy,* 18 N.C. 586. In endeavoring to apply this rule, and to ascertain whether this will was so obviously defective for the purpose of passing lands as to come within it, we are to exclude the presumption generally applicable, that every man is supposed to know the law; for the statute upon which the whole doctrine of color of title is founded, recites, as the evil to be remedied, that many persons had gone into possession of land upon titles having patent defects, *e. g.* on sales by administrators, endorsements of patents, etc., which, on the supposition that all men know the law, could have deceived no one, and would not have de-

served protection. So, in *Tate v. Southard,* it is said that "a writing, where the title does not pass by reason of the defective mode of conveyance employed," is color of title: so is a deed by husband and wife without her privy examination, *Pearce v. Owens,* 3 N.C. 234; a deed purporting to be by an attorney without any authority appearing, *Hill v. Wilton,* 6 N.C. 14; an unconstitutional act of the legislature, *Episcopal Church v. Newbern Academy,* 9 N.C. 233. All these are examples of patent defects which could not have misled a lawyer. We think that, in this case, the defect in the probate of the will was not so obvious but what it might have misled a man of ordinary capacity. The will appears to have been proved; it does not, manifestly, or except by a course of legal reason-
(345) ing, appear not to be proved so as to pass land. Had the record of the probate stopped after saying that the will was proven, and not added the words "by Andrew Hart," it might have been very doubtful whether it would not be presumed to have been proven in the only way it could legally have been, as a holographic will.

Must it be presumed to occur to every man of ordinary capacity, that the addition of these words vitiated it? To a lawyer, upon reflection, it would. The statute from which the doctrine of color of title is derived, is a statute of repose. Courts have long since ceased to be astute to defeat statutes of limitation. It has been well said that through them, Time, which is constantly destroying our muniments of title, is as constantly curing the loss.

It may be, that had this title been earlier assailed, the plaintiff might have proved the due execution, which, after fifty-eight years, he cannot be expected to do. In England, where wills of lands are not admitted to probate in the Ecclesiastical courts, the rule is, that a will thirty years old, produced from the proper custody, and accompanied by possession of the land, proves itself. Stark, Ev. 521; 2 Greenl. Ev. § 679.

Per curiam.

Judgment reversed, etc.

Cited: Perry v. Perry, 99 N.C. 273; *Mfg. Co. v. Brooks,* 106 N.C. 111; *Neal v. Nelson,* 117 N.C. 405; *Greenleaf v. Bartlett,* 146 N.C. 498; *Bond v. Beverly,* 152 N.C. 61; *Ipock v. Gaskins,* 161 N.C. 684; *Burns v. Stewart,* 162 N.C. 365; *Lumber Co. v. Cedar Works,* 165 N.C. 87; *Seals v. Seals,* 165 N.C. 413; *Norwood v. Totten,* 166 N.C. 650; *Alsworth v. Cedar Works,* 172 N.C. 22; *Butler v. Bell,* 181 N.C. 89.

JOSHUA WHITSELL, ADM'R. ETC. v. W. M. MEBANE.

The burden of proving the *due delivery* of a deed, which devolves upon him who claims under it, is not avoided by showing that he has it in possession:

Therefore, where a surety, before signing a bond, stipulated that it should be placed in the possession of a third party, until such surety should receive of the principal a certain indemnity against the risk he was assuming, and then *only*, be delivered to the obligee: *Held*, that a delivery by such third person to the obligee, before the performance of the condition stipulated for, was void; *also*, that the possession of such bond by the obligee, did not shift from him the burden, ordinarily existing, of proving that the bond had been duly delivered to him.

DEBT, tried before *Tourgee, J.*, at Fall Term 1869 of ALAMANCE Court. (346)

The plaintiff declared upon a bond executed by the defendant, as surety for one John A. Mebane.

It was shown that the defendant had refused to sign it, unless it were placed in the hands of one Barnhart, to be held by him until the principal should execute a mortgage upon a certain tract of land, in order to indemnify the defendant; after which, and then only, it was to be delivered to the obligee, the intestate. This was done, and the defendant instructed Barnhart not to deliver the bond until *he* should notify him. Defendant testified that he had never so notified him, and that he had never known that it was delivered, until the bringing of this suit.

His Honor instructed the jury, that under the circumstances, Barnhart was the agent of both parties, and that a delivery by him was valid, leaving him exposed for any improper discharge of his duties, to an action by the defendant; that, as the *conditions* were to be performed by a stranger, the plaintiff was not required to prove them; that the presumption was, that the delivery had been made rightfully, and that upon the evidence, the plaintiff was entitled to recover.

Verdict for the plaintiff, etc.; Judgment, and Appeal.

Scott & Scott for the appellant.

1. Whether or not there was a delivery, was a question for the jury: *Burling v. Patterson*, 38 E.C.L. 233; *Otey v. Hoyt*, 47 N.C. 70; especially under the circumstances of this case; Shep. Touch. 54.

2. Under the evidence, the Court should have told the jury, that the plaintiff could not recover. Shep. Touch. 57, (347)

etc.; *Threadgill v. Jennings,* 14 N.C. 384; *Fitts v. Green,* Ib. 291.

Phillips & Merrimon contra.

The bond being genuine, and found in the obligee's hands, the presumption is, that it was duly delivered. Best. Pres. 75; *Otey v. Hoyt,* 47 N.C. 70; *Blume v. Bowman,* 24 N.C. 338; *Iredell v. Barbee,* 31 N.C. 250.

DICK, J. The only question presented in this case, is, whether the bond declared on was properly delivered.

To determine this question, the intention of the obligor must be ascertained from the facts attending the transaction. The defendant signed the bond as surety, and placed it in the hands of Barnhart, to be held until certain conditions precedent were performed, and then to be delivered to the obligee. At the time of this agreement, and in the presence of the plaintiff's intestate (the obligee,) the defendant expressly instructed Barnhart "not to deliver said paper writing to plaintiff's intestate until he, the defendant, should notify him of the performance of said conditions." This made the bond an *escrow,* and constituted the depository an agent of the defendant: Touchstone, 59; *Johnson v. Baker,* 4 B. & Ald. 440. The duty of the agent was to keep the bond until notified that said conditions had been performed. The defendant never departed with the control of the bond by giving such instructions, and the delivery of the agent was invalid: *Phillips v. Houston,* 50 N.C. 302. The authority vested in the agent, was a naked power, and as he exceeded it, his act was entirely void: 2 Bouv. Inst. 335.

It was insisted by plaintiff's counsel in this Court, that it was the duty of the defendant to show that the conditions precedent had not been performed, as the possession of the bond by the
(348) plaintiff was *prima facie* evidence of delivery. Such is not the true rule of evidence.

The burden of proof of the formal execution of a deed, is upon the person who claims under it, and he must aver and prove the performance of conditions precedent.

There is error in the rulings of his Honor, and there must be a *venire de novo.*

Let this be certified.

Per curiam.

Venire de novo.

Cited: Pate v. Brown, 85 N.C. 168; *Devereux v. McMahon,* 108 N.C. 146; *Herndon v. Ins. Co.,* 110 N.C. 284.

THOMAS D. CARTER v. ROBERT F. HOKE AND OTHERS.

Where a complaint sought for a rescission of a sale of land, and an injunction, etc., upon the ground that the defendants had agreed to pay CASH upon receiving the deed, and to that end gave a *sight* draft, and that it had not been paid, and the drawers were insolvent; and the answer admitted those allegations, and sought to avoid them by other matter, *Held*, that as there was an equity confessed, the injunction should be continued.

In such case if some of the defendants file *a plea*, that they purchased *for valuable consideration and without notice*, from the parties who bought from the plaintiff; upon the motion to vacate the injunction, these allegations are also to be treated as matter of *avoidance; aliter*, if the defence had been made by an *answer, full and going into particulars.*

(The reasons for this distinction stated and discussed.)

In a suit involving the title to *mining-property*, a receiver is not to be appointed unless the parties in possession are insolvent, or are injuring the property by their management.

MOTION to vacate an injunction, etc., before *Henry, J.*, at Spring Term 1869 of MADISON Court.

The action had been brought in August 1868, in order to rescind a conveyance made in May 1867, by the plaintiff to the defendants Robert F. Hoke, Thomas J. Sumner, E. Nye Hutchinson, George W. Swepson and Robert R. Swepson, of a valuable Iron Mine in Mitchell County, known as the Cranberry Iron-ore- (349) bed; to have the defendants Charles W. and Francis B. Russell, who had bought from Hoke and his associates, and also Samuel W. Williams and J. C. Hardin, who otherwise, and previously, had connexion with the title, declared to be trustees of said property for the plaintiff; and, in the mean time, to have a receiver appointed, etc.

The pleadings were very elaborate; especially the answer of Hoke, Sumner, Hutchinson, which covered 98 pp. of foolscap.

All that seems necessary to state here, is, that the plaintiff charged that the defendants first named above, had contrived a scheme to defraud him of the property in dispute, of which he owned much the larger interest, and that, after deluding him with many negotiations upon the subject, at last they agreed to pay him $44,000, *cash*, for his interest; that, upon his tendering the deed, they, after making divers excuses, offered him a *sight draft* upon a bank in New York, which they represented to be upon funds deposited by them there, and that he, with some reluctance, received it; that, upon presentation, it was protested, and has never been paid; that the drawers are insolvent; and have since sold the land to the defendants, the Russells, etc.

The defendants Hoke, Sumner and Hutchinson, by joint answer, gave a detailed account of their connexion with the transaction, and alleged, that it was owing to certain ill faith and misconduct of the plaintiff, which they set forth, that the draft was not paid; that, although given *at sight,* it was abundantly understood by the parties that the funds to meet it were to be obtained within a few days of the time when it was given, by a resale then pending, — which resale was afterwards defeated by the plaintiff, that subsequently they had sold to the Russells, etc.

The Russells, "answering", stated, briefly, that they were purchasers without notice, at the price of $50,000, which they (350) had paid at the time of taking the deed, March 30th 1868.

It seems unnecessary to refer to the other answers.

Upon the coming in of the answers, a motion was made to vacate the order for a receiver, and also the injunction.

His Honor allowed the motion, and the plaintiff appealed.

Graham for the appellants.

1. The matter stated by the defendants Hoke, etc., as to why payment of the draft was not made is *in avoidance,* and cannot be considered upon a motion to vacate. Adams Eq. 195, 198; *Allen v. Pearce,* 59 N.C. 309; *High Shoals Co. v. Grier,* 4 ib. 132; *Ashe v. Johnston,* 2 ib. 149.

2. Averment by a *purchaser* that he is such *for value and without notice,* is necessary, and also is *in evidence.* Story, Eq. Pl. §§ 662, 806; Adams Eq. 325, 5.

Phillips & Merrimon contra.

1. The application for a restraint upon the Russells is not of the ordinary sort. *Deep River Co. v. Fox,* 39 N.C. 61.

2. The complaint is to be taken as averring that the Russells bought *with* notice, and therefore the answer here is *responsive,* and not *in avoidance. McNeill v. Magee,* 5 Mason 269; Story Eq. Pl., §§ 263, 264, 603, 604; *Howlett v. Thompson,* 36 N.C. 369; *King v. Trice,* 3 ib. 568; *Campbell v. Black,* 6 ib. 321; *Woodfin v. Johnson,* 54 N.C. 317; *Taylor v. Kelley,* 3 ib. 240.

PEARSON, C.J. In respect to the defendants Hoke, Sumner and Hutchinson:

The answers are full and responsive to the allegations of the bill; (although not to be drawn into precedent, because prolix and

argumentative) and the injunction can only be sustained by "equity confessed."

These defendants admit that the sale by Carter to them was *a cash sale,* that Carter accepted the "sight draft" as *money,* and delivered the deed, upon their assurance that the draft (351) would be paid on presentation; and that the money was not paid. Here is "an equity confessed," unless it can be avoided on the hearing, to-wit; Carter, trusting to their assurance that the money would be paid on the presentation of a sight draft, instead of retaining the title as a security for the payment of the purchase money, *takes their bond* for it, and executes the deed. When their bond was not made good, as little as in conscience they could have done, nothing else appearing, was to tender him back the deed, and take a bond for title when the purchase money was paid, or else to give him a mortgage on the land to secure the purchase money. There is a further "equity confessed," to-wit; the defendants without paying for the land, or securing payment of the purchase money in any way, actually transfer the land to the defendants, the two Russells; make no provision whatever for the payment of the purchase money, and do not pretend that they are able, or have any intention to pay it: on the contrary, they confess they are not able to pay the purchase money and do not intend to do it, if they can avoid doing so.

We think, there is equity confessed; and refrain from entering further into the subject lest it might prejudice the grounds set up in the answer by way of avoidance.

2. As to the defendants, the two Russells: They file what is called an answer, but what is in fact *a plea,* in which without responding to any of the allegations of the bill, they reply on the ground that they are "purchasers for valuable consideration and without notice."

A plea in equity is a special answer to avoid a general answer, under the rule that if one answers at all, he must answer fully; and the plea is only allowed when it puts the matter upon some *one point* which is decisive of the controversy, as, a "release," or a *purchase for valuable consideration without notice.* Mitford's Plead. 276.

Passing over the alleged irregularity in regard to the authentication of this answer; it does not profess to respond to the allegations of the bill; and the parties put themselves on the (352) ground of being "purchasers for valuable consideration without notice," and, of course, not subject to the plaintiff's equity.

In this stage of the proceeding, how is the Court to know that they have paid a valuable consideration? Admitting that proof of

this fact, will put on the plaintiff the proving of notice, still, here is new matter relied on by way of avoiding the plaintiff's equity, and until the plea is disposed of, these defendants are not in a position to sustain a motion to dissolve the injunction.

A plaintiff may not know whether a party to whom the property is transferred, has paid a valuable consideration, or not, or whether he bought with or without notice. Hence, it is not necessary in the *stating part of the bill,* to set out either that the property had been transferred without a valuable consideration, or that he had notice. It is sufficient to state that one who held the legal title subject to the plaintiff's equity, has transferred it to another party, to evade this equity, as is done by this bill. The party may then, either by plea or answer, set up the defence, that he is a purchaser for valuable consideration and without notice: but if he answers, he must do so fully, and go into particulars, in order to entitle him to ask for a dissolution of the injunction.

The rule, that, where a defendant relies on the defence of "purchaser for valuable consideration without notice," on proof that he paid a valuable consideration, the burden of disproving the negative part of the defence is put on the plaintiff, has an analogy in proceedings at law.

The declaration in an action against an administrator does not allege in so many words, that the defendant has assets, still, upon the negative plea, "no assets," the burden of proving assets, is on the plaintiff, because in the declaration there is by implication an allegation of assets; for otherwise the defendant does not unjustly *detain,* and refuse to pay the debt of his intestate.

(353) The plaintiff may, if so advised, set out in the *charging part of the bill* his information as to particular facts, tending to show that no consideration was in fact paid, or, that the party had actual or constructive notice. This will impose on the party the necessity of filing an answer, in support of the plea, for which reason it is called "an anomalous plea." This however is done only for the purpose of attaining a discovery on oath, and is by no means necessary in stating the plaintiff's grounds of equity. If particular instances of notice or circumstances of fraud are *charged,* they must be denied as specially and particularly as charged in the bill. This special particular denial of notice or fraud must be by way of answer in support of the plea. Mitford 276.

In our case, the bill does not charge, by *way of anticipating the defence,* that the defendants had notice; so, what is called an answer, is in the most approved form of a plea, "purchaser for valuable consideration and without notice," except that it does not aver *positively* that the *vendors* were in possession, at the date of the

execution of the deed; and an answer was not required to support this as a *plea.*

But looking on it, as an *answer,* it is not responsive, and is not so full and satisfactory as it should be, if intended as the foundation of a motion to dissolve the injunction.

It is not probable that these defendants paid $50,000 cash, without inquiring as to the title, and as to all of its "environments." This required no explanation in a plea, but in an answer the party professes to set out all that he knows, or believes from information, relevant to the subject of controversy, and the Court cannot fail to notice that in the answers of their co-defendants Hoke, Sumner and Hutchinson it is averred, that these two defendants, *at the first,* advanced $30,000 for an interest in one-fourth of the property, to be expended in its development, and afterwards, at how long an interval is *not* stated, paid $50,000 cash for the fee simple estate in the whole; so, these gentlemen had greater means of information than is disclosed by their answer.

Is a court expected to be able to believe that, in this interval, these gentlemen had not heard of the loud clamor of (354) the plaintiff, that he had parted with a legal title on a *cash sale,* at the price of $44,000, and had never received one cent of the purchase money!

These objections to the answer, and the consideration that the allegation of being purchasers for valuable consideration without notice, is matter of avoidance, in our opinion fully meet the motion to dissolve the injunction.

But we are of opinion, that the order for a receiver, by which, of course, the mining operations must be stopped, for the receiver had no funds to meet the necessary outlays, was improvidently granted, for there is no allegation that the defendants, Charles W. Russell and Francis B. Russell, are insolvent, or not amply able to account for the mesne profits, in the event that the land is held liable for the plaintiff's claim; or that the property is being injured by their management; on the contrary, it is better for all sides to keep the works in operation.

3. In respect to the defendants, Harden, Williams and the two Swepsons, it appears, by the answer, that they are not affected by the injunction. But they are necessary parties, because their rights may be involved in the final adjustment of the whole matter. So they must be content to abide the course of the suit, and have no right to interfere upon the question of injunction, and the appointment of a receiver.

There is error in the decretal order.

It will be modified so as to continue the injunction against any disposition or transfer of the land, until the final hearing, leaving the order to stand so far as it discharges the receiver, and allows the defendants, Charles W. and Francis B. Russell, to resume the operation of the works.

The costs in this court will be paid by the defendants, Hoke, Sumner and Hutchison.

This will be certified.

Per curiam.

Ordered accordingly.

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(355)

JOHN W. RAGLAND v. SAMUEL J. CURRIN.

The Code of Civil Procedure is *one Act*, and no part of it went into effect before the 24th of August 1868; *therefore* a suit asking for an injunction, begun August 22d 1868, properly conformed to the old practice.

A bill in equity, asking that a deed should be surrendered by the defendant, and he be enjoined from committing certain trespasses upon the land included therein, upon the ground that such deed had never been delivered, cannot be maintained; the plaintiff has an adequate remedy at law, either by an action of Detinue, or Trespass *quare clausum*.

MOTION to dismiss a suit, heard by *Watts, J.*, at Spring Term, 1869, of GRANVILLE Court.

The facts appear in the opinion.

His Honor refused the order applied for, and the defendant appealed.

Bragg for the appellant.
Graham contra.

RODMAN, J. The action began by a petition or complaint sworn to on August 22nd 1868, praying an injunction, which, on the same day, was ordered by the Judge. A subpœna therefor, issued on the 28th of August, returnable to Spring Term 1869, at which time the defendant appeared, and moved to dismiss the action, on the ground that it was governed by the Code of Procedure, and (1) had not been begun by summons as thereby required; (2) that the plaintiff had neither given a prosecution bond, nor made a deposit; (3) that the subpœna was not under the seal of the court. The

Judge refused to dismiss the action, and allowed the plaintiff then to give a prosecution bond, and the defendant appealed.

Certain parts of the Code of Civil Procedure, as stated in what is headed Title XXIII, were ratified on the 18th of August 1868, and certain other parts, including Title XXII, and so (356) much of what is printed as Title XXIII as enacts that the act should go into effect on its ratification, were ratified on the 24th of August. Although apparently Title XXIII is a part of the Act, yet no part of that Title in fact is so, except the first three lines, which themselves are inaccurately printed. Obviously, it is impossible that the date of ratification can be contained in the enacting part of a statute, because the statute is enacted before its ratification, and it is impossible for the legislature to foretell at what date it may be ratified. The clause fixing the time at which the Act should go into effect, is found no where except at the end of the whole Act. That part of it which was ratified on the 18th of August, would not, but for that clause, have gone into effect until thirty days after the adjournment of the legislature. When the last part was enacted, the effect of the concluding clause, was, to make the Act as a whole, take effect from the date of the ratification of that part. We have examined the original manuscript Act in the office of the Secretary of State, and find that the last clause, which is the only one relating to the time at which the Act is to go into effect, is in the following words: "This Act shall go into effect upon its ratification."

The whole Code is spoken of and treated as but one Act, and no part of it went into effect before the 24th of August 1868. The present proceeding must be regarded as a suit pending at the adoption of the Code, and the right of the plaintiff to relief must be tried under the law previously existing.

Under the old system of separate courts of law and equity, the class of cases in which the plaintiff could demand an injunction as the sole and substantive relief, was very small: *e.g.* An injunction against the invasion of a copy-right. When the plaintiff had a remedy at law, he was bound to pursue it, and if, in any case, that remedy was inadequate, he might supplement it by the ancillary jurisdiction of a Court of Equity. But a mere legal right which might be adequately adjudicated in a court of law, (357) was in no case a sufficient ground for a bill in equity. In this case the plaintiff's cause of action is not very clearly stated. He alleges, as we understand his complaint, that he signed and sealed, but never delivered, a writing purporting to be a deed for certain lands, but that the defendant fraudulently got possession of the

writing, and, by color of it, committed a trespass on the lands, to his damage, etc. It seems to us that his remedy was clearly at law, either by an action of detinue for the pretended deed, or by an action of trespass *quare clausum fregit.* If he had delivered the deed, but had been induced to make such delivery by fraud, he might have invoked the aid of a Court of Equity to protect him against the fraudulent and inequitable assertion of the admittedly legal title, either as ancillary to an action of trespass, at law, or to a demand by bill in equity to have the deed so fraudulently procured, rescinded. But in this case the plaintiff does not allege, but denies, any delivery of the deed; if never delivered in fact, it was, in law, not the deed of the plaintiff, and conferred no right as against him, and his remedy was the purely legal one which every possessor of an estate in lands has against a trespasser. Tried by the test of the former law, and regarding the petition of the plaintiff as a bill in equity, we are unable to see any equity by which it can be supported: *Irwin v. Davidson,* 38 N.C. 321; *Lyerly v. Wheeler,* 45 N.C. 266.

It is unnecessary to notice the other points.

Judgment below reversed, and bill dismissed.

Per curiam.

Ordered accordingly.

Cited: Walter v. Earnhardt, 171 N.C. 732; *Crowell v. Bradsher,* 203 N.C. 494.

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(358)

FURMAN, DAVIS & CO. v. E. F. MOORE, ADM'R, ETC.

Whether an account in the handwriting of the party charged, under a heading in the same handwriting, showing that it was an account of one partner's indebtedness to the firm, entered upon the partnership books, be *a signed account,* within the statute heretofore prescribing the *degrees* of deceased person's debts, *Quaere?*—but at all events it is no *settled* account showing the partner's indebtedness *to his co-partner,* but is merely an item in the general settlement of their dealings in that connexion.

An administrator, under our former system, had no right to retain a debt of lower dignity within the nine months given him to plead, upon the ground that he had no notice of debts of higher dignity.

ASSUMPSIT, tried before *Barnes, J.,* at January Special Term 1868, of CUMBERLAND Superior Court.

The action was brought in October 1857, on a note made to the plaintiffs by a firm trading under the style of "Moore & Brother" which was composed of W. F. and J. J. Moore. Both partners were dead, the defendant being administrator of the former, under letters issued in June 1857.

The defendant pleaded Fully-administered, etc.; and the question before the Court, was upon *retainers,* allowed to him by the Commissioner who stated his account.

The deceased, previously to becoming a partner in "Moore & Brother," had done business with the defendant as partner in the firm of "W. F. & E. F. Moore." The books of that firm, (which had never been *settled,)* showed, in the handwriting of the deceased, *an account* stating the items of his indebtedness to it, under a *heading* also in his handwriting.

The defendant claimed to be allowed to retain one-half of this, as being a *liquidated and signed account* in his favor.

He also claimed to be allowed to retain an account not signed, on the ground that he had paid himself (as was admitted) *before he had notice* of the existence of the plaintiffs' debt.

These items were allowed by the Commissioner; but having been excepted to, were rejected by his Honor; and the (359) defendant appealed.

B. Fuller for the appellant, cited, and commented upon, *Newman v. Taber,* 27 N.C. 231; *Midgett v. Watson,* 29 N.C. 143; *Plummer v. Owens,* 45 N.C. 254; Parsons Laws of Business 140; *De-Tastet v. Shaw,* in 2 Wms. Ex. 941.

Hinsdale contra.

1. The account is not *settled, Wilson v. Jennings,* 15 N.C. 90; *Newman v. Taber,* and *Midgett v. Watson, ubi sup.* Lindley, Part, 862.

2. There was no intention to *authenticate by signature,* which is necessary. 3 Green. Cruise. 47 and 48 notes.

3. There was no delivery.

DICK, J. The action of the plaintiffs is upon a promissory note executed to them by the intestate of the defendant. The defendant, as administrator, claims the right of retaining an account which he insists is due to him from his intestate, and is settled, liquidated and signed by the debtor, and as such is of equal dignity with the debt of the plaintiffs: Rev. Code ch. 46, § 21.

It appears that the defendant and his intestate, W. F. Moore were partners, under the name and style of W. F. & E. F. Moore. During the existence of said partnership, the intestate was the book-keeper, and entered in the ledger of the firm, under his name and in his handwriting, his individual indebtedness to said firm. There never has been a liquidation and settlement of the partnership business. Under an order made in this cause, an account was taken of the administration of the defendant, and the commissioner allowed one-half of said ledger account as a credit to the defendant, upon the ground that it was a settled and liquidated account signed by the intestate, and as such was properly retained as against a debt of equal dignity.

(360) To this ruling the plaintiff excepted, and his Honor, in the Court below, properly sustained the exception. An account is "settled and liquidated," in contemplation of law, where it is a final adjustment of dealings between the parties, and ascertains what is justly due by one to the other: *Midget v. Watson*, 29 N.C. 143.

This account does not show what sum W. F. Moore, the intestate, owed to E. F. Moore, the administrator, but it is merely a statement preparatory to a final settlement of the partnership business of W. F. & E. F. Moore. The basis of a partnership is an agreement between the parties to share the profits and losses arising from some business, or undertaking. Usually partners have a joint capital or stock, by the employment of which they expect to realize profits, to be shared in due proportion between them. The interest of an individual partner cannot be known until an account is taken of the business, the assets and the liabilities of the firm, and the divisible surplus ascertained. Until this is done, there is no "settlement and liquidated account" of the dealings of the partnership, and one partner cannot sue the other at law.

As this Court is of the opinion that the account before us is not a "settled and liquidated account," it is unnecessary to decide the other question, which was so ably and elaborately argued by counsel, whether it is sufficiently *signed* to meet the requirement of the statute.

The ruling of his Honor on the second exception was also correct. Previous to the change made by the act of 1868-9, ch. 113, an administrator was required to pay the debts of his intestate in the order prescribed by law.

He was allowed nine months after his qualification before he could be compelled to plead in any suit, in order that he might collect the assets of the estate and ascertain its liabilities. If within

that period he paid or retained a debt of lower degree before one of a higher, and there was a deficiency of assets, he would be liable for the higher debt out his own estate. In such a case, the want of notice of the higher debt, would not avail to prevent such (361) personal liability. These principles of law are applicable to the present case, and fully sustain the ruling of his Honor on the second exception. We will not further elaborate the question, as the law upon the subject has been so materially changed by the above recited act.

There is no error, and the judgment below must be affirmed.

Let this be certified.

Per curiam.

Judgment affirmed.

WILLIAM P. LITTLE v. C. C. KING AND OTHERS.

A conveyance in regular form, executed in 1859, with a memorandum under seal annexed, stating that it was made in substitution for a previous deed between the same parties for the same *land*, executed in 1854, and lost, — will, notwithstanding such memorandum, pass whatever estate the bargainor may have in such land in 1859.

(An injunction against the judgment at law in this controversy. [See Phil. 484.] dissolved, upon the bill and answer.)

INJUNCTION, before *Logan, J.*, upon a motion to dissolve at January Special Term 1870, of MECKLENBURG Court.

The bill was filed in equity, Spring Term 1868, to restrain the defendants from taking possession under a writ of possession in an action of ejectment, (see *King v. Little*, 61 N.C. 484,) and, as will be seen from the Opinion, the plaintiff set up in equity, grounds for relief, similar to those on which he had before relied as a defence at law. The decision turns mainly upon the facts as found by the Court, and these are sufficiently given in the Opinion.

The Judge below dissolved the injunction, and the plaintiff appealed.

Wilson for the appellant. (362)

R. Barringer contra.

DICK, J. The defendants, with the exception of Williams, are the heirs at law, of Mrs. Cynthia D. King, and as such, have the legal title to the land in controversy.

"The deed of July 1859, to Mrs. King, professes to convey, and does convey the title which Williams *then* had to the land. The memorandum was only explanatory:" *King Little,* 61 N.C. 384.

It is well settled, that Courts of Equity will assume jurisdiction to grant relief against contracts executed under mistake, or in ignorance of material facts; but in cases where a party seeks to change or avoid his deed, on the ground of mistake or ignorance as to its legal effect, the limits of the equity of correction or rescission are more difficult to define. If the deed is such as the parties intended it to be at the time of its execution, then a mere mistake of law will not ordinarily be relieved against. In all cases of this character, it is essential that the error be on both sides, and that it be admitted by the answer, or distinctly proved. We will not consider this question further, at this stage of this case — but await the proofs. It is evident from the pleadings, that the land was originally purchased for the benefit of Mrs. Cynthia D. King, who was the wife of an infirm, improvident, and insolvent husband; and that Williams, the vendor of the plaintiff, had acted from 1854 until 1859, as her friend and trustee. The deed from Jones, the trustee of Mrs. King, to Williams, in 1857, was made without warranty, and the bill does not set forth the consideration, but states upon information, "that before the substituted deed of the the 25th of July 1859, the said Williams had purchased said premises from the said Colin C. King and his wife, paying, partly in money, partly in debt, and partly in a note, which has been paid off since the war." The answer states positively that there was no consideration for the deed, from Jones to Williams — and that the allegations (363) of said payments are untrue. It is therefore apparent, that in 1857, Williams took the deed as a trustee for Mrs. King, and she never, in any way, discharged him from said trust until 1859. She had the equitable title of said land, and the deed of July 1859 gave her the legal title. It is certain, from this state of facts, that Williams could not have gone into a Court of Equity "with clean hands" and asked to be relieved from the legal effect of his conveyance, on the ground of ignorance of the law.

The fact that Williams has not filed an answer in this case, is somewhat significant.

We will now consider the question, whether the plaintiff is in a better condition, on the ground that he is a *bona fide* purchaser for valuable consideration, without notice of the equities affecting his vendor.

Mrs. King and her family were in possession of the land from 1854 until they were ejected by the plaintiff in 1860, always claim-

ing as owners. It appears in plaintiff's bill, that he had a conversation with Mrs. King before he purchased the land, and she told him that the *legal* title was in Williams. The answer states that she told him that Williams had been her trustee until July 1859, when the deed conveying her the legal title was executed, and that said deed was registered; and he could see it. This evasive statement in the bill, and the direct and positive statements in the answer would seem to fix the plaintiff with full notice of the claim of Mrs. King.

The plaintiff further says "that he *quietly* took possession of premises, after his said purchase from Williams." Whereas, it appears from the answer that he brought an action of ejectment against King and his wife, "and they, being poor and embarrassed, were unable to give security for the cost of the suit and damages, and were, after judgment by *default,* ejected from the premises."

It appears, both in the bill and the answer, that King and his wife, in a short time after they were dispossessed, commenced an action of ejectment to recover their home, and, after many years, under the decision of the Supreme Court, they ob- (364) tained the legal process to put them in possession, which is now arrested by injunction. The answer is fully responsive to the evasive bill, and as there is no equity confessed, the injunction is dissolved.

Per curiam.

Ordered accordingly.

Cited: S.c., 77 N.C. 138; *Johnston v. Case,* 132 N.C. 798; *Gudger v. White,* 141 N.C. 518.

THE STATE v. NATHAN ALMAN.

A jury charged without case of alleged murder, retired to consider of their verdict upon Saturday of the first week of the term, at 8 o'clock, P. M., and upon Monday of the 2d week, at 5½ o'clock, P.M., returned into Court, being unable to agree; thereupon, the Judge ordered a juror to be withdrawn; *Held,* that such order was erroneous, and in consequence thereof, the prisoner could not be tried again, and had a right to be discharged from custody.

On a trial for felony no order that may prejudice the prisoner, can be made in his absence from the bar.

MOTION to discharge a prisoner, made before *Watts, J.,* at Fall Term 1869, of WAKE Court.

The prisoner had been indicted at the same term for Murder. The jury charged with the trial of the case retired to consider of their verdict at 8 o'clock, P.M., of Saturday in the first week of the term, "and being unable to agree," came to the bar of the Court on Monday evening at half-past 5 o'clock, when a juror was withdrawn, and the jury discharged, neither the prisoner nor his counsel being present in Court.

Afterwards, at the same term, the counsel for the prisoner moved for his discharge from custody. This motion was overruled, and the prisoner appealed.

(365) *Fowle & Badger for the appellant.*
Attorney General and Cox contra.

RODMAN, J. In *The State v. Prince,* 63 N.C. 529, it was decided that a Court had no power to discharge a jury under the state of facts appearing of record there. In that opinion, the previous decisions of this Court were discussed, and we thought ourselves justified, by the authority of *Newton's* case, 66 E.C.L. 716, and the reasons therein stated, in holding that the rule asserted in our former cases, could not be supported in its full extent. The counsel for the present defendant, in his argument before us, suggested that by an incidental statement occurring in the opinion in *Prince's* case, to the effect that in *Newton's* case, the jury had been discharged after a deliberation of about thirty-six hours, without the statement of the additional fact which existed in that case, *i. e.* that the term of the Court had expired, the Judge below might have been mislead to suppose, that in our opinion a jury might be properly discharged if unable to agree after a deliberation of thirty-six hours, without further reason to justify the discharge. We are not inclined to think that the Judge below drew any such inference, as it would betray on his part a superficial consideration of the the opinion. We were not there, undertaking to prescribe the circumstances which would justify a Judge in discharging a jury, and the circumstance in *Newton's* case of the length of time during which the jury had deliberated, was mentioned only to show that the case departed widely from the previous decisions of this Court. In fact such an inference was precluded by the statement, that it was impossible to lay down any general rule which should govern all cases, but that each must be decided by the Judge presiding at the trial, on its own circumstances. The only case in which we undertook to say that it would be proper to discharge a jury, was one like *Spier's,* in which the

term expired during the trial, and, as the law then stood, the Judge had no power to prolong it.

In *Prince's* case we held, that the course of a Judge in discharging a jury before rendering a verdict in a capital case, could be reviewed on appeal; and in this case we are called on to (366) decide, whether the reason for discharging the jury assigned by the Judge, was sufficient. The only reason assigned is, that after a deliberation of about forty-five hours, they were unable to agree. Had the additional reason which existed in *Newton's* case, and in *Spier's* case, and in the case of *State v. Bullock,* 63 N.C. 570; viz: that the term had expired, or was about to expire, concurred in this case with the inability of the jury to agree, after such a time of deliberation, we should hold that the Judge had rightly exercised his judicial discretion. But in this case there was no such additional reason. The case was committed to the jury on Saturday evening of the first week of the term, and the jury was discharged on the evening of the Monday of the second week, after a deliberation of about forty-five hours. We do not think that the mere lapse of that space of time without an agreement by the jury, coupled as we may suppose it to have been (although the fact is not stated,) with their declaration that they probably could not ever agree, was a sufficient cause for their discharge.

To be put in jeopardy of one's life through a criminal trial, is a grave occurrence. The common law, as once understood, absolutely prohibited a second jeopardy, and the principle is incorporated in the Constitution of the United States, *Amendments, Art. V.*

For the reasons stated in *Prince's* case and more fully in the cases there referred to, the Courts both of England and of the several American States, have felt themselves compelled to depart from a literal obedience to this principle. But it must never be supposed that the rule is abolished. Reason and humanity concur with authority, to defend it. Every exception from it must justify itself; it must be shown that the exception stands on as good ground as the rule.

We have not noticed the fact stated in the case, that the prisoner was not present when the jury was discharged, because in the view we take of it, that irregularity was immaterial. (367) It might however have been otherwise. Our State Constitution *(Declaration of Rights, Art. 1 § 11.)* gives to every person accused, the right to be confronted with his accusers. This was not a new rule requiring interpretation. It has long been perfectly settled that in a trial for felony, no order which may prejudice a prisoner can rightfully be made in his absence. It would be superfluous to

cite authorities for this maxim. We suppose the course of the Judge was simply inadvertent, but we do not feel at liberty to let it pass without observation. In our opinion the prisoner is entitled to his discharge.

Let this opinion be certified.

Per curiam.

Order accordingly.

Cited: S. v. Jefferson, 66 N.C. 312; *S. v. Honeycutt,* 74 N.C. 391; *S. v. Lane,* 78 N.C. 550; *S. v. McGimsey,* 80 N.C. 379; *S. v. Davis,* 80 N.C. 387; *S. v. Bass,* 82 N.C. 571; *S. v. Cain,* 175 N.C. 829; *S. v. Beal,* 199 N.C. 295; *S. v. Crocker,* 239 N.C. 452.

HENRY JARMAN *v.* ELI W. SAUNDERS.

A Court cannot order *satisfaction* of a judgment to be entered *because of* some matter accruing *before* such judgment was rendered.

It is improper to make a Sheriff party to an order of injunction against process in his hands.

Where plaintiff stated that the defendant had formerly sued him, and that after such action was brought, an accord and satisfaction had taken place between them, and that, upon that account, and relying upon the implied promise of the defendant not to prosecute such suit, he had neglected to plead therein; that the defendant had thereupon taken judgment against him, and was pressing execution, etc.: *Held,* that the plaintiff was entitled to relief, by an order, That upon his filing at its next term, in the Court where this suit had pended, a bond, with approved security, sufficient to cover the debt, etc., the defendant should withdraw his execution, the judgment be vacated, and the plaintiff be allowed to plead; all costs of the present application to follow the result of such new trial.

(The application, although by summons and complaint, treated as a motion in the original cause.)

(That the defendant denied the existence of such accord and satisfaction, immaterial.)

(Observations upon *Common* and *Special* injunctions, in connexion with the C.C.P.)

MOTION, to vacate an injunction, heard by *Thomas, J.,* (368) at Fall Term 1869, of ONSLOW Court.

The facts are stated in the opinion.

His Honor ordered the injunction to be vacated, and the plaintiff appealed.

Manly & Haughton for the appellant.
Strong contra.

RODMAN, J. The complaint states, that the defendant, in some Court, and at some time, (neither are stated, but, as no point was raised on the omission, we suppose we may assume, in the Superior Court of Onslow, at some past time, not very remote,) brought an action against the present plaintiff, upon an endorsement which he had made on the note of one Hill; that the plaintiff had a good defence to said action, in the nature of an accord and satisfaction after action brought, which he would have made in due form, but that, relying on the implied promise of the defendant not to prosecute his said action, he (the present plaintiff) omitted to appear or plead, and the defendant, unjustly, and in violation of his agreement, took judgment by default against him, for some $1,100.00, and has caused an execution to be levied on his property: and the plaintiff demands judgment, 1. That the defendant be ordered to enter an acknowledgment of satisfaction of his said judgment: 2. That the defendant pay the plaintiff certain damages; 3. That the defendant and the sheriff of Onslow be enjoined from prosecuting the said execution.

The reasons why no one of these judgments can be rendered, are so obvious as to require only the briefest statement. As to the first: the Court may order satisfaction of a judgment to (369) be entered of record upon proof of satisfaction thereof after judgment; but not by reason of anything occurring before judgment, and which might have been pleaded in bar of the judgment. As to the second: no case is presented for damages. As to the third: it has been so frequently held that an injunction should not be prayed against the sheriff who is only the agent of the plaintiff, that if the sheriff had appeared, we should have been bound to have allowed him his costs.

Notwithstanding this mistaken claim, we think we are required to consider, whether, upon the plaintiff's complaint, he is entitled to any relief; and we think he is. He alleges that he has been deprived, through the fraud of the defendant, of an opportunity to make his defence to the original action; and the relief which he may rightfully claim is, to have the judgment by default set aside, and to be allowed to plead to the merits in the original action, and to have the execution enjoined in the meantime. It would

be extremely inconvenient to have a trial in this action, of the matters which might have been put in controversy in the first. Assuming, as for the present purpose we must, the truth of the complaint, we think there is stated an equity sufficient to entitle the plaintiff to the relief above stated. How is this equity of the plaintiff affected by the answer, which positively denies the agreement upon which it is founded? The distinction between what used to be called a common injunction, and a special injunction, is stated in *Heilig v. Stokes,* 63 N.C. 612, on the authority of the cases there referred to.

The former is said to be when a defendant sets up an equitable defence to the action at law, which by the constitution of the law-court, he could not then avoid himself of. If an injunction was granted on a bill setting up such an equity, upon the coming in of an answer, denying the facts constituting the equity, the injunction was dissolved of course unless some special reason
(370) was alleged for a continuance of it. A special injunction was founded, not on an equity, existing in the controversy at law between the parties, but on something collateral to it; as, for example, the necessity of protecting property in dispute, pending the litigation. The injunction to which the plaintiff in this case is entitled, is evidently of the latter sort, and will not be dissolved merely on the defendant's denial, if in the opinion of the Court, it appears reasonably necessary to protect the plaintiff's right until the controversy between him and the defendant can be determined. Here it seems to us that there are matters in controversy between the parties, and that the present plaintiff is entitled to make his defence to the original action, and consequently to have the present execution restrained.

It may be said that under the definition of a common injunction above given, it is difficult to conceive how, now when legal and equitable demands are tried in the same Court, and in the same forms of action, and when every equitable defence can be made in the original action, a case for common injunction can ever arise.

There is another observation which it may be well enough to make. Under the former system it was settled doctrine that a Court of law could not set aside its regular judgment at a subsequent term. If the enforcement of the judgment became inequitable for any reason of which a court of equity could take notice, it would be enjoined. Now that the same court exercises the jurisdiction both of a Court of law and of a Court of equity, and that without any difference of form founded on the difference between law and equity, it would seem to follow that the rule alluded to, no longer exists to the extent of prohibiting a Superior Court from

setting aside its judgment at a subsequent term, for any sufficient cause which could have been, and, by accident or fraud, was not, pleaded in bar of the judgment, and that the proper way to apply for such relief is, by a motion supported by affidavits, in the original cause. Such we consider this to be. A motion may (371) be put in the form of a petition; indeed, such is its more proper form: 3 Dan. Ch. Pr. 1787—1801. In fact, as is there stated, the difference is in form only, and not a substance or effect, the petition being in writing, and the motion not: 3 Dan. Ch. Pr. 1781. Of course we have no opinion on the merits of the original controversy between these parties. The order below is reversed, and the following order made, which will be certified:

If, before the next term of the Superior Court for the County of Onslow, or within the first five days thereof, the plaintiff in the present action shall enter into an undertaking payable to the defendant in the present action, in the penal sum of two thousand five hundred dollars, with sureties who shall be approved as sufficient by the Clerk of said Superior Court, or by the Judge thereof, with a condition to be void in case the present plaintiff shall pay to the present defendant whatever sums of money the said present defendant shall recover of the said present plaintiff in the action now or lately pending in said Superior Court for Onslow, wherein the present plaintiff is defendant, which action is the one referred to in the complaint in this case; and shall abide by, and perform the judgment in said action; then the judgment by default, therein heretofore entered, shall be set aside, and the defendant in said action (the plaintiff in this case) shall be allowed to plead therein, and the action shall be tried and determined according to the course of the said Superior Court: and the defendant is ordered to withdraw the execution heretofore issued in said action, and to refrain from further proceeding therein, and from taking out other execution, until the same shall be allowed by the said Superior Court. The costs of this action, as between the parties thereto, shall abide the final judgment in said Superior Court of Onslow, and shall be adjudged in that action. The defendant in the present action will pay the costs of this court, subject to be recovered by him, or the final judgment in the action in the (372) Superior Court of Onslow, as aforesaid.

Per curiam.

Reversed.

Cited: Bledsoe v. Nixon, 69 N.C. 83; *Tull v. Pope,* 69 N.C. 188; *Thompson v. Badham,* 70 N.C. 146; *Ponton v. McAdoo,* 71 N.C. 105; *Faison v. McIlwaine,* 72 N.C. 313; *Horne v. Horne,* 75 N.C.

101; *Lord v. Beard,* 79 N.C. 9; *Smith v. Hahn,* 80 N.C. 242; *Molyneux v. Huey,* 81 N.C. 112; *Jones v. Cameron,* 81 N.C. 157; *Wahab v. Smith,* 82 N.C. 232; *Mabry v. Henry,* 83 N.C. 300; *McLean v. McLean,* 84 N.C. 371; *Mauney v. Gidney,* 88 N.C. 203; *Harrison v. Bray,* 92 N.C. 493; *Mfg. Co. v. McElwee,* 94 N.C. 429; *Black v. Black,* 111 N.C. 302; *Rosenthal v. Robertson,* 11 N.C. 597; *Jeffries v. Aaron,* 120 N.C. 170; *Jones v. Buxton,* 121 N.C. 286; *Hooker v. Yellowley,* 128 N.C. 301; *Cobb v. Clegg,* 137 N.C. 159; *Stockton v. Mining Co.,* 144 N.C. 599; *Sash Co. v. Parker,* 153 N.C. 132; *Zeiger v. Stephenson,* 153 N.C. 530; *Miller v. Curl,* 162 N.C. 5; *Cahoon v. Brinkley,* 176 N.C. 10; *Craddock v. Brinkley,* 177 N.C. 127; *S. v. Scott,* 182 N.C. 882; *Sanders v. Ins. Co.,* 183 N.C. 67; *Walker v. Odom,* 185 N.C. 558; *Tobacco Growers Assoc. v. Pollock,* 187 N.C. 411; *Garner v. Quakenbush,* 187 N.C. 606; *Fowler v. Fowler,* 190 N.C. 541; *Finance Co. v. Trust Co.,* 213 N.C. 372; *Beck v. Voncannon,* 237 N.C. 713.

GEORGE C. DOUGLAS v. R. A. CALDWELL.

A suit in equity begun in 1867 is to be governed in regard to procedure, by the laws then existing; *therefore* where a bill was filed to set aside a release given by a ward to his guardian, and for an account, etc.; *Held,* that the Court had no power, before making a decree to set aside the release, against the defendant's will, to make an order of reference, particularly an order of reference to hear, try and determine the issues in the cause.

BILL in Equity, filed in 1867, before *Cloud, J.,* upon a motion to refer, at Fall Term 1869 of ROWAN Court.

The point involved is one of practice, and requires no further statement of facts than appears in the opinion.

His Honor ordered the issues to be referred, and the defendant appealed.

Craige for the appellant.
Wilson and Blackmer & McCorkle contra.

SETTLE, J. This was a bill in equity, filed in 1867, praying that a release, executed by the plaintiff to the defendant, might be set aside, and an account re-opened for a settlement of the accounts of the defendant, as guardian of the plaintiff. The plaintiff alleges

that in executing the release, he was over-reached by the defendant. The allegations of the bill are denied by the defendant's answer. The cause was regularly transferred from the Court of Equity of Rowan County, to the Superior Court of said county, and stood under the order of "replication and commissions." At (373) Fall Term 1869, the Court, upon motion of the plaintiff, and against the will of the defendant, acting under the impression that the provisions of the Code of Civil Procedure, sec. 245, applied to this suit, ordered a reference of all the issues in the cause to J. F. Graves, Esq., to hear, try and determine the same.

In this there is error. This cause is governed by the procedure existing prior to the Code. That practice did not permit such a reference as is here made. "A reference is ordered, to ascertain the mode and extent of the relief which the particular circumstances may require, after the decree upon the hearing establishing the right to some relief. Where a mortgage or a partnership is declared, accounts are ordered, etc."

"Inquiries relate to matters supplementary to the general relief decreed on the hearing." *Lunsford v. Bostion,* 16 N.C. 483.

The gist of this controversy is, the release, which the plaintiff seeks to set aside. Before a decree establishing the right of the plaintiff to have this release set aside, there is nothing to refer to the master. Incidental and supplementary to such a decree, would be an account of the guardianship; and this would be a proper subject of reference.

Let it be certified that there is error in the order of reference.

Per curiam.

Order reversed.

Cited: Murphy v. Harrison, 65 N.C. 248; *Smith v. Barringer,* 74 N.C. 671; *R. R. v. Morrison,* 82 N.C. 143; *Royster v. Wright,* 118 N.C. 154; *Grady v. Parker,* 230 N.C. 169; *Solon Lodge v. Ionic Lodge,* 245 N.C. 287.

(374)

JESSE W. PEEBLES v. CHARLES H. HORTON.

Upon an issue of fraud in regard to a conveyance of land, it appeared that the *consideration* set out, was $4000, whilst there was evidence that it was considerably less; thereupon the vendee *(defendant)* asked the Court to instruct the jury that it was not incumbent upon him to prove that he had given exactly *that amount*, so that it were shown that he had given *a fair and reasonable price; Held*, that instructions, in reply to this prayer, That the fact, that the consideration set out in the deed was $4000, did not *per se* render the deed fraudulent; but that in questions of fraud, the jury were at liberty to take it into consideration together with other circumstances, are responsive and correct.

That the only parties present, in February 1865, at a conveyance of all of the vendor's land in satisfaction of *old debts*, were the vendor and vendee, who were brothers-in-law, and the subscribing witness, also a brother-in-law of the vendee, is a fact calculated to throw suspicion upon the transaction, *i.e.*, is a badge of fraud.

That a defendant declines to call as a witness in regard to a transaction to which he was a party, a disinterested and unimpeached person, then known by him to be present in Court; and instead, becomes a witness in regard to such transaction himself—it being the very matter in question in such suit—is also calculated to excite suspicion; and instructions thereupon, That, it was not evidence of fraud by itself, but considerable latitude is permitted to counsel in such matters, and, under the circumstances the plaintiff's counsel were at liberty to comment upon it as a badge of fraud, and the jury may consider of it in making up their verdict, are correct.

ISSUES, from the Supreme Court, tried before *Watts, J.*, at January Special Term 1870 of WAKE Court.

It is the same case that is reported, upon a former trial of it, in 63 N.C. 656, as *Peebles v. Peebles.*

The deed, which was impeached by the plaintiff as fraudulent against himself, as one of the creditors of Joseph A. Peebles, the bargainor, had been executed February 26 1865, by said Joseph to the defendant, who was his brother-in-law, for the expressed consideration of $4,000, alleged to have been paid in *debts* (seven-
eighths being *old, i.e., ante-war,*) due by the bargainor to the
(375) defendant. The only other person present at its execution, was one Weathers, also a brother-in-law of Horton.

There was evidence tending to show that the true consideration was considerably less than $4,000.

1. Upon the point of *consideration,* the counsel for the defendant asked the Court to instruct the jury. That it was not necessary for Horton to show that Joseph Peebles owed him the full sum of $4,000 when the deed was executed, in order to establish that it was

bona fide and upon a valuable consideration, but, that, in order to establish a valuable consideration, it was only necessary to show that he paid a fair and reasonable price for the land, in money or money's worth.

In reply to this, his Honor instructed the jury, That the fact, that the consideration set out, was $4,000, did not *per se* render the deed fraudulent; but in questions of fraud the jury were at liberty to take it into consideration, together with other circumstances.

2. The counsel for the plaintiff, in addressing the jury, commented upon the fact that the defendant had chosen to become a witness himself, and not to introduce Joseph A. Peebles, who *he* alleged, was not pecuniarily interested, and who knew all about the creation of the alleged debts, and the negotiation for the purchase of the land:—as casting suspicion upon the defendant's case, etc.

The counsel for the defendant asked the Court to instruct the jury, that the plaintiff's counsel had no right to comment before the jury upon the failure of the defendant to introduce Joseph A. Peebles as a witness, and that no inference could be drawn by the jury from that fact, for or against either side, as he was not interested either way, and was equally accessible to each.

His Honor, in reply, told the jury "that the defendant's failing to introduce Joseph Peebles, is not evidence of fraud by itself, but that considerable latitude is permitted to counsel in such matters, and, under the circumstances, the plaintiff's counsel was at liberty to comment upon it as a badge of fraud, and the (376) jury may consider it in making up their verdict."

Verdict for the plaintiff. Rule, etc.; Rule refused. Certificate accordingly.

Haywood, Rogers & Batchelor, Fowle & Badger for the defendant.

Phillips & Battle contra.

PEARSON, C.J. After a careful examination of the transcript we are satisfied that there has been a "fair trial." When issues of fact are sent to the Court below to be submitted to a jury, this Court is not disposed to set aside the verdict, and will never do so, except for manifest error: *interest reipublicæ ut sit finis litium.*

The instruction: "The fact that the consideration set out in the deed was $4,000, did not *per se* render the deed fraudulent; but in questions of fraud the jury were at liberty to take it into consideration together with the other circumstances;" is in our opinion fully responsive to the instruction asked for, and "hits the mark pre-

cisely:" for it cannot be supposed, that the latter part of the instruction was worded for the purpose of leaving out of consideration the question of *bona fides*, and bringing it down to the mere matter of a valuable consideration. If so, why talk about "a fair and reasonable price for the land, in money or in money's worth, or in debts due to him by the said Joseph A. Peebles"? Taking the proposition abstractly, $100 was a valuable consideration; and if that was the meaning, a reference to the value of the land was impertinent. His Honor took the right view of the instruction asked, and gave the proper response.

2. If a weak old man is induced to execute a deed "in an out of the way place," and with secrecy, this is a circumstance (377) entitled to much weight in passing on the question of imposition, so, if one promises a brother-in-law, no one else being present except another brother-in-law (to witness the deed) to execute a deed for his property, purporting to be in consideration of $4,000, made up of old debts, to the exclusion of his other creditors, this is a suspicious circumstance, or as his Honor calls it a "badge of fraud;" that is, a fact calculated to throw suspicion on the transaction, and calls for explanation. So, if the bargainee, to meet the charge of combination to commit a fraud, is content, to offer himself as a witness to explain the transaction, and does not call his brother-in-law, the bargainor, who is present in Court; that circumstance is calculated to excite suspicion, and transpiring in the presence of the jury will, of course, have its effect upon their minds.

The ruling of his Honor, to allow full comments on both sides, was proper to aid the jury by a full discussion, to determine how much weight ought to be given to it, and whether in point of fact the witness was not called, because the bargainee, who had peculiar means of knowing what he would swear, was afraid to trust him; or whether it was a mere question of professional skill between the attorneys on either side.

An order of removal because the party cannot have a fair trial in his own county, *Bumgarner v. Manney*, 32 N.C. 121; the fact that a party does not choose to make a witness of himself, *Devries v. Haywood*, 63 N.C. 53; are not embraced by the principle, that the jury ought to have all of the lights that can be made available, in the dark trailing after fraud that seeks to hide its tracks.

The principle is well settled, whilst the exceptions to it rest upon peculiar circumstances. According to our judgment, this case falls under the general principle. A jury is necessarily influenced by the fact, that the maker of a deed which is attacked for fraud, is not called to give a full explanation, and that the bargainee,

who is a party to the suit, chooses to put the matter upon (378) his own oath.

Per curiam.

No error.

Cited: Chambers v. Greenwood, 68 N.C. 278; *Farrar v. Staton,* 101 N.C. 85; *Goodman v. Sapp,* 102 N.C. 483; *Maney v. Greenwood,* 182 N.C. 584.

THE STATE *v.* JAMES MARSH.

The *forcible detainer* of personal property, is not indictable at common law.

One tenant in common does no wrong, (civil and criminal) to a co-tenant by keeping sole possession of, *ex. gr.*, a bale of cotton, even by force.

FORCIBLE-TRESPASS, tried before *Watts, J.*, at Fall Term 1869 of JOHNSTON Court.

The facts were, that Creech was tenant in common of a bale of cotton, with Hodges and Sanders; that the two latter had authorized the defendant to take it into his possession: it being before in the possession of Hodges. Just after the defendant placed it in his cart, Creech came up, and having made some previous arrangement with her co-tenants by which she was to take the cotton into possession, demanded that the plaintiff should deliver it to her. He refused to do this, and a quarrel ensuing, he retained possession by force.

Under the instructions of his Honor, the jury found a verdict of guilty; and the defendant appealed.

Strong for the appellant.
Attorney General contra.

DICK, J. In contemplation of law, it is not a civil injury, or a public wrong, for one tenant in common, or his agent, to withhold the common property from the possession of his co-tenant. They have a mutual right of possession, and if this right is denied, the party excluded has a simple and speedy remedy, by a severance of the co-tenancy.

In this case, one of the co-tenants uathorized the defendant to take the cotton into his possession, and the subsequent de-
(379) tainer of it from the prosecutrix, even if it was with force, was not an indictable offence.

It is doubtful whether a forcible detainer of land is indictable at common law, when the entry was peaceable; but it is certain that the doctrine of forcible detainer has never been extended to personal property.

His Honor erred in his instructions to the jury, and there must be a *venire de novo*. Let this be certified.

Per curiam.

Venire de novo.

W. L. HENRY v. JEREMIAH RICH.

Money paid to a deputy sheriff by the defendant, on certain executions, then in such officer's hands, is by the law, at once applied to such executions; therefore, it cannot be recovered from such officer by the defendant upon a promise by him to account with him.

If such money be misapplied by the officer, it is a question betwixt him and the *plaintiffs* in the executions, only.

Submitting to a jury, issues upon points not necessarily decisive of the case, and requiring verdicts in the form of neither general nor special verdicts, is irregular.

ACTION for money, tried before *Henry, J.*, at December Special Term 1869 of BUNCOMBE Court.

The plaintiff alleged, that whilst the defendant, as Deputy Sheriff, had in his hands executions against him, amounting to more than $420, he had paid him $420, to be applied to these, and that defendant promised, that if not so applied, he would return it; and set forth in his complaint, a receipt signed by the defendant, dated 13th September 1862, as follows: "Received of William L. Henry, Four Hundred and twenty Dollars, on judgments in my hands against him;" also, that he had not so applied it, and
(380) had refused to return it. After an answer had been filed, and the parties were at issue, certain issues were submitted to a jury: "1. Did J. Rich give the receipt? 2. Did he fail to apply the money as alleged? 3. Did he promise to pay back the money? 4. If not, what promise was made?"

The jury found in the affirmative of no.'s 1. and 2., in the negative of 3.; and, 4., "that he promised to account for it," and "left the judgment to the Court."

Thereupon, his Honor gave judgment for the plaintiff, and the defendant appealed.

Phillips & Merrimon for the appellant.

So soon as the deputy sheriff collected the money, *the law applied it* to the process in his hands, in proportions to be ascertained afterwards; the plaintiff is protected from any second payment of it to the plaintiff in that process: *White v. Miller,* 20 N.C. 55; *Lytle v. Wilson,* 26 N.C. 226; *Hampton v. Brown,* 13 Ib. 18; *Brooks v. Gibbs,* 47 N.C. 326. *Tarkington v. Howell,* 27 N.C. 357, is distinguishable, *there* was a surplus after satisfying the execution.

Battle & Sons contra.

It is apparent, that the defendant, when he received the $420, had executions in his hands against Henry, to a larger amount. Therefore, he was *Henry's* agent to apply the money; and not having done this, he is responsible. His holding Henry's money is a sufficient *consideration* for his promise to account with him: *Wheatley v. Law,* Cro. Jac. 668; *Robinson v. Threadgill,* 35 N.C. 39; Com. Dig. Ass., B. 10, Metcalf, on Cont. 164, 5.

READE, J. If the facts were as alleged by the plaintiff, or as found by the jury, the plaintiff is not entitled to recover. If the defendant, as deputy sheriff, had executions in his hands against the plaintiff, to the amount of $420, he was entitled (381) to collect the amount out of the plaintiff, and it was the duty of the plaintiff to pay it, and the moment he did pay it, it was in contemplation of law applied to the satisfaction of the executions.

When the plaintiffs in the executions attempted, as they have done, to renew the executions against the present plaintiff it was his right to rely upon the payment to the sheriff: and he may do so now, if by his laches he has not lost the opportunity.

We observe that the facts in the case were not submitted to the jury, either for their general or special verdict, but only certain issues which were not necessarily decisive of the case, and upon the

finding of the jury upon these issues, his Honor gave judgment for the plaintiff. The practice is new, and irregular: C.C.P. sec. 233.

There is error.

Per curiam.

Venire de novo.

Cited: Motz v. Stowe, 83 N.C. 438; *Porter v. R. R.,* 97 N.C. 70; *Davidson v. Gifford,* 100 N.C. 22; *Dysart v. Brandreth,* 118 N.C. 974; *Erskine v. Motor Co.,* 187 N.C. 832.

P. M. WARREN v. NOAH BROWN.

A note payable "in current notes of the State of North Carolina," is not negotiable; *therefore,* under our former system an endorsee thereof could not maintain an action at law upon it, in his own name.

ASSUMPSIT, tried before *Cloud, J.,* at Fall Term 1869 of WILKES Superior Court.

The plaintiff declared as endorsee *(second)* of a note for $1175.50 made by the defendant, June 18th 1862, at one day after date "to be paid in current notes of the State of North Carolina."

The defendant objected that he could not maintain an ac-
(382) tion upon it in his own name.

His Honor was of a different opinion. Verdict and Judgment for the plaintiff, and Appeal by the defendant.

Boyden & Bailey for the appellant.
No counsel contra.

SETTLE, J. Are "current notes of the State of North Carolina" the same things as money, in contemplation of law?

Nothing but coin was a legal tender in payment of a note for money, before the recent acts of Congress. This note bears date June 18th 1862, and is payable "in current notes of the State of North Carolina," which may mean, either Treasury Notes of the State, or, notes on various banks of the State. A note, to be negotiable, should be for a sum certain, payable in money, and without conditions. Here the suit was instituted before the adoption of the

Code, by a second endorsee, in his own name, on a note not negotiable.

The objection is fatal to the present action.

Per curiam.

Judgment reversed.

Cited: Johnson v. Henderson, 76 N.C. 229.

THOMAS A. ALLISON v. THE WESTERN N. C. R. R. CO.

Whilst a slave was in the employment of a Railroad Company, as a *Section hand,* he was directed by an agent of the Company, to sleep in a certain house, which had (unknown to the Company and to himself) an open keg of powder standing under one of the beds, placed there a day or two before, for temporary purposes, by a servant of a bridge-contractor with such Company; the slave was killed by an explosion of the powder, caused as was supposed, by fire from a torch whilst he was searching for his hat: *Held,* that the Company was chargeable with the *negligence* of the person who placed, and left the powder in such a position.

CASE, tried before *Buxton, J.,* at July Special Term 1870 of IREDELL Court. (383)

The action had been brought in 1860, to recover damages for the loss of a slave, whilst in the employment of the defendant, in 1859, under a contract of hire as a section-hand.

The slave, with others, had been placed by the Company, for a temporary purpose, under the control of a contractor, who was building a bridge for it. The *Section-Master* accompanied, and remained in charge of them. Whilst so engaged, he was directed to sleep with other slaves of the Company and the contractor, in a house having *bunks* in it for beds. A day or two before his going there, owing to the coming up a sudden rain, a servant of the contractor had ordered a keg nearly full of powder, and open, to be put into the house in question, under a bunk. It remained there until the happening of the accident.

The temporary use of the slave had ceased upon one evening, and on the next morning he was to leave. On that morning, whilst the train was about to go off, he was seen in the house, with a torch, looking for his hat. Just afterwards an explosion took place, and he was killed.

His Honor instructed the jury that the question, whether the slave had been *bailed* to the contractor, or, if so, whether such

bailment had terminated, when the injury occurred, was immaterial; that the defendant was under obligation to procure safe quarters for its hands, and that if they should believe that the death occurred by an explosion of powder, the presence of which was unknown to the slave, and that it had been placed there by an agent of one who was using it in the course of fulfilling a contract with the Company, under the circumstances of this case, the defendant was liable.

Verdict for the plaintiff, Rule etc. Judgment, and Appeal.

Furches for the appellant.
Boyden & Bailey, and Clement contra.

READE, J. To put a number of slaves into a room to
(384) cook, eat and sleep, with an open keg of powder under their sleeping bunk, unknown to them, is negligence, and subjects the negligent bailee to damages for any injury to the slaves, by reason of the explosion of the powder.

It is objected, that the bailee did not know of the presence of the powder. The answer is, that his servant, in the regular course of his employment, put it there; and although the bailee had not that "guilty knowledge" which would subject him to criminal liability, yet, civilly, the act of his servant is his act; *qui facit per alium,* etc.

It makes no difference that the servant was not the *immediate* servant of the bailee, but was the servant of Contractors, who were the agents of the bailee.

"The owner of a ship appoints the master, and desires the master to select and appoint the crew: the crew thus become appointed the owner, and are his servants for the management and government of the ship, and if any damage happens through their default, it is the same as if it happened through the immediate default of the owner himself:" Broom's Maxims 812.

There is no error.

Per curiam.

Judgment affirmed.

Cited: Britt v. R. R., 144 N.C. 254; *McGhee v. R. R.,* 147 N.C. 152.

J. N. HARSHAW AND OTHERS EX'RS. ETC. v. JOHN DOBSON.

Where a complaint sought for the cancellation of a deed alleged to have been delivered under the following circumstances: At Fall Term 1863 the Judge who held the Superior Court for the County of Burke, in which the parties resided, made a violent charge to the grand jury, *upon the subject of receiving Confederate money for debts,* threatening such as refused it, with imprisonment; thereupon the defendant, who was judgment debtor (rendered in 1858) of the plaintiff's testator, upon a bond payable in specie, as the consideration for a tract of land, for which he held the judgment creditor's bond for title—moved his Honor to be allowed to pay off the judgment in Confederate money, and was allowed to do so, and to have satisfaction entered, and the Judge also sent word to the creditor, that, if he did not receive the Confederate money and execute a deed, he would have him sent to Richmond, Va.; and the latter, under fear, being infirm, etc. received the money and delivered the deed; *Held,* that the plaintiff was entitled to the relief demanded.

ACTION, tried upon demurrer to the complaint, by *Mitchell, J.,* at Fall Term 1869 of BURKE Court. (385)

The facts are stated in the opinion.

The judgment asked, was, that it might be declared that the deed in question was procured by fraud and circumvention; that it should be surrendered for cancellation, and that it be ordered that the title to the land should be held subject to the trusts of the original contract of sale.

The defendant demurred, and his Honor sustained the demurrer.

The plaintiffs appealed.

Folk for the appellants.
No counsel contra.

READE, J. The demurrer admits the facts stated in the complaint. His Honor sustained the demurrer and gave judgment for the defendant. In reviewing the decision it becomes necessary to state the facts set out in the complaint:

The plaintiff's testator had a judgment against the defendant in Burke Superior Court, for a balance of $3000, rendered——— Term 1858, which was founded on a bond given by the defendant to the plaintiff's testator in 1850, for a tract of land, with the stipulation that the bond was to be paid in gold or silver coin; and the defendant held the bond of the plaintiff's testator to make him a title to the land when he should pay the purchase money in gold and silver coin. In the Fall of 1863, during the existence of the Confederate Government and the war to perpetuate the same, the Superior Court for Burke County was held. (386)

The community were greatly excited about the war, and easily enraged against any one who was unwilling to take Confederate Treasury notes in payment of debts: and the Judge then presiding in said Court charged the grand-jury "that it was an indictable offence for a citizen of said Confederate States to refuse to receive its money in payment of debts; and, from his place on the Bench, threatened with punishment and imprisonment, either in the county jail, or some prison of said government, such person as should dare to refuse said money in payment as aforesaid." That the said charge to the grand-jury, and the threats and violent character of the Judge, were well known to the defendant, and thereupon the defendant came into court, and moved his Honor to be permitted to pay off and satisfy the said judgment in Confederate Treasury notes, and his Honor allowed the motion, and directed the payment and satisfaction to be entered of record. That thereupon his Honor sent a message to the plaintiff's testator, that it was his fixed purpose, in case he refused the Confederate Treasury notes, to have him sent to Richmond. That on receipt of this message, being old and infirm, and in fear of his life, by reason of the Judge's threats, and the tyranny of the war power, he agreed to receive the Confederate notes, and made the defendant a deed to his land.

While the demurrer admits the facts as against the defendant, yet they ought not to be taken as true to the prejudice of his Honor's name and memory; and, therefore, the counsel at this bar made no comments on the enormity of the alleged charge and threats of his Honor. Neither zeal for their client, nor his solemn affidavit of the truth of his statements, could move them from the professional propriety of awaiting the proof. We commend this prudence and justice as due both to the high character of the profession and the irreproachable character of the Bench.

But so far as the defendant is concerned, the facts are
(387) true—he admits them. As against him, therefore, what is alleged of the Judge's charge and threats, is true, and their effect upon the plaintiff's testator is also true. And it is true that the defendant knew it, and fraudulently, and unconscientiously availed himself of it to pay off a gold debt with Confederate Treasury notes, worth only a few cents in the dollar, and to extort from an old and infirm man a deed to a valuable tract of land; and although it does not certainly appear that the defendant instigated the charge and threats aforesaid, yet the avidity with which he availed himself of them, makes it probable that he did, and is the same as if he had. This, if it be not better described as a deed without a name, is gross fraud and circumvention.

The demurrer ought to have been overruled, and but for the agreement of the parties, as appears of record, that if the demurrer were overruled, the defendants might answer and put the facts in issue, the plaintiffs would have been entitled to the judgment demanded. Adams Eq. 431; Phil. Eq. 170.

There is error. This will be certified that the agreement of the parties may be carried out.

Per curiam.

Demurrer overruled.

Cited: S.c., 67 N.C. 203; *Randolph v. Lewis,* 196 N.C. 54.

JOHN KINCADE AND ARCHIBALD KINCADE, EX'RS. V. JOHN W. CONLEY AND WIFE, AND OTHERS.

In a suit charging two executors with negligence, in investing in Confederate money, although the proofs show that only one of them was *active* in so doing, yet if there be no allegation in the pleadings, sustained by full proofs, that the other dissented from such investment, he also will, be chargeable with the loss.

(The principle upon which equity interferes to set aside verdicts, etc. in courts of law, and also former decrees in courts of equity, for surprise, etc., stated.)

(That the details of the decree impeached, are shown upon a second hearing of the original cause, to have been correct, is not a result in conflict with the decree impeaching it.)

BILL in Equity to impeach a former decree, heard by *Mitchell, J.,* upon pleadings and proofs, at Fall Term 1869 (388) of BURKE Court.

The case is the same with that reported, upon an interlocutory point, in 62 N.C. p. 270.

A principal question between the parties, was whether the decree in the former suit (Win. Eq. 44) so far as it charged the present plaintiffs with certain Confederate money received by them officially, should stand.

The opinion here seems to require no statement of facts.

The injunction previously granted (See Phil. Eq. 270) having been dissolved by his Honor in the Court below, (except as regarded the interest of one party) the plaintiffs appealed.

Folk and F. H. Busbee for the appellant.

1. The opinion in *Kincade v. Conley,* 62 N.C. 270, decides among others, the following points: That the bill was properly filed, and that the Executors were taken by surprise in the final decree, and that it would be fraud to have it enforced against them.

2. The equity which was sufficient to have the injunction continued, is sufficient, if no new facts appear, to have a new account taken. *Kincade v. Conley, supra.* The exhibits filed, show, that the reception of the Confederate money, if not caused, as the bill asserts, by the language of one of the Judges, was the *devastavit* of one Executor, and not properly charged against both. *Caldwell's Statement.*

3. The funding of the Confederate money was not a waste. *Cummings v. Mebane,* 63 N.C. 315.

Moore contra.

PEARSON, C.J. If a plaintiff at law obtains a verdict on (389) false testimony, it is against conscience for him to enforce the judgment. Courts of Equity relieve the defendant by a decree that the plaintiff consent to set aside the verdict and judgment, and have the case tried at law *de novo.* This is the primary equity. An injunction to restrain execution is auxiliary. Whether the bill will be entertained, except upon an allegation, that the witness who swears falsely, has been convicted of perjury, is a point about which the authorities are not agreed.

So, if a plaintiff at law obtains a verdict and judgment by *surprise,* as, if a suit be pending in McDowell Superior Court, and the plaintiff tells the defendant, he need not attend Court, for he will meet him at Buncombe, and arrange the matter, and the plaintiff at McDowell Court presses a trial, and takes a verdict and judgment in the absence of the defendant, a court of equity will relieve, by a decree that the plaintiff consent to set aside the verdict and judgment, and have the case tried *de novo.* This is the primary equity; an injunction issues as ancillary.

So, if a *decree* be obtained in a court of equity, by false testimony, or by *surprise,* the Court will entertain a bill to impeach the decree, and on proof of the allegation, the former decree will be put out of the way, and the matter proceeded in, as if such decree, had not been entered.

This is a bill to impeach a decree as having been obtained by surprise, and it is held, the decree having been obtained in this

Court which has no original jurisdiction, that the Court of Equity below has jurisdiction. *Kincade v. Conley,* 62 N.C. 270. It is held further that "from the answer, enough appears to show that the plaintiffs were, under the extraordinary circumstances in which they were placed, taken by surprise, by the final decree in this Court, and that it would be a fraud (on the part of the defendants) to have it enforced." Accordingly the case was sent back to the Court below, to be there heard and determined, as the right of the parties may be established, treating the final decree in this Court, as put out of the way. (390)

The interlocutory decree declaring the defendant J. W. Conley entitled to a share as administrator of his first wife, was of course to stand: *Conley v. Kincade,* 60 N.C. 594.

This brief reference to the principle, on which a bill in the Superior Court was sustained to impeach a decree of this Court, as having been obtained by surprise, is made necessary by reason of the fact, that the statement of the case in the Court below, does not show clearly, that his Honor did fully comprehend the scope of the bill, or the principle on which it rests.

For the plaintiffs it is insisted: His Honor in declaring "there is no ground or accident" ruled in opposition to the decision, when the case was last before this Court, by which it is held, that from the answer it does appear that the plaintiffs were taken by surprise by the final decree, and it would be fraud on the part of the defendants to enforce it.

For the defendants it is insisted: His Honor admitting the surprise, which amounts to fraud, in obtaining the final decree in this Court, heard the case as if that decree was out of the way, and, upon the pleadings and proofs offered before him, declares, as a matter of fact, that there was no fraud in regard to the receipt of Confederate notes by the plaintiffs in payment of ante-war debts, and that the plaintiffs, in receiving Confederate notes, acted in their own wrong, and without the consent or concurrence of the defendants.

It appears, by the transcript of the record, that, by consent, the bill is dismissed as to J. W. Conley. He represented two shares, and bought land at the sale made by the plaintiffs, at the price of some $5000, which he paid in Confederate notes, and could not, in conscience, demand payment in other funds. So the case is relieved from much complication, by the withdrawal of all claim on his part.

It also appears by the transcript, that at August term 1867, on the filing of the certificate from the Supreme Court, "repli-

(391) cation and commission," was entered, and at Spring Term 1868, "the cause is set for hearing, and, by consent, the parties are allowed to take testimony during the term."

The statement of Tod. R. Caldwell, Esq., is filed by the defendants, and by it, the allegation of the plaintiffs, that they had received Confederate notes by the consent and approval of the defendants, other than J. W. Conley, is disproved, and it is established that they acted in their own wrong. The plaintiffs offer no proofs.

The transcript further shows, that the cause was heard upon bill, answers, exhibits, proofs, and argument of counsel on both sides.

So we are led to the conclusion, that, as to the defendant, J. W. Conley, the plaintiffs failed to establish the allegations of the bill; that the cause was heard upon the merits; and that his Honor declares there was no fraud or accident as alleged, not in regard to the matter of surprise, on account of which the decree in this Court had been put out of the way, but because, in a fair showing, the plaintiffs could not prove, that they had been induced to receive Confederate notes, or to invest in Confederate funds, by the advice and concurrence of the parties, who were then holding them to account.

This view is confirmed by the fact, that, in regard to the share of Isabella Boon, the injunction is continued, and a reference made as to what amounts, if any, have been paid to her administrator or heirs, before or since the decree of the Superior Court.

The point, suggested on the argument, that, as it was not proved that Archibald Kincade received the Confederate notes, he ought not to be charged by the decree, cannot be acted on. There is no allegation in the pleadings and proof, that he did not receive Confederate notes, or concur with his co-executor, in the Confederate funds: proof, without allegation, is as unavailing as allega-

(392) tion without proof. In judicial proceedings, there must be *"allegata et probata."*

We see no error. Decree affirmed. This will be certified.

Per curiam.

No error.

Cited: Corpening v. Kincaid, 82 N.C. 203; *Grant v. Edwards,* 88 N.C. 248; *Grant v. Edwards,* 90 N.C. 32; *Grantham v. Kennedy,* 91 N.C. 154.

MOSES A. BLEDSOE v. THE STATE OF NORTH CAROLINA.

The provision in the new Constitution (Art. 4, § 11,) giving to the Supreme Court, original jurisdiction to hear claims against the State, etc., probably intends that such *hearing* shall be chiefly of *the law*, involved in any such claims, including only such general observations upon *the facts* as may be required to render the rules of law laid down, intelligible in their special application. At all events, this must be so in the absence of further legislation, providing the Court with the proper machinery for deciding issues of fact.

CLAIM against the State, *decided* by the Court, at June Term 1869, and ordered to be reported to the General Assembly, for its actions: (Constitution of 1868, Art. IV., § 11.)

The claimant filed his complaint in this Court at January Term 1869, setting forth a claim against the State, for articles delivered to the "Insane Asylum," at the dates, and for the prices specified below, the latter being "in gold coin":

1864. April 1st to August 2d, 859 1-12 cords pine wood, at $500.
1863. Oct. 1st to 31st, 198⅛ barrels of corn, at $4.65.
Oct. 14th to 31st, 902⅓ bushels sweet potatoes, at $0.58.
1864. Oct. 24th, 400 bushels sweet potatoes, at $0.58.

It was also stated that the *wood* was contracted for by Dr. E. C. Fisher, then Superintendent of the Asylum, March 13th 1863, at $20 per cord; that upon the 25th Oct. 1864, Dr. Fisher gave the claimant an order for $6,000—for the 400 bushels (393) of potatoes, upon which claimant had received at various times, $4000.

That, "in or before April 1865," the claimant sold and delivered to the Asylum, 87 other barrels of corn, worth $6.00 per barrel, and 37 bushels of wheat, worth $3 per bushel; that upon this, he had received in payments, afterwards, in corn, flour, etc., the value of $107.64; that, by act of March 16th 1866, it was decided that all dues to the Asylum should be turned over to the Public Treasury, and that the Asylum, thenceforward, should be supported by direct appropriations from the Public Treasury. The prayer for judgment, was for $6,338.74, in gold, with interest upon different portions thereof, from the various debts above.

A copy of this was served upon the Governor, and the Attorney General.

Upon the 4th of February 1869, an order was made, by consent, that the Clerk should take an account of the matters set forth by the claimant, and empowering him to examine the parties upon oath, and to send for persons and papers.

Afterwards, a report was made by the Clerk, the result of which

was, that, including interest to the 10th of February 1869, the claimant was entitled, on account of his claim, to $11,147.90.

Thereupon, the Court, not being satisfied with such report, ordered *eight* issues, covering the whole ground, to be submitted to a jury of Wake county, by the Superior Court, etc.

This was done at Spring Term 1869, before Watts, J., the verdict upon the whole, being that the value of the articles, (after deducting payments) at the time and place of delivery, was $9,408.61.

This finding was thereupon certified to this Court, as required.

Fowle & Badger and Haywood for the claimant.
Attorney-General contra.

(394)

READE, J. The Constitution provides, that "The Supreme Court shall have original jurisdiction to hear claims against the State; but its decision shall be merely recommendatory: no process in the nature of execution shall issue thereon: they shall be reported to the next General Assembly for its action." Art. 4, § 11. In the 10th section it is provided that "the Supreme Court shall have jurisdiction to review upon any appeal, any decisions of the Courts below, upon any matter of law or legal inference: but no issue of fact shall be tried before this Court."

Construing the two sections together, we are of the opinion that it was not contemplated, that when a claim is presented against the State, there shall be a "trial" of the facts in detail, but only that we should decide such questions of law as may seem to be involved, together with our own impression of the facts generally, so as to make our decision of the law intelligible. Especially must this be so, unless there shall be some legislation to enable us to find the facts in detail; for we have no jury, and if we had, it would be inconvenient and expensive to bring witnesses from all parts of the State; and depositions are always unsatisfactory. Probably, the provision in the Constitution was induced by the consideration, that many claims would be presented, growing out of the events of the late war, and it was desired that they should have the consideration of the Court, in aid of Legislative action.

We first referred the facts to the Clerk, but his report was unsatisfactory; and we then ordered issues to be tried in a Superior Court by a jury, but we are not satisfied either with the rulings of his Honor, or with the verdict of the jury. And, therefore, we state the facts generally, as they appear to us from the complaint of the plaintiff, and the exhibits filed, and the evidence before the Clerk, and the statements at the Bar.

In March 1863, the plaintiff, who was a director in the Lunatic Asylum, entered into a written contract with E. C. (395) Fisher, who was Superintendent of the Asylum, to deliver 3000 cords of pine wood at $20 per cord. The plaintiff now charges $5 per cord, in coin, or its equivalent, with interest from the time of its delivery. And he was allowed by the jury, under instructions from his Honor, $7.50 per cord in the present currency. There are several objections to allowing this charge. (1) The plaintiff was a director for the Asylum in 1863-'4, and in that sense was its guardian, and the person with whom he contracted was Superintendent. And it does not appear, nor is there any allegations that the Board of Directors was consulted, which would have been proper in so large a transaction. (2.) It does not appear that there was any necessity for the contract. Indeed it appears that there was not; for, none of the wood was delivered until more than a year from the time of the contract, and the greater portion was never delivered at all. (3.) There is no evidence that the wood was worth $20 per cord at the time of the contract; and when evidence was offered by the State on the trial before the jury, of the price at which wood was selling, the plaintiff objected to the evidence, and it was ruled out. And it appears from the plaintiff's own statement before the Clerk, that wood was not worth any thing like what he charges; for, he states that he delivered the wood between April and August, 1864, and that "before some of it was delivered it was selling higher than $20 per cord." Now at that time Confederate money was twenty for one of coin: if therefore he had received Confederate money according to his contract he would have realized but one dollar in coin. Yet he charges five. And, from his statement, we infer, that even in 1864, when he began to deliver the wood, it was not worth $20 per cord; because he says, that "before *some of it* was delivered, it sold for more than $20." Now, if it was only worth $20 in 1864, when Confederate money was twenty for one, it would only have been worth $5 per cord in 1863, when Confederate money was only five for one. (4.) The wood (396) was to be delivered, not at Raleigh, but in Johnston County. (5.) There was no time stipulated for the delivery. It was stated before us at the Bar by one of the plaintiff's counsel, that he is now receiving in Raleigh from a tract of land adjoining the plaintiff's in Johnston county, pine wood at $2.50 per cord. And we are satisfied from this and other information, that $2.50 per cord in Federal currency, would be a full allowance to the plaintiff, for delivering the wood in Johnston, instead of Raleigh.

Another item is, for 198 barrels of corn, in the Fall of 1863, at $4.65 per barrel, in coin. There was evidence before the clerk, that

coin was high at that time, and that individuals gave as much as $1 per bushel in coin, and that the price in Confederate money, was $65 per bushel. We know that during the war *individuals* in some sections, had great difficulty in getting corn at any price. But the State had facilities for getting corn which individuals had not. In the Eastern part of the State corn was abundant and cheap, and the State got large quantities, and furnished the counties, and we do not doubt that the *guardians* of the Asylum might have made an arrangement with the State upon much better terms than the plaintiff's. We are satisfied that $5 per barrel in Federal currency would be a full allowance for the corn furnished in 1863, and $6 per barrel for all the remainder of the corn.

The item of 902 bushels of sweet potatoes, in October 1863, was furnished at the season for gathering them, and we think 75 cents per bushel in Federal currency a full price for them.

The item of 400 bushels about the same time in 1864 was furnished, at $6000, in Confederate money, and $4000 of the amount was paid, which being for two thirds of the 400 bushels, the other one-third *(viz)* 133 bushels, will be put at 75 cents per bushel.

The "wheat at $3 per bushel in currency" was not sold
(397) at all. It was *loaned* in December 1864, to be paid out of the crop of 1865. There was evidence that wheat was worth $3 at the time it was loaned, but there was no evidence that the wheat of the crop of 1865 was worth $3 per bushel. And we think that $2 per bushel in Federal currency is a fair price for that.

The clerk will make out a copy of the plaintiff's complaint, and a copy of this opinion, and an account of the items with the prices we recommended, and sum up the whole, and deduct therefrom the sum of $106.64, which the plaintiff has been paid, and add interest upon the remainder, from May 1865, until 1st January 1869, and transmit the same under the seal of the Court, to the Governor of the State, to be communicated to the General Assembly.

There is nothing in the character of the claim which is illegal. It is for fuel and provisions furnished for the Lunatic Asylum. The fact that they were furnished during the rebellion, is nothing against them. The Asylum is an institution of mercy and charity, in no way connected with the war, and is a sacred duty to maintain it under all circumstances.

It was decided by this Court, in *Att'y. Gen'l. v. Cape Fear Navigation Co.,* 37 N.C. 444, that the State is not bound to pay interest unless there is a special contract to that effect.

The contract, in this case, must be understood to have been made, with reference to the law, as it then stood. But because of the changes in, and the disturbed condition of the government, and

because payment has been delayed for a long time, we recommend a departure from the rule so far as to allow interest from the end of the war—say 1st May 1865, until 1st January 1869—when the plaintiff presented his claim to the General Assembly. And we do not recommend interest after that time; because, if the plaintiff had presented a fair and reasonable claim, we are to suppose that it would have been allowed. The subsequent delay is by his own folly. And, for the same reason, we allow him no costs, (398) but order that he pay the costs of this suit. For stating the account herein directed, the clerk will be allowed $5.

Per curiam.

Venire de novo.

Cited: Reynolds v. State, 64 N.C. 461; *Clements v. State,* 76 N.C. 201; *Clements v. State,* 77 N.C. 144; *Horne v. State,* 82 N.C. 384; *Reeves v. State,* 93 N.C. 258; *Garner v. Worth,* 122 N.C. 256; *Miller v. State,* 134 N.C. 272; *Dredging Co. v. State,* 191 N.C. 250; *Lacy v. State,* 201 N.C. 314; *Yancey v. Hwy. Comm.,* 222 N.C. 109.

IN THE MATTER OF B. F. MOORE AND OTHERS.

In the matter of *B. F. Moore and others,* decided at June Term 1869, the following order was made:

Upon the argument in *Ex parte Biggs* at this term, the power of the Court to strike from the list of Attorneys, any unworthy member having been conceded,

Ordered, That the rule upon the signing of what is called "a solemn protest of the members of the Bar of the State of North Carolina," made at June Term 1869, be discharged.

Per curiam.

Rule discharged.

CASES AT LAW.

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

JUNE TERM, 1870

ANDERSON & YOUNG v. THE CAPE FEAR STEAMBOAT COMPANY.

In a case where there are a number of witnesses on each side who contradict each other, it would be improper (generally,) for the Court to select one of them, and instruct the jury that *if they believed him*, they must find their verdict in a particular way, because, among other reasons, that would be to make the case turn upon his veracity, whereas he might be truthful, and yet, his testimony be liable to modification, or explanation by other parts of the testimony.

Where fire was communicated to a barn by sparks from a Steamboat, and the boat was provided with an effectual "spark-extinguisher" which was not at the time in use: *Held*, that the fire was caused by *negligence* upon the part of the Steamboat.

CASE, tried before *Russell, J.*, at December Special Term 1869, of NEW HANOVER Court.

The plaintiffs sought to recover damages from the defendant for the negligence of its servants in managing the Steamboat, "Gov. Worth," whereby the barn of the plaintiffs, and the machinery therein were destroyed by fire communicated by sparks from the smoke-stack of said Steamboat, while navigating the Cape Fear River in April, 1867.

Several witnesses were examined for both plaintiffs and
(400) defendant. Among the witnesses for the defendant, was A. P. Hurt, the Captain of the Steamboat, at the time of the alleged injury, who testified that he had been a steamboat Captain for 20 years, and was familiar with the navigation of the Cape Fear River; that he had command of the "Gov. Worth" on the day the barn was burned; that when he left the wharf at Wilmington, a strong wind was blowing from a direction East of South, and the Steamboat, when loosed from the wharf, was carried by the wind out in the river without using her paddles; that she left the wharf about 2 o'clock in the afternoon; that the plaintiffs' barn was on the East side of the river about 3½ miles from Wilmington; that there was a long reach in the river, up which the Steamer went towards the barn, and that said reach was parallel with the course of the river at Wilmington, and that the wind was carrying the sparks diagonally across the river, and not towards the barn; that there was a sharp bend of the river at that point where the barn was located, (the barn being on the "cove side,") and that the river was 150 yards wide at that point; that in going up, the Steamer hugged the shore opposite the barn so closely as to attract the observation of a passenger, and that she was about 150 yards from the barn while passing; that the Steamer was going at her usual rate of speed with the usual amount of fire and steam; that she threw fewer sparks than any Steamer on the river, and had the highest smoke-stack on the river; that he never knew sparks to fly from her smoke-stack further than 20 or 30 yards, and that she was the safest boat on the river; that about 200 yards before reaching the barn he passed the Steamboat "Gen. Howard" coming down the river on the side next the barn, and that the wind was blowing hard at that time.

Capt. Hurt further testified, in answer to the cross-examination of plaintiff's counsel, that he used no spark-arrester at that
(401) time, because he had tried various experiments with spark-arresters of a half dozen kinds and found them impracticable, as they would choke up the smoke-stack and get knocked off by limbs and trees on the river banks, and that he had found that using a smoke-stack 40 feet high, as he did on the "Gov. Worth" was the best means of preventing the emission of sparks.

He stated that he had on the boat, connected with the boiler and smoke-stack, an appliance that he sometimes used to avoid the danger of setting fire to buildings by sparks, which on the examination, was termed a "spark extinguisher;" he said that on coming into the City of Wilmington, he always used this arrange-

ment, and that he sometimes used it by partially putting it on when passing buildings on the river bank. In answer to a question by plaintiff's counsel, he stated that he did not know that it was used at all in passing the barn in question. In answer to a question by defendant, he said that he could use this appliance without difficulty when coming into the City, because he always had on a good head of steam and the boat could be got up to the wharf easily, but that he could not keep it on for any considerable length of time without very seriously interfering with the progress of the boat. He further said that there were many buildings on the river bank between Wilmington and Fayetteville, and that he thought if he put the extinguisher on every time he passed a building it would take two days to make the trip instead of one as at present.

John C. Bailey, a witness for the defendant, testified that the Steamer "Gov. Worth," on the occasion in question had a contrivance for arresting sparks which was a part of her machinery, (the appliance spoken of by Capt. Hurt as a "spark extinguisher") and by means of which sparks could be arrested by turning the "exhaust" into the smoke-stack, that it was a good contrivance for that purpose but could not be used for any great length (402) of time without stopping the boat, and that it could be used as much as twenty minutes at a time without materially interfering with the progress of the boat.

A. D. Young, one of the plaintiffs, testified that the barn had been standing by the side of the river where it was when burned, for 17 years; that on the day when it was burned he went from town to the plantation where the barn was, in a boat; that in going up the river he met the Steamer, "Gen. Howard" which had passed the barn on its way to town, and at the points of meeting was 1¼ miles below the barn; that about a half hour after meeting said Steamer he went to the barn and went over it and saw no fire anywhere near it, and that there was no fire in the fields and none anywhere nearer than the dwelling house which was a half a mile distant; that he left the barn and about ten minutes afterwards the Steamer, "Gov. Worth" passed the barn on its way up the river, and in a very few minutes after it passed he saw the barn burning; that everything was very dry at the time, that the wind had been blowing very hard for four or five hours; that it was a little West of South, and in a direction to carry sparks from a Steamer going up the river directly towards the barn.

Daniel Stevenson, witness for the plaintiffs, testified that he was fishing on the other side of the river nearly opposite the barn, that he saw the Steamer, "Gov. Worth," and it passed within fifty

yards of the barn; that the wind was blowing very hard, that a great quantity of very large sparks was flying from the smoke-stack of the Steamer directly towards the barn; that he saw the sparks blown to the barn, and upon it, and in a very little while he saw the barn in a blaze, and that the wind was blowing from a little West of South.

Richard Meares, witness for the plaintiffs, testified that
(403) he was on the same side of the river with the barn, and about 300 yards from it; that he saw the Steamer, "Gov. Worth" coming up the river; that the wind was blowing hard and blew the Steamer in towards the shore and near to the barn, and that he saw the sparks fly from the smoke-stack of the Steamer upon the barn and set it on fire.

John McRae, witness for plaintiffs, testified that he had been fishing in a creek on the same side of the river with the barn and about one-fourth mile from it, and that he had spread his net on the bank to dry; that when the "Gov. Worth" turned a bend in the river about a mile above the barn, a great quantity of sparks was blown from her smoke stack into the creek where he was; that thinking his net in danger he ran to save it and saw the sparks from the Steamer set fire to the stubble in the field which was burned off, and soon afterwards he saw the barn on fire.

Gaines, a witness for the plaintiffs, testified that at the time the plaintiff's barn was burned he was employed on the plantation of one Ivey, about a mile to the northward of the barn; that he saw the barn burning and saw sparks from it set fire to some dead trees, six or seven hundred yards distant from the barn, and nearly due North of it.

S. L. Fremont, witness for the plaintiffs, testified that he was an engineer by profession, and had been particularly familiar with the principles and use of steam engines for more than fifteen years on railroads, but was not familiar with steamboat machinery; that there is no difference in the principle in steam engines, whether used on Steamboats or railroads; that at the time the barn was burned, and for many years before there were several kinds of spark arresters well and generally known to persons using steam engines, which were used for preventing accidents by fire from sparks and which were effectual for that purpose, and that these spark-arres-
(404) ters could be used on steamboats as well and effectually as on railroads, and that but for their use the railroads would burn up the country.

Much of the evidence on both sides was circumstantial and much of it conflicting on material points. Six witnesses were exam-

ined as to material points on the part of the plaintiffs, and seven on the part of the defendant.

There was evidence that steamboats had been running on the river for a great many years without ever setting fire to anything.

The defendant's counsel asked his Honor to charge the Jury,

1st. "That if they believed the testimony of Capt. Hurt, there was no negligence."

His Honor refused to give the instruction and defendant's counsel excepted.

2nd. "That if they believed Capt. Hurt's testimony in regard to the means used to prevent fire, there was no negligence"—which instruction was also refused, and defendant's counsel excepted.

His Honor charged the Jury that if it was true as stated by Capt. Hurt, that he was 150 yards from the barn, and not nearer, and if it was true that sparks from the smoke-stack would not fly further than 20 or 30 yards, then there was no negligence, but that the Jury must consider this testimony of Hurt, in connection with the evidence of other witnesses, some of whom positively contradicted his statements, and many of whom stated circumstances relied upon by the plaintiffs as being inconsistent with his testimony. His Honor further charged the Jury that if they believed that boats had been passing for years without setting fire to this building, and that the building had been set fire to by the "Gov. Worth," then there is a presumption of negligence, and it devolved on the defendants to show that they used proper precautions, that they could repel it by showing that the circumstances under (405) which the event happened were extraordinary, as for instance by a violent gale of wind; that if the wind was blowing when the boat passed the barn, and if there was any appliance known to steamboat men which would arrest the sparks, then the defendants were bound to use it unless the use of it would break up their business, or in other words, be impracticable.

In commenting upon the case of *Herring v. W. & W. R. R.*, to the Jury, his Honor said, "in that case it was a human being that was on the track with the instinct of self preservation, and it was presumed he would get off the track, if it had been a log of wood it would have been negligence, and in this case it was a house standing on the river bank which the defendants were bound to see, and it was their duty to take all reasonable and proper precaution in passing it."

To the charge as above given and the comments on the case of *Herring v. W. & W. R. R.*, the defendant's counsel excepted.

Verdict for plaintiffs for $5,000; Rule for new trial; Rule discharged; Judgment and appeal.

Strange for the appellants.
Bragg contra.

1. The Judge properly refused the instructions 1st and 2nd, prayed by defendants. *Gaither v. Ferebee,* 60 N.C. 310; *State v. Norton,* Ib. 303; *State v. Summey,* 2 Ib. 108.

2. As to negligence, the charge was correct. *Ellis v. Ports. R. R. Co.,* 24 N.C. 138; *Garris v. Same,* Ib. 324; *Herring v. Wil. & Ral. R. R. Co.,* 10 Ib. 402; *Avent v. Murrel,* 49 N.C. 323; *Aycock v. R. R. Co.,* 6 Id. 231;*Hayett v. Phil. & Read. R. R.,* 23 (406) Pa. 373; 20 Ib. 177; 1 Denio 91; 1 Red. on R. R. 452.

3. Upon the evidence, there was negligence, and even if the charge were wrong, the verdict was right, and cures the error of the Judge. *Chaffin v. Lawrence,* 51 N.C. 179, and cases cited.

READE, J. The facts being ascertained, negligence is a question for the court. When the testimony is all on one side, or is not contradictory, the Court can decide whether there is, or is not, negligence. When the testimony is on both sides and contradictory, the Court must submit the testimony to the jury to find the facts and apply the law, as the Court shall explain it, as to what constitutes negligence in the particular case. Here there were six witnesses for the plaintiffs, and seven for the defendant, and their statements were conflicting. The defendant selected the testimony of one of his witnesses, and asked his Honor to charge the jury, that "if they believed the testimony of Captain Hurt, there was no negligence." The testimony of this witness was by no means the most consistent and satisfactory, and was expressly contradicted by others. Such a charge under the circumstances would have been calculated to mislead the jury, and induce them to believe that the case depended upon the truthfulness of the witness, and that a verdict against it would be an imputation of perjury. This would be a trial of the *witness* rather than of the *case;* whereas both the witness and his testimony might be in the main truthful, and yet so explained or modified by the other testimony as to authorize a verdict against it. If his Honor had passed upon the testimony to ascertain the facts, he would have considered the whole, and he could not do less than submit the whole to the jury, when he substituted them to find the facts for him. His Honor did charge the jury that if they be- (407) lieved the most important part of Capt. Hurt's testimony,

i.*e.*, "that the steamboat was one hundred and fifty yards from the barn, and that the sparks did not fly more than twenty or thirty yards from the boat," then there was no negligence. This is self-evident, and the defendant had the benefit of it. Take out this portion of his testimony, and there is nothing left which shows ordinary care on the part of the boat: on the contrary it makes out a clear case of negligence, upon the supposition that the barn was burned by the boat, as was clearly testified to by the other witnesses; for Capt. Hurt states that he had no "spark-arrester" on at the time, and that there was a strong wind. The testimony in detail is sent up with the case, and taken as a whole, the jury were well authorized to find that as the boat went up the river there was a strong wind which blew the sparks from the steamboat upon the barn, and burned it down, that there was no "spark-arrester" used, and that there are spark-arresters in general use on steamboats and railroads, which are effectual for the purpose, that the boat had a "spark-extinguisher" which was sometimes used and was effectual when used, and could be put off and on at pleasure, and it was not used on this occasion. These facts make a clear case of negligence.

The reason given for not using the spark-arrester constantly on this boat was, that it choked the smoke-stack and impeded the speed of the boat. If that be true, still it is an inconvenience which must be submitted to in favor of life and property; and it is an inconvenience to which other boats and railroads submit. If it were not so,then, as stated by one of the witnesses, the country would be burned up. It was stated by Capt. Hurt that as a substitute for the spark-arrester, he used a higher smoke-stack than common, which he found to be the "best means for preventing the emission of sparks." If it was the "best means," then it was not negligence to use it instead of a spark-arrester. But this seems (408) inconsistent with other parts of his testimony in which he states that he had upon the boat a "spark-extinguisher," which he always used when going into Wilmington, and sometimes when passing buildings on the river. Why use it at all, if the high smoke-stack was better? Why was it better to use it when going into Wilmington and passing other houses on the river, and not better to use it when passing this barn? This uncertainty, not to say inconsistency, in the testimony of Capt. Hurt, shows clearly that his Honor could not have put the case to the jury upon it, as he was asked by the defendant to do. It seems to be uncertain, even in his own opinion, whether the high smoke-stack or the spark-extinguisher was the best means; and the fact that he used the latter in places of greatest danger, would justify the inference that he thought the spark-extinguisher the best means. If so, there was a special

reason why he should have used it on this occasion; because he was passing a barn of great value, full, probably, of combustible material, and there was a strong wind. In determining the question of negligence on any given occasion, the circumstances must be taken into consideration. What would be ordinary care in one case, would be negligence in another. Where the danger is increased, the safeguards must be increased; just as a bailee must take better care of a purse of gold than of an umbrella. Exception was taken to his Honor's charge, that if there was any appliance known to steamboat men that would arrest the sparks, the defendant was bound to use it. If this be construed to mean that the defendant must use all or the very best appliances, the charge would be objectionable; but such a construction would be "sticking in the bark." The plain meaning is, that the defendant was bound to use some efficient means to arrest the sparks, and thus understood, the charge is right.

(409) The exception to his Honor's comments on the case of *Herring v. W. and W. R. R.*, are without force, as it seems to us. No error is specified.

If there was any error in the instructions of the Court, the finding of the jury seems to us, in view of all the evidence, to be right, and that cures the alleged error.

There is no error.

Per curiam.

Judgment affirmed.

Cited: Brem v. Allison, 68 N.C. 416; *Jackson v. Comrs.,* 76 N.C. 284; *Rhea v. Deaver,* 85 N.C. 340; *Aycock v. R. R.,* 89 N.C. 328; *Lawton v. Giles,* 90 N.C. 382; *S. v. Rogers,* 93 N.C. 532; *Pleasants v. R. R.,* 95 N.C. 203; *Long v. Hall,* 97 N.C. 293; *S. v. Weathers,* 98 N.C. 686; *Emry v. R. R.,* 109 N.C. 592; *White v. Barnes,* 112 N.C. 330; *Williams v. Rich,* 117 N.C. 240; *Harris v. Murphy,* 119 N.C. 37; *Miller v. R. R.,* 128 N.C. 28; *Cogdell v. R. R.,* 129 N.C. 401; *Williams v. R. R.,* 130 N.C. 120; *S. v. Hopkins,* 130 N.C. 649; *Stewart v. Lumber Co.,* 146 N.C. 106; *Bowman v. Trust Co.,* 170 N.C. 303; *Royal v. Dodd,* 177 N.C. 212; *Taylor v. Meadows,* 182 N.C. 267; *Halsey v. Snell,* 214 N.C. 212.

E. G. FLOYD, ADMR., ETC. v. JOSHUA HERRING.

An administrator has no estate in the *realty* of the deceased: therefore,

He cannot maintain an action to recover possession of realty, under the proceedings "for the relief of Landlords," authorized by act of 1863, c. 48, and 1864 c. 12.

Where a will is contested, land devised therein vests *ad interim* in the heirs of the deceased.

Where a will was proved in common form, and, because no executor was named therein, administration *cum testamento annexo* was granted; *Held* that upon a contest in regard to such will occurring subsequently, and a consequent revocation of the probate, the previous grant of letters was not thereby necessarily annulled.

PROCEEDINGS under the acts for the relief of Landlords, before *Russell, J.*, upon appeal, at Spring Term 1870, of ROBESON Court.

The defendant was tenant of a house, etc., under a lease by one Griffin, who died in November, 1865, leaving a will, proved in common form at November term 1865 of Robeson County Court, by which he devised his lands to his widow. No executor be- (410) ing named in the will, administration *cum testamento annexo* was granted to the plaintiff. At August term 1866, a petition was filed by the heirs of the deceased for a re-probate of the will, and thereupon the former probate was revoked at February term 1867, and probate in solemn form ordered, the proceedings in which are still pending. The appointment of the plaintiff as administrator was not revoked.

The defendant having retained possession after his term had expired, the plaintiff commenced proceedings in his own name to turn him out, in September 1866, under the Acts of 1863 c. 12, and 1864 c. 48, and having had a verdict and judgment before the magistrate, the defendant appealed to the Superior Court.

At the trial in the Superior Court, his Honor having intimated that the plaintiff could not recover, there was a nonsuit, and the plaintiff appealed.

Leitch and N. A. McLean for the appellant.
Strange contra.

DICK, J. These proceedings cannot be maintained under the Acts of 1863 and 1864, "For the relief of Landlords," for the plaintiff as administrator *cum testamento annexo*, has no interest in the premises. A personal representative has no control of the freehold

estate of the deceased; unless it is vested in him by a will, or where there is a deficiency of personal assets and he obtains a license to sell real estate for the payment of debts. The control derived from a will may be either a naked power of sale or a power coupled with an interest. The heir of the testator is not divested of the estate which the law casts upon him, by any power or trust until it is executed: *Ferebee v. Proctor,* 19 N.C. 439.

(411) The authority given to a personal representative to sell land for the payment of the debts of the deceased, is a mere naked power, and confers no title or interest in the estate. He is merely an agent of the Court and acts under its direction in the execution of the power, and after the sale is made and confirmed, the Court may designate some other person to make the title to the purchaser. Rev. Code, ch. 46, sec. 49.

In this case the land in question was devised by the testator to his widow. There is a pending contest respecting the probate of the will, and no title can pass to the devisee until the will is duly proved and allowed by the proper Court: Rev. Code, ch. 119, sec. 20. The title of the land descended to the heirs of the testator, subject to be divested in favor of the devisee, when the will is duly admitted to probate. In England it is not necessary to the validity of a devise that it be admitted to probate in the Ecclesiastical Court. It is regarded as a conveyance and must be duly proved in a Court of Common Law, when the devisee seeks to assert his title against the heir or any other adverse claimant. A devise breaks the descent and passes the title to the devisee immediately upon the death of the devisor. In this country, probate is necessary to the validity of a devise, and until this requisite is complied with, the title to land devised must necessarily pass to the heir, as the fee cannot be in abeyance. In the case before us, as matters now stand, the heirs of the testator can alone take advantage of the acts for the relief of landlords above referred to.

It was also insited at the bar by the counsel for the defendant, that the plaintiff cannot maintain his suit for the reason that his general letters of administration are null and void, as there is a pending contest respecting the probate of the will, and that the Court only had power under such circumstances to appoint an administrator *pendente lite.*

(412) The will was admitted to probate in common form, and that probate was valid until it was set aside: *Etheridge v. Corprew's, Exr.,* 48 N.C. 14. As there was no executor named in the will, the Court had the power to appoint the plaintiff administrator *cum testamento annexo.* As the Court had jurisdiction of the subject matter and the particular case, the appointment is valid

until properly revoked: *Hyman v. Gaskins,* 27 N.C. 267. The revocation of the probate in common form did not have the effect of annulling the administration which was properly granted. The case of *Slade v. Washburn,* 25 N.C. 557, is not analogous to the one before us. In that case the Court exceeded its jurisdiction, and its action was properly declared to be null and void; but in our case the Court acted within the scope of its legitimate authority. If the will is hereafter established in solemn form, there will be no grounds for the revocation of the letters of administration of the plaintiff; but if the will is set aside, the case may be different.

There is no error.

Per curiam.

Judgment affirmed.

Cited: Fike v. Green, 64 N.C. 667; *Womble v. George,* 64 N.C. 763; *Syme v. Broughton,* 86 N.C. 157; *In re Palmer's Will,* 117 N.C. 139; *Speed v. Perry,* 167 N.C. 129; *Barham v. Holland,* 178 N.C. 106; *Barbee v. Cannady,* 191 N.C. 532; *Hoke v. Trust Co.,* 207 N.C. 607; *Linker v. Linker,* 213 N.C. 353; *Pack v. Newman,* 232 N.C. 401; *Griffin v. Turner,* 248 N.C. 681; *Paschal v. Autry,* 256 N.C. 174; *Hargrave v. Gardner,* 264 N.C. 120.

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(413)

J. J. BIGGS v. JAS. M. HARRIS.

Where an apprentice, then nineteen years and two months old, was, in July, 1860, upon his master's removal from the State, hired out by him for the rest of that year and also for the year 1861: *Held,* that it was *error* for the court to instruct the jury, "that if the consideration of the notes given for the value of the apprentice during the above years was not the assignment of the full unexpired term of the apprentice, but only a hiring by the master for the years 1860 and 1861, the plaintiff would be entitled to recover;" and that he ought to have submitted the following instructions to the jury: Was it the effect of the transaction that the plaintiff *transferred his mastership* of the apprentice to the defendant? If yea, he cannot recover; if nay, the defendant is liable.

DEBT, tried before *Watts, J.,* at December Special Term 1869 of WAKE Court.

The plaintiff declared upon two bonds executed by the defendant July 27th, 1860, for $75.00 each, payable severally 1st January 1861, and 1st January, 1862, to the plaintiff "for the hire of a boy."

For the defendant evidence was given tending to show that the boy, free colored and nineteen years of age, had at May Term, 1860, of Wake County Court, been bound as an apprentice during his minority, to the plaintiff; that at the date of the notes the plaintiff was upon the eve of removing from the State, and that the notes were given for the hire of the boy for the rest of the year 1860 and for 1861; also that the notes were in fact given for the assignment of the full unexpired term of the apprenticeship. His Honor instructed the jury that if the consideration of the notes was the assignment of the full unexpired term of the apprentice, the plaintiff could not recover; but if it was not such assignment, but only a hiring of the apprentice for 1860 and 1861, the plaintiff would be entitled to their verdict.

Verdict and judgment for the plaintiff; appeal by the de-
(414) fendant.

C. M. Busbee for the appellant.

The assignment or transfer of an apprentice, or his services, is inconsistent with the nature of the trust, and against the policy of the law. Revised Code, chap. 5. *Musgrove v. Kornegay,* 52 N.C. 71; *Allison, et al. v. Norwood,* 44 N.C. 414; *Goodbred v. Wells,* 19 N.C. 476.

It is *contra bonos mores,* and against the policy of the law, for a master to *hire out an apprentice;* and a contract founded upon such consideration, will not be supported: *Hall v. Gardner,* 1 Mass. 296; *Ayer v. Chase,* 19 Pick. 556; *Graham v. Kinder,* 11 B. Mun. (Ky.) 62; *Huffman v. Rout,* 2 Met. (Ky.) 50. See also, *Davis v. Coburn,* 8 Mass 172; *Stewart v. Ricketts,* 2 Humph. 151; *Tucker v. Magee,* 18 Ala. 99.

The case of *Futrell v. Vann,* 30 N.C. 402, relied on by plaintiff does not sustain his case, as it turned upon a promise made after the original contract was rescinded, upon sufficient consideration, to-wit: *the allowance of a certain credit, etc.*

At any rate it was a promise to pay for *past* services. See *Turner v. Vaughn,* 2 Wilson 339.

Fowle & Badger and A. M. and R. G. Lewis contra.

READE, J. It is indispensable to the well-being of society that the young should be under the control of persons of experience until the mind is trained, and the manners and habits formed; and with us the period of this dependence covers more than half of the aver-

age human life. In the case of parents and children, natural affection is the guarantee that this control will be exercised for the best interests of the child and society, and no other guarantee (415) is sought. When the parent is lost then society takes the control, and the young are entrusted to guardians and masters; and because these are not supposed to have the natural affection of parents, they are put under the obligations that they will fill the place of parents, and they are required to do, not what a parent may or may not do at pleasure, but what a parent ought to do. To this end the appointing power selects or ought to select, as guardians of wards, and masters of apprentices, not men who may be able to give bonds, but men of integrity and moral worth as well, retaining the power to remove them for cause, and appoint others in their stead. It is one of the most delicate and responsible trusts which is committed to society, or which society can commit to its tribunals, the care of the young; those who are alone in the world.

But what would the care of the appointing power be worth, if the master who is selected, can transfer his authority to another as a matter of traffic? If this were allowed we should soon have a system of servitude worse than slavery: for in slavery the value of the property was a guarantee of careful treatment, but the master of an apprentice has neither the affection of a parent nor the interest of property. He must be trusted, therefore, mainly for his integrity, aided somewhat by a pecuniary obligation for faithfulness.

It may therefore be safely laid down that a master of an apprentice cannot transfer his *mastership* to another.

A master of an apprentice has, however, as a compensation for his care and responsibility, a right to the *services* of the apprentice, and he is not restrained from hiring him out to service for a day, or a month, or any such reasonable time; but still he must retain the *mastership,* and be liable for all abuses of the trust. And a sufficient cause to remove a master would be, the putting (416) the apprentice to improper servitude, or with an injudicious person.

In the case under consideration, his Honor was of the opinion that the master had the right to hire out the apprentice for any time less than the whole time of servitude. But this is not the rule. The rule is, that he cannot transfer the *mastership* for any time, not a day, not an hour; but he may transfer the *services,* and the length of time is not a matter of consideration, except in so far as it may be evidence of the intent to transfer the *mastership.* The master is not obliged in person to superintend the labor of the apprentice, but may put him under another, as under a mechanic to learn a trade, or a school master for instruction, in which case the

school master has the immediate control, the master the general control, and the binding power the paramount control. This is a clear case where the appointing power ought to have revoked the binding, and selected another master; for the fact that the apprentice was bound in May, at the age of about nineteen years, and was hired out in July, for the balance of that year and for the next year, covering almost the whole period of servitude, and that upon the eve of the master's removing from the State, make it probable that the master was trifling with the trust, and ought to have been removed.

But the question remains, can the defendant take advantage of the wrongful act of the master. Is he not *in pari delicto?* Unquestionably he is *in pari delicto,* and therefore we would not aid him; but the defendant is not asking us to aid him, it is the plaintiff who is seeking aid, and we will aid neither, the acts of both being wrongful, as against the policy of the law.

This is said upon the supposition that the fact be that the master did intend to abuse his trust, and to transfer the mastership to the defendant. If he did, then the act was against public (417) policy; if he did not, then the defendant cannot say, whatever the appointing power might have said, that the act was wrongful. In that case he would have been obliged to comply with his contract.

The question which ought to be submitted to the jury is: Was it the effect of the transaction that the plaintiff transferred his *mastership* of the apprentice to the defendant? If yea, then he cannot recover, if nay, then the defendant is liable: *Futrell v. Vann,* 30 N.C. 402.

Per curiam.

Venire de novo.

WILLIAM A. RUSSELL v. JEREMIAH ADDERTON AND OTHERS.

In case of doubt, an instrument will be construed as a *covenant not to sue,* rather than as a *release.*

The operation of a covenant not to sue, was formerly, that, after the creditor had taken judgment for his debt, the coventee resorted to equity for a specific performance of such covenant, in the course of which he was fully protected not only from paying any thing more, *directly,* but, if there were *sureties,* by restraining the creditor from collecting *any amount* out of them, as that would subject the covenantee to their action,

and thus violate the covenant *indirectly;* so, if there were other *principal* obligors, by restraining the collection of more than an *aliquot part* of the debt, or of any amount that would subject the covenantee to an action for contribution.

Under the C.C.P. the same relief may be had by *counter-claim,* so as to put the judgment in the form of a separate one against the several other principals, for such an amount of the debt and interest as would not give them a right of action against the covenantee.

DEBT, tried before *Buxton, J.,* at Spring Term 1870, of MONTGOMERY Court.

Three cases depending upon the same principle of law were heard at the same time, between parties substantially (418) the same, one L. F. Russell being plaintiff in the third suit. The defendants in each, were Jeremiah Adderton, Thomas Stokes and John P. Mabry, who, with J. M. Crump, as principals, and two others as sureties, had executed three notes for $1,400 each, payable to the plaintiffs. The pleas were, Payment and set off, and, by Thomas Stokes, Release of T. J. Patrick, administrator of J. M. Crump, who had died pending the suit. At Fall term 1869, Stokes, upon paying the costs to that time, was allowed to pay into Court for the plaintiff, in each case, one-third of $1,000 with interest from February 25, 1868, and thereupon, to add the pleas, Tender, Accord and Satisfaction, Release, Payment into Court.

Upon the trial, Thomas Stokes testified that in January 1868, Patrick, as administrator of Crump, and he, agreed with the plaintiff, to compromise the three suits for themselves jointly, by paying at February Court, $2,000, and thereupon being released; that Patrick at that time paid his part, and Stokes was allowed until the next week to pay his, but that, owing to high water, he was not able to attend at the place agreed upon.

The following is a copy of the receipt taken by Patrick from the plaintiff:

"Received February 25, 1868, of Dr. Thomas J. Patrick, Administrator of James M. Crump, deceased, six hundred and sixty-six dollars and sixty-six and two-thirds cents in full of all claims which I may have against him as administrator aforesaid, arising from the liability of his intestate as one of the principals on two notes, the one due to me individually, and the other to me as administrator of Gilbert Russell, both of said notes bearing date August 29th, 1861, the said notes being each for the sum of fourteen hundred dollars, with Jerre Adderton, Thomas Stokes, James M. Crump and J. P. Mabry, as principals; and I further agree to enter a (419) non-suit as to the said James M. Crump, and not to receive

the same upon the suits now pending; the above consideration being in full of all claims against the estate of the said J. M. Crump, and not to receive the same upon the suits now pending; the above consideration being in full of all claims against the estate of the said J. M. Crump arising by reason of his being one of the principals of said notes, it being understood that this agreement is in no way to affect the liability of the other principals. In witness," etc., etc.

(Signed.) W. A. RUSSELL, [Seal.]

The remainder of the $1,000 was paid by Patrick to L. F. Russell, upon receiving from him a like receipt.

Upon the trial, the defendant submitted that the operation of the receipt above, was to *release* Crump's estate, and, therefore, the other defendants; and, as another view, that at all events Stokes was released by the joint compromise on behalf of himself and Patrick, which created a new contract by way of substitution, and had been fulfilled by Patrick's payment at the time, and his own subsequent payment into Court.

His Honor directed the jury, in each case, that the plaintiff was entitled to a verdict according to the face of the note, subject to a credit for $333.33⅓ paid by Patrick, February 25th, 1868. He also intimated that as the plaintiff had declined to receive the money paid into Court, except as a credit *pro tanto*, Stokes might withdraw it; and thereupon he did.

Verdict and judgment accordingly, and the defendant appealed.

N. McKay and Battle & Sons for the appellant.

Blackmer & McCorkle contra, cited Parsons' Cont. (1866). 28, 29; 2 *Ib.* 715; *Winston v. Dalby ante* 299; *Bailey v.* (420) *Berry,* 8 Am. Law. Reg. 270; *Durell v. Wendell,* 8 New Hamp. 369; *Bank v. Messenger,* 9 Cow. 37; *Couch v. Mills,* 21 Wend. 424; *McAllister v. Sprague,* 34 Maine 296.

PEARSON, C.J. The case turns upon the construction of the deed executed by the plaintiff to Patrick, administrator of Crump. If the instrument be treated as a "release," it operates by way of extinguishment, and enures to the benefit of the other obligors, as well as of Crump. If it be treated as a "covenant not to sue," the other obligors remain liable for the balance of the debt.

The first construction in most cases disappoints the intention of the parties, and carries the legal effect of the instrument beyond their meaning; for which reason the Courts incline to adopt the construction which gives to the instrument the effect merely of a cove-

nant not to sue, and the intention of the parties is carried out by allowing the creditor to take judgment at law, leaving the party who holds the covenant to his remedy in equity for a specific performance, by which he is fully protected not only from paying any more directly, but, if there be sureties, by restraining the creditor from collecting any amount out of them, because that would subject him to their action, and thus indirectly violate the covenant, or, if there be other principal obligors by restraining the collection of any more than an aliquot part of the debt, or any amount that would subject the party to an action for contribution.

In our case the intention that the deed is not to operate as a release and extinguish the whole debt, is not left to conjecture, but is apparent on the face of the instrument. The consideration set out, is the payment of a part of the debt, and there is a proviso "that this agreement is in no way to affect the liability of the other principals." So, beyond question it is merely a "covenant not to sue." The sureties are not named, and are treated as if dis- (421) charged, and although by the words of the proviso the liability of the other principals is in no way to be affected, this must be taken in connection with the other parts of the instrument, by which it is stipulated that the sum paid was to be in full of all claims against Patrick, administrator. The defendant was to enter a non-suit as to him, and "was not to receive the same (the amount paid by Patrick) upon the suits now pending." From this it is clear that the liability of the other principals was to be affected by giving them the benefit of the sum paid, and although their liability was not to be otherwise affected, taking them *jointly,* still it was to be affected, taking them severally, to the extent of not subjecting any one to the payment of more than an aliquot part, for if he was forced to pay more, that would subject Patrick to an action for one-half of the excess, and thus violate the stipulation that the receipt of part should be in *full* of all claims so far as he was concerned, directly or indirectly. The deed being in the words of the creditor, is to be taken most strongly against him, so as to give it full effect in favor of the other party. It follows, there was no error in entering judgment for the whole balance, according to the verdict, leaving Patrick, in connection with any of the other principals, to see to it that no more than an aliquot part was collected from any one, so as to give an action against Patrick for contribution, by a bill for a specific performance should it become necessary.

Under the Code of Civil Procedure the matter could be set up as a counter claim, so as to put the judgment in the form of a sepa-

rate one against the several other principals, for an amount of the debt and interest which would not give them a right of action against Patrick. In this particular the Code is an improve-
(422) ment upon the old mode of filing a bill.

As the plaintiff does not appeal, we take no notice of the order allowing Stokes to withdraw the money paid into Court. If objected to, its correctness might have been questioned; he is liable for the amount which he originally agreed to pay. This may save the parties from the expense of a resort to the Courts, in order to have the "covenant not to sue" specifically performed.

Per curiam.

Judgment affirmed.

Cited: Harshaw v. Woodfin, 64 N.C. 569; *Carrier v. Jones,* 68 N.C. 129; *Evans v. Raper,* 74 N.C. 645; *Craven v. Freeman,* 82 N.C. 365; *Dudley v. Bland,* 83 N.C. 224; *Sandlin v. Ward,* 94 N.C. 496; *Smith v. Richards,* 129 N.C. 268; *Smith v. R. R.,* 151 N.C. 483.

DOE ON DEM., GEORGE V. CREDLE v. W. R. AND GEORGE W. CARRAWAN.

Where a man, upon eve of marriage, agreed with his intended wife that a previous transaction, by which he had mortgaged a certain tract of land to one, who was a trustee for children of hers, in order to secure a part of the purchase money due for such land, should be cancelled, and that, in lieu of what was due, which exceeded the then value of such land, *the land* should be conveyed to such children; and this was done: *Held,* that this was not an act of which *creditors* of the husband could complain, and *also,* that there was nothing in the Statute (Rev. Code, c. 37, § 24,) that required such agreement to be *in writing.*

EJECTMENT, tried before *Jones, J.,* at Spring Term 1870, of HYDE Court.

The plaintiff claimed title under a sheriff's deed, made after a sale of the lands in question by virtue of an execution against one John Cahoon, to satisfy a judgment obtained in favor of a
(423) creditor, by note dated January 1st 1855, at May Term 1857 of Hyde County Court.

The defendants claimed under a deed from the said Cahoon, dated May 15, 1855, reciting as a consideration "an agreement between myself and wife prior to our marriage," and also, love and

affection "for the said children," the defendants, and also, five dollars.

A witness called to show what was the nuptial agreement alluded to, having answered that it was *by parol,* — upon objection, further evidence in regard thereto was excluded.

The defendants then offered to prove that John Cahoon, who was a second husband of the mother of the defendants, had purchased the land in question from one Benson, and in order to secure a part of the price had mortgaged the same to said Benson: that afterwards, at a time when the balance due for the purchase money exceeded the value of the land, a marriage being in contemplation betwixt Cahoon and Mrs. Carrawan, it was agreed between them that the mortgage transaction should be cancelled, and that in satisfaction of the money due for the price of the land, which although nominally payable to Benson, really belonged to Mrs. Carrawan's children the present defendants, the land should be conveyed by Cahoon to the defendants; and that this was done.

Upon objection, this evidence was excluded.

Verdict, and Judgment for the plaintiff, and Appeal by the defendants.

Carter for the appellants.
Battle & Sons contra.

DICK, J. The parties to this action of ejectment claim under the same person, and the question to be determined is, which party has the best title to the land in controversy. The plaintiff claims title under a sheriff's deed, as a purchaser at an (424 execution sale made to satisfy a debt contracted by the grantor before the execution of the deed of the defendants. The defendant's deed was executed before the judgment was obtained on said debt, and is founded upon three considerations:

1. An agreement between the grantor and his wife, made prior to their marriage.

2. Love and affection for the defendants, the children of his wife.

3. Five dollars in money.

The second is no consideration at all, and the third is merely nominal, and was inserted to give effect to the deed as a bargain and sale. If its validity depends upon these considerations alone, it is a voluntary conveyance, and fraudulent as to debts existing at the time of its execution; unless the defendant can show in evidence,

such a state of facts as will bring it within the exception mentioned in the Statute, Rev. Code, c. 50, § 3.

Where the right of creditors are affected, a voluntary conveyance is presumed in law to be fraudulent, and, to rebut this presumption, it is incumbent on the party claiming under such deed, to show that it was executed under such circumstances as will meet the requirements of said Statute. *Black v. Saunders,* 46 N.C. 67.

The evidence of the defendant upon this part of the case was insufficient, and the judgment in the Court below would be affirmed, but for the error of his Honor upon another material point in the defense.

The defendants offered evidence tending to explain and render more specific the consideration first stated in the deed in general terms, and to show that the *agreement* referred to, constituted a *bona fide* and valuable consideration. Such evidence was (425) clearly admissible, and it was improperly rejected: *Jones v. Sasser,* 18 N.C. 452; *Chesson v. Pettijohn,* 28 N.C. 121; 1 Greenl. Ev. 353. The evidence offered tended to show that the grantor formerly purchased the land in question from Benson, the trustee of the defendants; that a large part of the purchase money was still due, and that a mortgage had been taken to secure said debts; that the mortgage had existed for nearly two years and that the land was then of less value than the debts. Under these circumstances the grantor and his intended wife entered into an agreement that the debt and mortgage should be cancelled, and for this consideration, the grantor should execute a deed to the defendants. This agreement was not a marriage settlement or marriage contract, within the meaning of the Statute, Rev. Code, c. 37, § 24; and there was no necessity that it should be in writing and duly registered. This parol agreement was partially executed before the marriage, by the cancellation of the debt and mortgage, and constituted a valuable consideration for the deed afterwards executed to the defendants. The arrangement was substantially a foreclosure of the mortgage, and did not unjustly affect the rights of other creditors. As the debt secured by the mortgage was greater than the value of the land, other creditors could have obtained nothing by the sale of the equity of redemption under an execution. The agreement, therefore, between the grantor and his intended wife, was not only a lawful, but a very prudent arrangement, as it relieved the grantor from a large debt, and at the same time secured the just claims of the defendants.

The rights of the defendants were greatly prejudiced by the re-

jection of admissible and relevant evidence in the Court below, and there must be a *venire de novo.*

Per curiam.

Venire de novo.

Cited: Warren v. Makely, 85 N.C. 14; *Hobbs v. Cashwell,* 152 N.C. 188; *Aman v. Walker,* 165 N.C. 228; *Tire Co. v. Lester,* 190 N.C. 414; *Bank v. Mackorell,* 195 N.C. 744.

(426)

MARY CARNEY v. JAMES WHITEHURST.

One who claims the land under a conveyance made by the deceased, has a right to intervene in proceedings for dower in such land, instituted by the widow against the heirs of the deceased. (Act. of 1868-'69, c. 93, § 41.)

MOTION, by a purchaser of the land, to be allowed to intervene in proceedings for dower, heard by *Jones, J.,* at Spring Term 1870, of PITT Court.

The plaintiff had made the heirs parties, alleging that the deceased had died seized, and in possession. They answered setting up a sale of the lands by the deceased to one Gray, as trustee to pay debts, and that after his death, the trustee had resold them to James Whitehurst. Whitehurst also moved to be made a party defendant to the proceedings.

His Honor refused the application, and Whitehurst appealed.

Hilliard for the appellant.

Howard, and Phillips & Merrimon contra.

RODMAN, J. The only question in this case is, whether the application of Whitehurst to come in and be made a party defendant, should have been allowed. He claimed to own the land in which dower was sought, by a purchase from the deceased during his life time. Questions of practice merely, in the absence of a positive rule established either by statute or rule or decision of the Court, must be decided on considerations of general convenience. In this case, however, there existed a positive law which settles the question without argument. Section 41 of ch. 93, acts 1868-'69, p. 215, enacts that, in proceedings to recover dower, "the heirs, devises, and other

persons in possession of, *or claiming estates in the land,* shall (427) be parties." This act was ratified on March 27th, 1869, and was therefore in force at the time of the application by Whitehurst, at Spring Term 1869; although, as the act had not been then published, it is not surprising that it had not come to the knowledge, either of the Court or of the counsel in the cause. This practice is in harmony with that established in civil actions by C.C.P. § 61.

There was error in the judgment below, and this case will be remanded to the Superior Court of Pitt, in order that James Whitehurst may be allowed to make himself a party, and to make defence according to the course of the Court. The appellant will recover costs in this Court.

Per curiam.

Error.

Cited: Welfare v. Welfare, 108 N.C. 275.

ROBERT SIMPSON v. SARAH SIMPSON.

Where process in the body of it purports to be *original,* an endorsement of "alias" or "pluries" by the Clerk, will not change its character.

A court has no power to amend process returned at a former term, without giving notice to persons whose rights have previously accrued.

MOTION to rescind a previous order, made before *Buxton, J.,* at Spring Term 1870 of UNION Court.

The order in question had been made in the County Court of Union at October Term 1865, and had been granted at the motion of the defendant without notice to the plaintiff; its effect was to amend certain successive executions which had issued in a State case theretofore constituted in that Court against one John (428) W. Simpson, by changing them from originals into "alias" and "pluries" executions. These executions had been issued from time to time upon a judgment rendered at April Term 1853, and terminated with one returned to January Term 1857; a sale of land having been made under the last, January 5th, 1857, (under a levy dated Nov. 10th, 1856,) to one Helms, under whom the defendant claimed. The plaintiff claimed the land under a deed from John W. Simpson, executed Nov. 23d, 1853. On the face of these

executions they were all originals, but the second in the series was endorsed by the Clerk "alias Fi. Fa.," and those succeeding, "pluries Fi. Fa."

His Honor made a rule upon the defendant to show cause why the former order should not be rescinded, and, upon hearing it, made such rule absolute, and the defendant appealed.

Wilson for the appellant.
Battle & Sons contra.

1. An amendment is not proper if it affect the rights of third persons. *Bank of Cape Fear v. Williamson,* 24 N.C. 147; *Phillipse v. Higdon,* 44 N.C. 380.

2. The *endorsement* is no part of the record: *State v. Roberts,* 19 N.C. 540; *State v. Barnes,* 52 N.C. 20. See also *McIver v. Ritter,* 60 N.C. 605.

SETTLE, J. The endorsement of the words "alias" and "pluries," formed no part of the record, and could not have the effect of changing their tenor from originals to alias and pluries executions. This was conceded by the defendant when she sought to have them amended by an order of the County Court. However extensive the powers of the Courts may be in respect to amendments, they certainly have not the power to allow them without notice, when they change in substance the process from what it was when (429) issued, if the rights of third persons be thereby affected: *Bank of Cape Fear v. Williamson,* 24 N.C. 147; *Phillipse v. Higdon,* 44 N.C. 380.

The case before us is a strong illustration of the injustice of such a course. An amendment is allowed in 1864 without notice to the party interested, which in effect reached back and disturbed a title acquired in 1853. The record of the County Court having been transferred to the Superior Court, his Honor was correct in vacating the order and the amendments made in pursuance thereof by the County Court in 1864.

Per curiam.

Affirmed.

Cited: Hatch v. R. R., 183 N.C. 624; *Mintz v. Frink,* 217 N.C. 104.

JAMES HOOVER v. B. F. NEIGHBORS.

Where parties to suits in Court agreed in writing to submit to arbitration those suits *and all matters in dispute* between them, and thereupon the arbitrators made an award, and disposed in a praticular manner, of the costs in the suits pending: *Held*, that the Judge had no power, upon a return of the award into Court, to alter the award as regards such costs.

MOTION, to alter an award as to certain costs, made before *Tourgee, J.*, at Fall Term 1868, of RANDOLPH Court.

Two suits were pending between the parties in the Courts of Randolph County, when, at February Term 1868 of the County Court, "upon motion and by mutual consent, the matters in dispute were referred" as follows, viz: "Whereas divers suits are pending in the County and Superior Courts of Randolph County, (430) between" etc., "and divers matters of dispute exist between them, arising from mutual notes and accounts and liabilities. We therefore, agree and bind ourselves to refer all such suits, and all matters in dispute between us, of every description, to the arbitrament and award of," etc., etc.

At Fall Term 1868, the award was returned to Court, to the effect, amongst other things, that Neighbors should pay the costs of one of the suits, and Hoover, those of the other. Upon motion by Hoover, the Court changed the award so as to order that Neighbors should pay the costs of both suits.

Thereupon Neighbors appealed.

Gorrell for the appellant.
Scott & Scott, and Mendenhall contra.

SETTLE, J. No objection is made to the award, save as to that part which disposes of the costs of the reference.

It is contended that in this particular, the arbitrators exceeded their authority. If the terms of the submission are broad enough to clothe them with power over this question, then they have but discharged their duty. If it be conceded that they had no such power, then the law disposes of the costs by fixed rules: Russell on Arb. 63, Law Lib. 290. The question then arises, did not his Honor exceed his authority, in altering the award and entering a judgment contrary to its terms, and not warranted by law, even if the award had been silent as to costs.

The practice of entering judgments on awards was adopted in cases where the reference was by rule of Court, as a milder manner of enforcing the awards than the process of attachment for con-

tempt. If they are not set aside for some good cause, the practice has always been to follow the awards strictly in entering these *quasi* judgments.

Here, the parties submitted to arbitrament and award all their suits and all matters of dispute between them, of every (431) description. These terms are very broad, but whether they are sufficiently comprehensive to embrace the costs of the reference or not, we need not consider, as our opinion is based upon another ground, to-wit: that his Honor had no discretion in awarding costs. He had nothing to do with the matter, for the reference was not by rule of Court, but by the agreement of the parties; they had selected their own Judges, and if either party was dissatisfied with their award or the manner in which it was being carried out, his remedy was by an action on the submission bond or upon the award, whereby all questions as to the power of the arbitrators and the proper disposition of the costs, could be determined.

There was error. Let this be certified, etc.

Per curiam.

Reversed.

J. M. LONG v. A. F. GRAEBER.

A tenant by the curtesy *consummate* may sell his estate, notwithstanding the act, Rev. Code, c. 56, § 1.

CIVIL action for possession of land and for damages, tried before *Cloud, J.*, at Spring Term, 1870, of ROWAN Court.

The plaintiff claimed title under a deed by one Gibson, dated 1863, and the latter, under a deed made in 1862 to him as trustee to pay debts, by the defendant. The defendant's title was as husband of a wife he had married in 1851, and who died in 1861, having had issue born alive, and capable of inheriting. (432)

The defendant claimed that his deed to Gibson was void, as contravening the provisions of the Revised Code, c. 56, § 1.

His Honor gave judgment for the plaintiff, and the defendant appealed.

Boyden & Bailey for the appellant.
Blackmer & McCorkle contra.

SETTLE, J. Could Graeber, who was tenant by the curtesy consummate, sell his estate? He professed to do so by deed in trust to secure the payment of his debts; but he now contends that the law was more careful of his interests and the rights of the issue by the marriage, than he showed himself to be, and that he, and every one else, is prohibited from selling his estate by Rev. Code, ch. 56, sec. 1, in order that he, at all events, and perhaps his children also, may have a homestead. He seems to think that there is a magic about the *Homestead* which will drive off all debts, though they be secured by deed in trust or other lien. In this he is mistaken.

The principle which governs this case is laid down with great clearness in *Houston v. Brown,* 29 N.C. 162. The views contended for, however, in the two cases are widely different.

In *Houston v. Brown* the heirs at law attempted to eject the tenant by the curtesy, upon the ground that the act under consideration takes away the husband's right to an estate by the curtesy. Here the tenant contends that the same enactment binds his estate so fast to him that neither he nor any one else can sever it.

The true purpose of the act, it is said in the case just cited, "was to adopt to a partial extent the principle of the homestead (433) law, and provide a home for the wife during her life, leaving the rights of the husband unimpaired and unrestricted after her death." During her life the husband is under certain restrictions, but "after her death there is no intimation of an intention to interfere with his rights according to the common law."

Per curiam.

Judgment affirmed.

Cited: Morris v. Morris, 94 N.C. 617; *McCaskill v. McCormac,* 99 N.C. 551; *Thompson v. Wiggins,* 109 N.C. 509; *Hussey v. Kidd,* 209 N.C. 234.

DOE ON DEM. ISAIAH MODE v. A. M. LONG.

Where one or two coteminous proprietors of land cleared and fenced up to a line of marked trees, believing that to be the dividing line, whereas it was at some points as much as twenty-five yards over upon his neighbor's land: *Held,* that such act constituted an open and notorious adverse possession up to the marked line, and rendered a deed made by the neighbor during such possession, for that part, void.

MODE *v.* LONG.

EJECTMENT, tried before *Henry, J.*, at Spring Term 1870 of RUTHERFORD Court.

The question was as to the true boundary line between the lands of the plaintiff and defendant, and also as to the effect of a possession by the latter under the circumstances given below.

The defendant was in possession of a part of the land known as "the Smart Grant," and the plaintiff owned a tract adjoining that grant, and calling for the line of that grant as its western boundary. In the grant that line was straight; from *A. to B.*, in the plat furnished on the trial. For sixty or more years, however, a line of marked trees, varying at some points by twenty-five yards to the east of the straight line, had been supposed to be the true line. In 1844 the defendant had cleared and enclosed a field up to the line of marked trees, and remained in possession to the (434) beginning of this action (1863). In 1852 the plaintiff had taken his deed for the land adjoining.

For the defendant it was insisted that the line of marked trees was the true boundary; or, at all events, that the deed taken in 1852 by the plaintiff was void as to all land upon the west of the marked trees, so much thereof having then been in the adverse possession of the defendant.

Under the instructions of his Honor there was a verdict for the plaintiff; and the defendant appealed.

Battle & Sons for the appellant, cited *Saffret v. Hart,* 50 N.C. 185, and distinguished the present from the case of *Gilchrist v. McLaughlin,* 29 N.C. 310.

Bynum and Hoke contra, upon the first point cited *Carraway v. Clancy,* 51 N.C. 361; and, upon the second, 2 Sm. Lead. Cas. 561; *Gilchrist v. McLaughlin,* 29 N.C. 310; *Bynum v. Carter,* 26 N.C. 310; *Green v. Harman,* 15 N.C. 158.

PEARSON, C.J. His Honor charged, in substance, that the corners at A and B being fixed, the true line was a straight one between these points, as contended for by the plaintiff, and not "the line of marked trees," as contended for by the defendant, such line of marked trees not being called for in the deed. Assume this to be so. His Honor further charged, in substance, that the fact of defendants having cleared and fenced in the land up to the line of marked trees, claiming that to be true line, did not have the effect of rendering the plaintiff's deed, executed while the defendant was occupying, inoperative as to the part occupied: for the possession was not adverse, inasmuch as it was taken supposing the marked

trees to be the true line, which turned out to be a mistake. There is error.

He ought to have charged, that the fact of the defendant's
(435) clearing and fencing up to the marked trees, claiming that to be the true dividing line, amounted to taking an open, notorious *adverse* possession; for it made him a trespasser, and exposed him to an action, notwithstanding it turned out that he was laboring under a mistake; and the effect of this possession, although it did not extend the defendant's "paper title" beyond the true line, was to create an adverse holding, so as to make the plaintiff's deed void in respect to it, on the ground that he must have known that he was "buying a law-suit," which the law forbids.

The present action rests on the ground that the defendant was in adverse possession of the *locus in quo;* for if the possession was permissive, the action cannot be maintained. So, the plaintiff, taking either horn of the dilemma, must go out of Court. We presume his Honor fell into error by not adverting to the difference between our case and *Gilchrist v. McLaughlin,* 29 N.C. 310. There the defendant, after the trial of an action in which the true line was determined, and intending to set his fence back to that line, by mistake put one or two corners of the fence across the line, so as to include a small portion of land on the west side. The Court held that this was not an open, notorious and adverse possession, so as to give the defendant a claim on the west side of the line, his intention being to pursue that line and to put his fence on the east side of it; and the small encroachment was to be attributed to mistake, and not to design, and might be deemed permissive; but, at all events, such permission did not have the requisite notoriety to be allowed to affect the question of title.

In our case, clearing and fencing a field up to a line of marked trees, was certainly an open and notorious act, and the mistake was not in attempting to set a fence with a line, but in asserting another and a different line to be the true one, and making it neces-
(436) sary to have a law suit in order to show the mistake, and establish the true line. Here, the mistake was in regard to which of two lines was the true line of "Smart's grant," called for in the deeds of both parties; that depended on a *question of law.* There, the mistake was in not running the worm of a fence exactly with a straight line; a mistake as to matter of fact, from inadvertence, and with no intention to assert a claim. So note the diversity.

Error.

Per curiam.

Venire de novo.

Cited: Clark v. Wagoner, 70 N.C. 708; *Young v. Griffith,* 71 N.C. 337; *Dawson v. Abbott,* 184 N.C. 196.

WILLIAM PARHAM v. W. H. GREEN.

Where the principal placed property in the hands of a surety, sufficient to satisfy the debt, and then left the State. *Held,* that a third person, also bound for the debt as surety, having been compelled to pay it, might recover its amount from the person who had received the property, *without making a previous demand.*

ASSUMPSIT, tried before *Logan, J.,* at Spring Term 1870, of CLEVELAND Court.

The case is stated in the Opinion.

Verdict and judgment for the plaintiff.

The defendant appealed.

Hoke for the appellant.
Bynum contra.

RODMAN, J. This is an action of assumpsit begun in 1857, in which the plaintiff declared specially, and also, we (437) may assume, in the common counts, for money had and received, etc.

The case states that one Durham made a bond for money, and the plaintiff executed the same as his surety, and the defendant also signed the same, "W. H. Green, surety." Afterwards Durham left the State, and placed in the hands of the defendant, personal property sufficient to satisfy the debt, and the defendant, in consideration thereof, promised to do so. Afterwards a judgment was recovered on the note against both plaintiff and defendant, and plaintiff paid it. There was no proof of any demand by plaintiff on the defendant before suit.

There may be some room for doubt whether on the face of the paper the defendant bound himself as surety for both Durham and the plaintiff, or as co-surety with the plaintiff for Durham. We do not think it material which the contract originally was. By accepting money's worth from Durham, and promising to pay the debt, the defendant became, as between him and the plaintiff, the principal debtor. He took the place of Durham. The money which the plaintiff afterwards paid, was paid at the implied request of the

defendant as representing Durham, and the plaintiff is entitled to recover it back as money paid at his request. The authorities which support this proposition are so numerous that a brief reference to some of the text-books where they may be found collected, and to a few cases in our own reports, will be quite sufficient: 2 Robinson's Pr. 438; *Jenkins v. Tucker,* 1 H. Bl. 90; *Draughn v. Bunting,* 31 N.C. 12; *Hall v. Robinson,* 30 N.C. 58; 1 Pars. Cont. 468-'9.

These cases also answer the objection that there was no promise to pay the plaintiff, or any privity of contract between the defendant and him. Even in the common case of money paid by
(438) one co-surety in exoneration of another, there is no actual request to pay by the other, or any actual promise to indemnify. The law implies the request and the promise, from the respective situations of the parties, and because it is just and conscientious. "The defendant's assent will be implied in all cases where, through his default the plaintiff has been obliged to pay money, as where the plaintiff is a surety for the defendant, etc. And in general this count may be supported by proof that the money was paid for the defendant, from a reasonable cause, and not officiously: Phil. Ev., Book 2, ch. 9, p. 120, (3 vol. with Cowen & Hill's notes).

It is objected, however, to the plaintiff's recovery, that he made no demand of payment before suit. We do not think any demand was necessary. In *Sherrod v. Woodward,* 15 N.C. 360, it was held that when one surety pays the whole debt, he cannot recover a rateable share from a co-surety without giving him notice of such payment. The reason is stated to be: "The defendant may be ignorant of the default of the principal, or of the payment by the plaintiff. He may be willing to pay his part without suit, or notice may be important to him to procure the means of re-imbursement." *Norfleet v. Cromwell, ante* 1, was a case in which it was thought that notice was necessary for similar reason. See also 1 Chit. Pl. as cited in that case. But it seems to us that those reasons are not applicable in this case. The defendant of course knew of his own default; he knew that judgment had been obtained against both the plaintiff and himself, and he might have known, and we think he was put on the inquiry, and was therefore bound to know, that the plaintiff had paid the debt.

There is no error in the instructions of the Judge, and the judgment below must be affirmed.

Per curiam.

Judgment affirmed.

Cited: Leak v. Covington, 99 N.C. 566.

(439)

WILLIAM D. SMITH v. WILLIAM R. LOVE AND AMBROSE OVERBAUGH.

In an action to recover the price of certain guano sold to the defendants for use by themselves; it having been shown that the article was worthless: *Held*,

1. That the fact that one of the defendants, after the article had been made use of, in a conversation with the plaintiff, promised that, if the latter would release him, he would pay *one-third* of the price, in order to avoid a law suit, was no evidence of a new contract, and, *semble*, also, none of the original contract; but was merely an unaccepted offer to compromise.

2. That, if the article were worthless, the plaintiff could recover: a *re-delivery* of it by the defendants having been rendered *impossible* because it had been destroyed by the means resorted to in order to ascertain its value; or unnecessary, because being wholly without mercantile value, it need not have been returned.

CIVIL action for money, tried before *Buxton, J.*, at Spring Term 1870, of CUMBERLAND Court.

The case is stated in the Opinion.

Verdict for the defendant, and Judgment accordingly. Appeal by the plaintiff.

Hinsdale for the appellant.
Fowle & Badger contra.

RODMAN, J. This was an action in which the plaintiff sought to recover $321.38, the price of certain guano, sold and delivered to the defendants, for their use as agriculturists. The defendants admitted the receipt and use by them, of an article delivered to them by the plaintiffs as guano, and a promise to pay the sum claimed; but they allege that this article was not guano at all, and that it was utterly worthless. Love, one of the defendants, was examined by the plaintiff, and testified that he told the plaintiff, after (440) the guano had been used, that if the plaintiff would release him, he would pay one-third of the price, to avoid a law-suit.

The Judge instructed the jury that the evidence of Love, was not competent to prove a contract made, after the delivery of the article, to pay one-third of the price, but was allowed to go to them as evidence of what is called in the case, the first contract. The plaintiff excepted to this. We think the Judge committed no error to the prejudice of the plaintiff. The testimony of Love proved only an offer to compromise, which was not accepted, and was therefore no contract at all.

We are inclined to think the Judge should have told the jury that it did not tend to prove the contract declared on, and that it should be entirely disregarded. An offer to compromise a demand, is no admission of its rightfulness: 1 Greenl. Ev. 192; *Daniel v. Wilkerson,* 35 N.C. 329.

The judge instructed the jury, that "if the article sold was a genuine article, no matter how deficient in quality, the contract price must govern. But if it was a spurious, counterfeit article and worth nothing, then the plaintiff can recover nothing." The plaintiff excepted.

The first branch of this instruction was in favor of the plaintiff, and he cannot complain. How far it may be warranted in the present state of the law, we are not called on to inquire. In the second branch we see no error. It is familiar doctrine that upon an executory contract, where there is a total failure of consideration, the plaintiff cannot recover: 1 Pars. Cont. 162; *McEntyre v. McEntyre,* 34 N.C. 299. It is equally reasonable, though perhaps not as well known, that, "when a vendor sells an article by a particular description, it is a *condition precedent* to his right of action, that the thing which he offers to deliver or has delivered, should (441) answer the description." Benjamin on Sales, 442; *Chantor v. Hopkins,* 4 M. and W. 399.

"If the sale is of a described article, the tender of an article answering the description, is a condition precedent to the purchaser's liability, and if this condition be not performed, the purchaser is entitled to reject the article, or if he has paid for it, to recover the price as money had and received for his use." Benjamin, 443, 449, 479; *Caldwell v. Smith,* 20 N.C. 64.

It is true that in such a case, the general rule is that the buyer must return or offer to return the article in a reasonable time after its falsity is discovered. But if it is necessarily destroyed in making that discovery, or if it be wholly without mercantile value, this principle cannot apply. *Caldwell v. Smith, ubi sup.* For example, if on a contract to deliver so many barrels of whiskey, water be delivered, there can be no necessity for returning the water.

Dickson v. Jordan, 33 N.C. 166, cited for plaintiff, supports the first branch of the Judge's instruction, but has no bearing on the second.

There is no error.

Per curiam.

Judgment affirmed.

Cited: Montgomery v. Lewis, 187 N.C. 578; *Stein v. Levins,* 205 N.C. 304; *Dixie Lines v. Grannick,* 238 N.C. 556.

(442)

GEORGE W. CHARLES AND OTHERS v. W. W. KENNEDY, EXR., ETC.

A clause in a will, giving "unto my wife Lovey, the use and benefit of all my estate, real and personal, after paying my just debts, during her natural life. I also leave in the power of my wife, Lovey, to lay out all the surplus funds, consisting of notes and cash, in land, for her especial use and benefit during her natural life, and, after her death, to be given to my niece, Mary Jane, also a county claim of the following amount, $2,573.21, to be appropriated as above," gives a remainder in the surplus funds to Mary Jane, whether they were invested in lands or not.

Especially is this so in a will in which it appears that *Mary Jane* was the principal object of the testator's bounty; and that the testator did not intend to die intestate as to any portion of his estate.

CIVIL action, for the recovery of distributive shares in a fund of which it was alleged that one Thomas Pool had died intestate, argued, upon demurrer as to part of it, before *Pool, J.*, at Fall Term 1869, of PASQUOTANK Court.

The question raised by the demurrer, turned upon the construction of the second clause in the will, which is as follows:

"I hereby leave unto my wife Lovey the use and benefit of all my estate, both real and personal, after paying my just debts, during her natural life. I also leave in the power of my wife Lovey to lay out all the surplus funds, consisting of notes and cash, in land, for her especial use and benefit during her natural life, and after her death to be given to my niece, Mary Jane; also a county claim of the following amount, $2,573.21, to be appropriated as above."

The plaintiffs claimed that, as it was admitted that the wife of Thomas Pool had died without executing the power conferred upon her therein, of investing in land the "surplus funds," the testator must be held to have died intestate as to the remainder therein after such wife's death.

The will (dated August 20, 1838,) consisted of seven clauses. By the *first,* a tract of one hundred and forty-nine acres of land was given to the heirs of Richard Pool, etc.; the *second,* is (443) given above; by the *third,* six hundred and twenty-eight acres of land, and nineteen slaves, (the land, after his wife's death,) and, by the *fourth,* four hundred acres of land and seven slaves, were given to his niece, Mary Jane Pool, after his wife's death; by the *fifth,* a slave was given to Susie Wilcox, after his wife's death; by the *sixth,* a certain house was to be sold, and the proceeds given to his wife; and by the *seventh,* his wife was appointed executrix.

The defendants demurred to the bill so far as the claim above was concerned, and answered as to other parts of it.

His Honor, after argument, sustained the demurrer, and the plaintiffs appealed.

Pool and Smith for the appellants.

Mary Jane Pool's estate in the surplus depended upon the execution of the power. The remainder after the life estate of Mrs. Pool, at the death of the testator vested in his distributees, subject to be divested by the execution of the power; and this execution has not taken place.

During the argument, they cited 1 Redf. on Wills, 700; *Harrison v. Battle,* 21 N.C. 213; 1 Jarm. Wills, 485 and 530; *Brown v. Higgs,* 4 Ves. 709 and 8 Ves. 561; Story Eq. §§ 170-176; *Costerton v. Costerton,* 9 Ves. 445; *Harding v. Glyn,* 2 Lead Cas. Eq. 330, and notes; Story Eq. 1068-1070, Suglen on Pow. 137, 157, 182.

Bragg contra.

The plain intent and construction of the 2d clause of the will is to give Mrs. Pool a life estate in all his property; with a power to invest the proceeds of the surplus notes and cash after pay-
(444) ment of his debts, in land, which if she did, she was to have the use of during life, as she had before in the fund. What follows is a gift to his niece, Mary Jane, whether the wife changed the fund into land or not by virtue of the power. The power did not extend to giving the surplus funds, by the wife to the niece. But the niece took a vested remainder in the fund, by virtue of the will of the testator. In construing a will, technical rules of grammar will be disregarded. So, the words "to be given" will be construed as a gift to Mary Jane, by the testator. *Lowe v. Carter,* 55 N.C. 377.

But grant that Mary Jane did not take a vested remainder under the will of the testator. And that Mrs. Pool took a life estate, with a power to appoint—yet that power is not general. The subject, and the object of the power are both clearly pointed out, constituting *a trust,* which vested in Mary Jane, and her representative took, at the death of Mrs. Pool—the trust was imperative and will be enforced in Equity. *Alexander v. Cunningham,* 27 N.C. 430; *Little v. Bennet,* 58 N.C. 157; *Cook v. Ellington,* 59 N.C. 571; 2 Sug. Pow. 173 and 186-7; Lew. on trusts, 422 and 574, etc.

It vested in Mary Jane, whether the power was executed or not. Lew. on T. 581 to 583, See also, *Malim v. Keighly,* 2 Ves. 333 and 529; *Malim v. Barker,* 3 Ves. 150; *Longmore v. Broom,* 7 Ves.

124; *Brown v. Higgs,* 8 Ves. at page 570, and sequel. As to vesting; *Bayley v. Bishop,* 9 Ves. 6.

Where time is not assigned to the legacy, but to the payment of it, the legatee takes a vested interest. *Cooper v. Pridgen,* 17 N.C. 98; *Fuller v. Fuller,* 58 N.C. 223; *Rives v. Frizzle,* 43 N.C. 237.

READE, J. The question is as to the proper construction of the second clause of the will of Thomas Pool, which is given above. (445)

The widow did not "lay out the surplus fund in land," and the question is, whether her failure to do so caused an intestacy as to the remainder of the surplus fund, or, whether it vested in Mary Jane. The next of kin of the testator insist, that it was a gift to the widow for life, with a power to invest the fund in land, and then to give the land to Mary Jane; and that as the power was never executed, the legacy to Mary Jane fails. In behalf of Mary Jane it is insisted that it was not a general power simply, but a power *coupled with a trust* which vested in Mary Jane, and that it was not to be lost for the want of a trustee, and that the Court will enforce it.

The learning upon the subject was well presented and will be found in the cases cited. We think, however, that the doubt as to the proper construction may be solved by transposing the parts of said clause, so as to read as follows: I also leave to my wife Lovey all the surplus funds, consisting of notes and cash and a county bond of $2,573.21, during her life, and after her death to be given to my niece Mary Jane; with the power to my wife to lay out the funds in land, in which event the land shall go to Mary Jane, as the fund itself would have gone."

With this reading, it is plain that the remainder in the surplus fund would go to her if the investment had been made. We think that this is the proper construction of the clause, and that the remainder in the surplus fund vested in Mary Jane, whether laid out in land or not. We would so construe the clause unaided by extrinsic circumstances; but we are further induced to it by the considerations, (1) that it appears from the whole will that Mary Jane was the principal object of the testator's bounty (after his wife,) and we can not conceive why the testator desired her to have it if converted into land, and to lose it if not converted. The only reason suggested at the bar was, that it might be to guard (446) against improvident marriage; but in other parts of his will, he gives her not only land, but very large legacies in personal property. If he desired that she should have it in land only, it would have been easy in him to make it imperative on his wife to make

the investment, instead of leaving it discretionary with her, as his language clearly indicates. (2.) There is nothing to indicate that the testator intended to die intestate as to any portion of his estate.

There was no error in sustaining the demurrer, which referred to the second clause, but there was error in dismissing the bill. The plaintiffs are entitled to an account, if they desire it, and if there are other questions they will arise upon exceptions to the account.

Per curiam.

Order accordingly.

DOE ON DEM. OF J. W. HOWELL AND OTHERS v. ALLEN BUIE.

The act of February 10th 1863, (ch. 34,) by suspending the statute of limitations, prevented a possession of land extending from October 15th 1845 to January 16th 1868, from barring the State under the act giving such operation to *twenty-one* years' possession with color of title.

EJECTMENT, tried before *Buxton, J.,* at Spring Term 1870 of MOORE Court.

The facts appear in the Opinion.

Verdict, etc., for the defendant; and the plaintiff appealed.

(447) *Fuller and Phillips & Merrimon for the appellant.*
Manning contra.

READE, J. The lessor of the plaintiff claims title under a grant from the State, dated August 12th 1867. The defendant claims title by virtue of twenty-one years' possession under color of title, and known and visible boundaries: Rev. Code, ch. 65, § 2. Defendant had such possession from October 15th 1845, to January 1868; more than twenty-one years. The plaintiff replies to this, that the act of February 10th 1863, chap. 34, suspends the statute of limitation in the Revised Code, *supra:* and that is the only question in the case. That act is as follows: "In computations of time for the purpose of applying any statute limiting any action or suit, or any right or rights, or for the purpose of raising any presumption of any release, payment or satisfaction, or any grant or conveyance, the time elapsed since May 20th 1861, or which may elapse until the end of the present war, shall be excluded from such computation."

At the time of the passage of that act the defendant had had possession for less than sixteen years. Add the time of his posses-

sion after the war, and it still makes less than twenty-one years: and therefore the State, under which the plaintiff claims, was not barred by the statute of limitations. If it had appeared in the case, as probably the fact is, that those under whom the defendant claims had had possession for such length of time as added to the defendant's possession would have made twenty-one years up to the act of 1863, the defendant's title would be good. If the fact is so, then it may avail the defendant in a subsequent proceeding, but not as the case is now before us.

There is no error.

Per curiam.

Judgment affirmed.

Cited: Benbow v. Robbins, 71 N.C. 339; *Kitchen v. Wilson,* 80 N.C. 198.

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(448)

WILLIAM B. THOMPSON v. ARCHIBALD T. MCNAIR AND OTHERS.

An injunction, obtained by a plaintiff at law, in order to preserve property in litigation, until the determination of the suit at law, having been dissolved: *Held,* that no reference to ascertain damages sustained by the defendant because of such injunction, or other proceedings upon the injunction bond, could be had until after the determination of the suit at law.

EXCEPTIONS, to a report in Equity, tried before *Buxton, J.,* at July Special Term 1869, of ROBESON Court.

The plaintiff had brought an action of *Trespass,* Q.C.F., against the defendants, for injury to certain turpentine lands, and in order to preserve the property during the pending of such suit, had also obtained an injunction against them. At Spring Term 1867, the injunction was dissolved because the plaintiff had failed to show that the defendants were insolvent, and upon application by the defendants, an order of reference was made to ascertain the damages sustained by the defendants, by reason of the improper suing out of the injunction.

The Commissioner passed upon the titles of the parties, and ascertained the damages to be $1,225.00. The report having been excepted to by the plaintiff, his Honor set it aside, and the defendants appealed.

N. A. McLean and W. McKay for the appellants.
Leitch contra.

PEARSON, C.J. *Falls v. McAffee,* 24 N.C. 236, is decisive of this case. It cannot be known judicially that the injunction was wrongfully sued out, until the action at law is disposed of. Suppose the defendant should be allowed to have judgment in this proceeding, on the ground that there was not probable cause, and afterwards the action at law be decided in favor of the plaintiff, he would be entitled to recover back the very damages that the defendant now seeks to recover, and the record of the Court would be inconsistent and contradictory.

(449)

An injunction in aid of an action at law, to preserve the property pending the suit, is of rare occurrence. The fact that in order to make a report, the Commissioner in Equity felt constrained to pass upon the legal title in anticipation of the judgment in the suit at law, presents a legal absurdity, which the Courts avoid in judicial proceedings. An analogy may be found in the action for malicious prosecution. It is settled that the action cannot be maintained until the indictment is finally disposed of, either by an acquittal or a *nol. pros.* Otherwise, the defendant might recover damages and be afterwards convicted of the offence, and thus the record be made to contradict itself.

We concur with his Honor in the Court below.

Of course the rights of the defendant, if he has any, will not be affected by refusing to allow him to proceed on the injunction bond until the action at law is disposed of. This order is made without prejudice, and the defendant will be at liberty to proceed hereafter, as he may be advised.

Per curiam.

Judgment affirmed.

Cited: Crawford v. Pearson, 116 N.C. 720; *R. R. v. Mining Co.,* 117 N.C. 193.

(450)

J. T. PETTEWAY, AND JOHN W. HINSDALE, ADM'R. v. JOHN DAWSON.

A motion to strike out the name of a plaintiff, made by the attorney for the defendant, by virtue of a power of attorney to that end given by one of the plaintiffs, will be refused where the attorney for the plaintiff produces a letter from him of a date later than that of the power, authorizing the suit to go on.

MOTION, to strike out the name of one of the plaintiffs, made before *Buxton, J.*, at Spring Term 1870, of CUMBERLAND Court.

The facts appear in the Opinion.

His Honor refused to strike out, and the plaintiff Petteway appealed.

Fowle & Badger for the appellant.
Hinsdale contra.

READE, J. There are two plaintiffs of record. The defendant's attorney produced a power of attorney from the plaintiff Petteway, to dismiss the suit. The plaintiff's attorney thereupon produced a letter from said Petteway, dated since the power of attorney, authorizing him to prosecute the suit. His Honor refused the motion of the defendant's attorney to dismiss the suit, and the defendant's attorney prayed an appeal for the plaintiff Petteway, and signed a bond as surety for him to secure the defendant his costs. These proceedings are certainly "of the first impression."

The only question presented at the bar was, whether the letter to the plaintiffs' attorney revoked the power of attorney to the defendant's attorney. This is too plain for discussion. We suppose that the defendant's attorney did not mean to appear, and that His Honor would not have allowed him to appear, on both sides, and that the production of the power of attorney was only in the nature of a demand upon the plaintiffs' attorney for his au- (451) thority to prosecute for the plaintiffs. As soon as the plaintiffs' attorney produced the letter, that demand was answered, and the suit ought to have proceeded. The letter was ample for that purpose.

The interlocutory order being in favor of the plaintiffs, and as it appears of record that the plaintiff Petteway appealed therefrom, there being no error, the said Petteway must pay the costs of the appeal.

There is no error. Let this be certified, etc.

Per curiam.

Affirmed.

Cited: Hollingsworth v. Harman, 83 N.C. 155.

W. H. HOWERTON v. F. H. SPRAGUE.

Where the defendant, upon a motion to dissolve an injunction, uses his answer as an affidavit, the plaintiff has a right to offer affidavits additional to his complaint.

Where a creditor, by a binding contract, gives further time to the principal in a debt, this discharges the surety, "by matter in pais." Such discharge cannot be enforced by a Justice of the Peace, but by the Superior Court only; *therefore*,

In a case in which the creditor had taken out a process against the principal and surety before a Justice of the Peace, and had obtained judgment and levied an execution upon the goods of the principal, which subsequently he had instructed the officer to deliver up, upon, as was alleged, some binding contract to give such principal further time; *Held*, that the transaction did not amount to a *satisfaction* of the execution, but merely to a discharge by matter in pais; to enforce which the surety did right in resorting to an injunction in the Superior Court.

INJUNCTION, heard upon motion to dissolve, before *Cloud, J.*, at Spring Term 1870 of ROWAN Court.

The plaintiff was indebted to the defendant, as surety for (452) one Long. The latter had taken out proceedings against his debtors before a magistrate, and had obtained judgment and issued an execution, which was levied upon personal property of Long sufficient to satisfy it. Whilst this levy existed, a conversation and transaction took place between Sprague and Long. This was said by the plaintiff to have been without his knowledge and against his consent, and to have amounted to the giving of further time to the principal debtor. It was also alleged by the plaintiff that Sprague therein consented to waive the levy made by the officer, as above. Upon this the plaintiff commenced an action in the Superior Court, and obtained an injunction therein from Mr. Justice Settle, of the Supreme Court. The defendant answered, denying the material allegations in regard to the character of the transaction with Long, and the plaintiff's ignorance thereof, or dissent thereto.

At the hearing before Cloud, J., after the complaint and the answer had been read, the plaintiff offered the affidavits of the officer and of Long, in support of his case, but, upon objection by the defendant, the Court rejected them.

Order vacated; appeal by the plaintiff.

Boyden & Bailey and Clement for the appellant.
Blackmer & McCorkle contra.

1. Affidavits could not be offered by Pl'ff: C.C.P. § 196; *Clark v. Clark, ante* 150.

2. Assuming that the levy was a satisfaction of the execution, an injunction was not the proper remedy; for the magistrate granting the execution had the power to vacate the same, by a motion in the cause: *Foard v. Alexander, ante* 71.

3. If the Superior Court did have jurisdiction, the injunction could only be granted by the Judge of the District where the action was triable: C.C.P. §§ 344 and 345, Paragraph 3. No (453) notice of the application given, therefore erroneous: C.C.P. § 345, Par. 5; *Foard v. Alexander, ante* 71.

4. *Audita querela* is the remedy where *fi. fa. is satisfied:* 2 Saund. Rep. 147, note (1); *Parker v. Jones,* 58 N.C. 276.

5. The levy was not satisfaction: *Benford v. Alston,* 15 N.C. 351; also, *King v. Morrison,* 13 N.C. 341; *Stockton v. Briggs,* 58 N.C. 314; *Parker v. Jones, Ib.* 278.

PEARSON, C.J. If personal property sufficient to satisfy an execution be levied on, the debt is thereby satisfied, unless the property is destroyed without default, or unless the property is delivered back to the defendant in the execution. Consequently the debt here was not satisfied by the levy.

The plaintiff insists that the creditor without his consent entered into a binding contract with the principal debtor to give further time, the effect of which was to discharge him, the plaintiff, from further liability as surety.

It is a well settled principle of equity as between creditor and surety, when the creditor by a binding contract and not a mere *nudum pactum,* gives further time to the principal debtor, the surety is "discharged by matters in pais," as it is termed in the books. Of this equitable discharge the Justice of the Peace had no jurisdiction; the equity could only be enforced by the Superior Court. It would have been otherwise if the debt had been *satisfied.* His Honor, therefore properly took jurisdiction, and heard the motion to dissolve the injunction, upon the complaint and answer, and argument of counsel. But he fell into error in rejecting the additional affidavits offered by the plaintiff, by not adverting to the fact that on hearing the motion, the answer as well as the complaint was to be treated as an affidavit. Had the defendant put his motion on the insufficiency of the matter set out in the complaint, the (454) plaintiff would not have been allowed to offer additional affidavits; but when he used the answer as an affidavit, it opened the door and let in additional affidavits: C.C.P. § 196; *Clark v. Clark, ante* 150.

There is error. This will be certified.
Per curiam.
Reversed.

Cited: Deal v. Cochran, 66 N.C. 271; *King v. Winants,* 68 N.C. 64; *Stirewalt v. Martin,* 84 N.C. 7; *Stallings v. Lane,* 88 N.C. 217; *Mfg. Co. v. McElwee,* 94 N.C. 430; *Bell v. Howerton,* 111 N.C. 73.

DANIEL McARTHUR AND OTHERS v. JOHN C. McEACHIN AND OTHERS.

It is not competent for a Superior Court to grant an injunction against an order by County Commissioners within the sphere of their general duties, laying out a public road; nor can such Court, otherwise than under an *appeal* from such order, rescind it.

INJUNCTION, granted by *Russell, J.,* at Spring Term 1870, of ROBESON Court.

No statement of facts is required. The controversy is the same which appears *ante* 72.

The defendants appealed.

N. A. McLean for the appellants.
Leitch contra.

DICK, J. The Board of Commissioners of Robeson are entrusted with the important public duty, and are invested with the necessary authority to lay off public roads, and build bridges in their county: Special Act 1868-'69, ch. 104.

The manner in which their authority is to be exercised, (455) is regulated by a general statute: Acts of special session 1868, ch. 20. Upon such subjects they possess exclusive original jurisdiction, and are not liable to a civil action at the suit of a party aggrieved by an erroneous discharge of their public duties. The remedy of such a party can be obtained in the Superior Court on an appeal, or by writ of *certiorari: State v. Jacobs,* 44 N.C. 218; *Bledsoe v. Snow,* 48 N.C. 99.

The plaintiffs in this action seek to rescind an order made by the Board of Commissioners in the exercise of their legitimate authority, and also to restrain, by injunction, an officer duly appointed by said Board, from discharging his appropriate public duties.

Such remedy cannot be had by a civil action in the Superior Court, which has only appellate jurisdiction in the matter: Cooley on Const. Lim. 408.

The injunction must be vacated, and the proceedings dismissed.

Per curiam.

Ordered accordingly.

Cited: Ashcraft v. Lee, 75 N.C. 158.

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(456)

BEVERLY POWELL v. WILLIAM A. LASH.

Where successive dams at a certain point upon a creek had thrown the water back upon the plaintiff's land to a certain extent for more than twenty years, and after that a new dam, no higher than the former dams but tighter than they, erected six feet lower down the creek, filled up the bed of the stream with sand, and sobbed the plaintiff's land to a considerably greater extent than before, although it did not *pond* the water further back; *Held,* that the easement obtained by the twenty years possession, upon the maxim *tantum prœscriptum quantum possessum,* did not protect the owner of the dam from liability on account of the new injury.

PETITION (filed 1868) to recover damages for an injury done by a mill dam to lands of the petitioner, tried before *Cloud, J.,* at Spring Term 1870, of STOKES Court.

The boundary of the plaintiff's land approached the creek on which the dam was, on its eastern side, about two hundred yards above the dam, and ran thence up the creek two hundred or three hundred yards, and then crossed it at right angles running west. Two dams that had previously stood near the point where the present dam stands, and successively up to the time that it was erected, had thrown the water back so as to damage the plaintiff's land upon the eastern bank *for more than twenty years before,*— up to a point about one hundred yards below that at which the plaintiff's line crosses the creek. In 1858 or 1859, the present dam was erected, at a point six feet farther down the creek than that which it succeeded. It was no higher than the former dam, but was tighter. It did not pond the water as far as either of the former dams, but after its erection, sand and mud accumulated at the upper end of the pond gradually, and drove the pond, or backwater, nearer and nearer to the dam, and, at the same time, raised the bed of the

stream through the plaintiff's land, above the line which
(457) crosses the creek, until the water became, in 1866 and thence down to the present time, on a level with the banks at the line, and of the average of a foot and a half below the top of the bank through forty acres of bottom, which became sobbed and unfit for cultivation. Previously, the banks at the point where the line crosses, were three feet high, and through the body of the forty acres they were four, or four and a half feet high; and the bottom was dry enough for cultivation, and yielded fine crops.

The defendant showed that for ten or fifteen years past the banks of the creek had been cleared, and that the creek had been gradually filling up for five or six miles above the dam, and that the same fact was to be observed in other streams.

The plaintiff admitted that the defendant, and those with whom he was connected, had had a twenty years user of so much of the plaintiff's lands as lay between the point where the line approached the pond on the east side of the creek, and a point about one hundred yards below where the line crosses the creek.

The plaintiff requested the Court to charge that a twenty years' user afforded a presumption of a grant of license or easement only to the extent and in the state to which there was enjoyment for the whole twenty years, and that if from the evidence they should believe that there had never been a user for that length of time above where the line crosses the creek, that the plaintiff was entitled to damages for the injury to his bottom lands above the said line.

The Court declined so to charge, and instructed the jury that a twenty years' maintenance of the dam, and for that time using any part of the plaintiff's lands, whether above or below the line crossing the creek, afforded a presumption of an easement, and rendered the defendant irresponsible for damages, although the jury
(458) might believe that the filling up of the bed of the stream, and sobbing the plaintiff's bottom land above where his line crosses the stream, was occasioned by the dam of the defendant.

Verdict for the defendant; Judgment accordingly; Appeal by the plaintiff.

J. I. Scales and Phillips & Merrimon for the appellant.
Battle & Sons and Bragg contra.

DICK, J. The plaintiff admitted "that the defendant, and those with whom he was connected, had had a twenty year user of so much of the plaintiff's land as lay between the point where the line approached the pond on the east side of the creek, and a point about one hundred yards below where the line crosses the creek." This ad-

mission is in accordance with the facts set forth in the case. As the plaintiff permitted the defendant and those under whom he claimed to have the uninterrupted user, and enjoyment of the land for twenty years, for the purposes of a mill-pond, the law presumes that a right had been granted, and will not afford damages for an injury occasioned by such easement. The rights of the defendant and the acquiescence in the injury on the part of the plaintiff, are commensurate with the extent of the user on which the presumed grant is founded. On this subject, the Courts of the common law have adopted the rule of the civil law — *tantum prœscriptum, quantum possessum:* Washburn on Easements, 123; Angell on Water Courses, 452.

The modern doctrine of easements by prescription was adopted for the purpose of quieting titles and giving effect to long continued possession. It is founded upon the fact, that there has been an adverse possession and assertion of a right which exposed the party to an action, and the party encroached upon, has neglected to sue for the injury for a period of twenty years. The law (459) presumes that the right asserted could not have been allowed unless there had been a grant: *Felton v. Simpson,* 33 N.C. 84; *Mebane v. Patrick,* 46 N.C. 23.

Every easement by prescription, is an invasion of the rights of the owner of the servient tenement, and he is only estopped from claiming damages as to such injuries as he has quietly submitted to for twenty years. If any new injury is occasioned by the easement, the owner of the servient tenement, may, at any time within twenty years, sustain an action for this additional invasion of his rights.

The damages claimed by the plaintiff in this case are for the injury occasioned by the mill-pond to forty acres of bottom land above the pond. It appeared in evidence, that before the erection of the new dam by the defendant in 1859, the forty acres of bottom land "were in a good state of cultivation and yielded fine crops," and had never sustained any injury from the dams erected by the previous owners; that the water in the channel at the point where the line crosses, was three feet below the top of the banks, and the average height of the banks above the current was four or four and a half feet through the whole extent of the bottom lands of the plaintiff. Soon after the new and tight dam of the defendant was erected, the pond began to fill up with sand and mud, so that the water in the channel became level with the banks at the point where the line crosses, and was elevated in the same proportion through said bottom land. This elevation of the water-level has rendered the land unfit for cultivation, and thus caused great injury to the plaintiff.

The plaintiff insisted that this injury had existed but a few years, and was caused by the mill-pond of the defendant. This was a question of fact to be decided by the jury, and the instructions (460) asked for by the plaintiff's counsel were substantially correct, and ought to have been given. His Honor was in error in charging that "a twenty years maintenance of the dam, and for that time, using any part of the plaintiff's land, whether above or below where the line crosses the creek, afforded a presumption of an easement, and rendered the defendant irresponsible for damages, although the jury might believe the filling up of the bed of the stream, and the sobbing of the plaintiff's bottom land above where the line crosses the stream, was occasioned by the dam of the defendant."

The rights of the plaintiff were greatly prejudiced by this ruling of his Honor, and there must be a *venire de novo.*

Let this be certified.

Per curiam.

Venire de novo.

Cited: Thomas v. Morris, 190 N.C. 248.

H. W. REYNOLDS v. THE STATE OF NORTH CAROLINA.

The "recommendatory jurisdiction" over claims against the State, conferred upon the Supreme Court by the Constitution (Art. IV, Sec. 11,) does not extend to the settlement of disputed questions of fact, but only to the decision of such important questions of law as may arise in claims, the facts in which are agreed upon.

CLAIM *against the State,* filed in this Court, January 1870, and heard under Art. IV, Sec. 11, of the Constitution of the State.

The subject of the claim was the value of forty-four bales of cotton, said to have been sold by the State for about $6,290.00. The case set up by the plaintiff, a citizen of Virginia, was, that he (461) had purchased the cotton during the late war, in South Carolina; that it had remained there in his possession until September 1865, when it was seized with military force by one Mitchum; that he subsequently transferred it to Charlotte, N. C., at which place it was taken from him for the United States Government, by one Captain Leffingwell, U. S. A.; and that afterwards, about November 1865, Leffingwell transferred it to the State of

North Carolina, in part satisfaction of a claim which the latter had against the United States, for other cotton seized by them.

This statement was controverted by the State.

Moore, and Battle & Sons for the claimant.
Attorney-General contra.

PEARSON, C.J. We are fully satisfied, on a perusal of the papers in the proceeding, of the correctness of the view taken in *Bledsoe v. State, ante* 392, to-wit: that our "recommendatory jurisdiction" in regard to claims against the State, does not embrace cases involving mere matters of fact, and that it was not the intention of the framers of the Constitution to impose upon the Court the labor of the trial of facts, and that the jurisdiction is confined to claims where the facts being agreed on, it was supposed an opinion of the Supreme Court on important questions of law, would aid the General Assembly to dispose of such cases; it having been before a question, whether the Judges could consistently with their constitutional duties, communicate an opinion to the Legislature.

In this case there does not seem to be any important question of law presented by the evidence; but the matter depends on the facts as they may be arrived at from an examination and consideration of conflicting affidavits and loose statements, in reference mainly to the identification of the cotton. Supposing the cotton to be sufficiently identified, as a matter of fact, which this Court (462) does not assume the task of settling, we are inclined to the opinion that the legal effect of the order of Captain Leffingwell, which recognizes Mitchum, as an agent of the United States Government, and directs the Charlotte and South Carolina Rail Road Company to deliver the cotton to the department as property of the United States, taken in connection with his subsequent order transferring the cotton to the State of North Carolina in satisfaction of a claim admitted by him to be well founded, is to make the government of the United States *primarily liable* to the plaintiff, if he can establish his claim and put himself in a condition to be allowed to assert it, *(Mrs. Alexander's cotton,* 2 Wall. 404); and that the State cannot be resorted to *in the first instance,* if she can be made liable at all, for accepting the cotton in satisfaction of a valid claim, from an agent of the United States, having it in his possession and assuming the right to dispose of it as property of his government.

The complaint will be dismissed at the costs of the plaintiff.

Per curiam.

Ordered accordingly.

Cited: Peebles v. Comrs., 82 N.C. 384; *Reeves v. State,* 93 N.C. 258; *Cowles v. State,* 115 N.C. 181; *Garner v. Worth,* 122 N.C. 257; *Miller v. State,* 134 N.C. 272; *Dredging Co. v. State,* 191 N.C. 250; *Cahoon v. State,* 201 N.C. 314.

(463)

SMITH AND PENLAND v. CHARLES DEWEY, ASSIGNEE, ETC.

The defendant, as assignee in bankruptcy of the Bank of North Carolina, had obtained judgment at Fall Term 1869 of Burke Superior Court, against the plaintiffs upon a note made by them to the bank; an execution coming to the hands of the sheriff, the defendants, "being unable to obtain bills upon said bank," tendered to the sheriff one-half of the amount of the judgment, in currency, in satisfaction of the whole, which being refused, they obtained an injunction; *Held,* that it had been granted improvidently.

MOTION, to vacate an injunction, overruled by *Cannon, J.,* at Chambers for HAYWOOD, June 18th 1870.

The complaint alleged that defendant, as assignee in bankruptcy of the Bank of North Carolina, had obtained a judgment against them, upon a note they had given to the bank, at Fall Term 1869 of Burke Court; that execution issued therefor, and that they, "being unable to obtain bills upon said bank," had tendered to the sheriff one-half the amount of the judgment in currency, in satisfaction of the whole, and that it had been refused.

Thereupon, on application by them, his Honor issued an injunction. Subsequently, as above, the defendant applied at Chambers to have the order vacated. This was refused, and he appealed.

Moore and Phillips & Merrimon for the appellant.
Bragg contra.

PEARSON, C.J. Had the plaintiff been able to procure notes of the bank, and pleaded by way of set off, an interesting question would have been presented. But the question made by the facts set out in the complaint, is too plain for discussion. The plaintiff's case does not come within the meaning or the words of the statute, by the most latitudinous construction, to say nothing of the bank-

ruptcy law, or the rule, "good matter must be pleaded (464) in due form, apt time and proper order."

The order below is reversed, and the injunction vacated.

Per curiam.

Reversed.

T. C. AND L. A. BECKHAM, EX'RS., ETC. v. WITTKOWSKI & RINTELS.

Where one of two executors had informed creditors of his that certain cotton in a warehouse belonged to him, and thereupon they attached the same for a debt due by him: *Held*, that such executors, upon interpleading, were not estopped by the declarations made as above.

Executors who had qualified in South Carolina, and afterwards removed property from that State into this, may maintain a suit here for such property, without again proving the will, and taking out letters: in such case they need only show a duly certified copy of the record, etc. in South Carolina, as evidence of their title.

ATTACHMENT, tried before *Logan, J.*, at Spring Term 1870, of MECKLENBURG Court.

The property attached was four bales of cotton, seized in the possession of one Bryce, at Charlotte, as the property of the plaintiff, L. A. Beckham, a resident of South Carolina, by the defendants, who were his creditors. It was shown that he had told them that it was his private property. A question was thereupon raised, whether the plaintiffs were not *estopped* to show that the cotton belonged to them, as executors of another Beckham also a resident of South Carolina, and had, after his death, been sent by them, as executors, to Charlotte, and been deposited with Bryce.

It was also objected, that the plaintiffs had not proved the will, and qualified again in this State, as was alleged to (465) have been their duty before suing here.

Under the instructions of his Honor, there was a verdict for the plaintiffs. Judgment accordingly, and Appeal by the defendants.

Dowd for the appellants.
Barringer contra.

READE, J. There are two questions presented in this case:

1. Whether, if one of the plaintiffs, L. A. Beckham, deposited the cotton in his own name with Bryce, he and the other plain-

tiff, T. C. Beckham, were estopped, after it had been levied on by the defendants, as the property of L. A. Beckham, from claiming the cotton as the property of the plaintiffs as executors of J. C. Beckham. It will be observed that the question is not whether the plaintiffs are estopped to deny title in L. A. Beckham, the depositor, so as to defeat any lien which Bryce had for advancements, but whether they are estopped to show the truth as against the defendants, who are strangers to the transaction. Clearly they are not: if for no other reason, because estoppels must be mutual, and there is no mutuality here. The most that can be made of L. A. Beckham's alleged declaration that the cotton was his individual property, is, that it was a falsehood which did the defendants no harm, and of which they had no right to take advantage.

2. Whether the plaintiffs, who were the executors of J. C. Beckham in South Carolina, could sue in North Carolina without proving the will and taking out letters testamentary here. We think they could. The cotton was raised in South Carolina, and was the property of the executors, to be administered there,
(466) and it was only brought to this State on sale in the market, when it was seized by the defendants.

The plaintiffs had the right to sue here for the property, and to offer a duly certified copy of the record of the probate of the will and of their qualification in South Carolina, as evidence of their title, just as they would have the right to offer a bill of sale or any other instrument as evidence of title. It would have been otherwise if the property had been located in North Carolina at the death of the testator, to be administered here. In that case, it would have been necessary, under our statute, to exhibit a certified copy of the record of probate and qualification in South Carolina, in our Courts in North Carolina, for probate, and of the qualification of the executors in North Carolina; but as the property was not to be administered in North Carolina, there was no reason for taking out letters here. It was a simple question of title.

There is no error.

Per curiam.

Judgment affirmed.

Cited: Cannon v. Cannon, 228 N.C. 212.

(467)

LUKE MASON v. JAMES OSGOOD, ADM'R, ETC., AND OTHERS.

One who alleges that, as last and highest bidder, he had purchased lands at a sale made by an administrator under a license from the (late) County Court, and tendered a good note for the purchase money, but that the administrator refused to make title, and did not report the sale to Court, as was his duty, but had conveyed to a third person: should have sought relief by application to the Court which granted the license, and *in the case* made by the petition to sell, and cannot maintain *a bill in equity* against the administrator and the purchaser, asking for title, etc.

According to the plaintiff's case, the administrator had no license to sell to the party to whom he had conveyed, and therefore such sale was a nullity, and the plaintiff could not proceed against him under the idea that he was a trustee, etc.

BILL in equity, filed February 1868, and argued upon demurrer, before *Thomas, J.*, at Spring Term 1869 of CRAVEN Court.

The plaintiff alleged that the defendant Osgood, as administrator of one Hood, had obtained a license from the County Court of Craven to sell a tract of land, which he described, and that at the sale (Dec. 9th 1867,) he had become the last and highest bidder, for $115.00, and having immediately thereafter offered to pay a part of the price in U. S. currency, and to give a note with good security for the balance, subsequently (January 28th 1868,) tendered a bond with good security for the whole, which Osgood refused to accept, but not on account of its insufficiency; and that since the sale Osgood had conveyed the land to one Hume, also made a defendant, for the price of $165.00, Hume then knowing that the plaintiff had purchased as above. The prayer was for an injunction against both, for a title, etc.

The defendants demurred.

His Honor dismissed the bill; and the plaintiff appealed.

Haughton and Phillips & Merrimon for the appellant. (468)
Battle & Sons and R. G. Lewis contra.

DICK, J. A sheriff has authority under an execution to levy upon and sell the lands of the judgment debtor. The purchaser at such sale has a right, upon the payment of the purchase money, to demand a deed from the sheriff, and when the deed is executed, the title will have relation to the time of sale. An administrator's authority is more limited where he sells the lands of the intestate under a license obtained from Court. He is a mere agent of the Court to execute a naked power, and a purchaser acquires no right to the land until the sale is confirmed, and title made, under an

order of the Court granting the power of sale. If the administrator fails to report the sale, the purchaser may apply to the Court by a motion in the cause, for a rule to compel such return, so that the Court may confirm the sale if it sees proper.

In our case, as the sale was not confirmed, the plaintiff has no right to the land, and no claim to equitable relief.

There is another objection to the relief demanded, apparent on the face of the bill of the plaintiff. The defendant Hume has not the legal title, and therefore cannot be declared a trustee for another person. The administrator had no authority to make a sale to the co-defendant, and of course no title passed. The title is still in the heirs-at-law of the intestate, and they are not parties. The Superior Court now has no power to compel the administrator to make a report of the sale. That relief ought to have been sought by a motion in the cause, in the County Court.

There is no error.

Per curiam.

Judgment affirmed.

Cited: Joyner v. Futrell, 136 N.C. 304; *Harrell v. Blythe,* 140 N.C. 417; *Patillo v. Lytle,* 158 N.C. 97.

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(469)

PETER CANSLER v. JAMES A. HENDERSON.

"Thence, N. 57, E. 34 poles, with the ditch, to a willow stump on the bank of the ditch,"—the ditch being, at the beginning, 18 links, and, at end, 2 poles, wide, and the willow stump being, not directly upon its bank, but, upon a run which conveyed the water from the ditch: means, through the middle of the ditch to its end, and thence down the run to the willow stump.

CIVIL action, upon an arbitration bond, tried before *Logan, J.,* at Spring Term 1870, of GASTON Court.

The bond had been given with a view of settling a dispute between the parties, in respect to land; and an award had been made, the material portion of which, here, is that, in describing the boundary to be established between the parties, a line running from *a stone,* (marked B in the plat) the following language was used: "Thence N. 57 E. 34 poles, with the ditch, to a willow stump on the bank of the ditch." The ditch, nearest B was 18 links wide, and, at

the other end, two poles wide. The willow stump was not upon the bank of the ditch, but some feet off, upon a run, which carried the water from the ditch, and north-eastwardly from its lower end. A straight line from B to the stump did not touch the ditch. A line through the middle of the ditch was according to the course called for in the award, but the distance called for went beyond the end of the ditch, and to the left of the run.

The plaintiff claimed that the line ran through the middle of the ditch. In that event, the defendant had violated the award by erecting a fence upon the land of the plaintiff. The plaintiff also claimed that the penalty of the bond ($1000) was *liquidated* damages.

His Honor, after laying down the rules of law, applicable in cases of boundary, left the question involved, to the jury, stating that if they should find for the plaintiff, he was entitled to nominal damages. (470)

Verdict for the defendant; Rule, etc.; Judgment, and Appeal by the plaintiff.

Guion and Bynum for the appellant.

There was error in submitting the question to the jury, instead of charging that there was nothing to control the call. *Johnson v. Farlow,* 33 N.C. 201.

The point involved here is decided in *Sandifer v. Foster,* 2 N.C. 237; *Shultz v. Young,* 25 N.C. 385, and *Hays v. Askew,* 53 N.C. 226.

Wilson contra.

DICK, J. The abstract principles of law laid down by his Honor, are substantially correct: Battle's Dig. Title, Boundary.

The error of his Honor consisted in not applying the principles of law to the case before him. The only question in dispute, is the proper location of the line between the stone at B, and the willow stump at C, and this is a question of law, which ought to have been determined by his Honor. The description of the boundary in the award, after reaching the stone at B, is: "thence N. 57, E. 34 poles, with the ditch, to a willow stump on the bank of the ditch." The ditch was a fixed and certain object, existing at the time the award was made, and must control the course and distance. The word "with," in this connection, means "through" and not "parallel to," as contended for by defendant's counsel. By a fair, legal construction of the description of the boundary in the award, the line com-

mences at the stone at B, and runs through the ditch to its
(471) end, and thence along the water run to the willow at C.

The principles of law involved in this case are so plain and well settled, that they need no further discussion, or reference to authorities. The jury found a verdict against the plaintiff, and therefore the question as to the measure of damages is not properly before us.

On another trial, it may be well for the plaintiff carefully to consider the question, whether in law he is entitled to recover the damages he claims, for so slight a trespass.

Let this be certified.

Per curiam.

Venire de novo.

THEOPHILUS BLAND v. C. J. O'HAGAN.

A bond had been executed by the defendant, leaving the name of the obligee blank; the bond was afterwards executed by others, and then the blank was filled with the name of the plaintiff, and the date was altered; suit having been brought upon the bond, on the trial the plaintiff offered to show, "that the signers of the paper authorized him to fill the blank and make the alteration of date, or assented to what he had done:" *Held*, that, as parties who appeal from rulings below in regard to the evidence, must set forth in distinct terms the evidence rejected, so that this Court may pass upon its admissibility, and, as the proposition above did not show *the sort of evidence* tendered, there appeared to be no error in its exclusion.

DEBT, tried before *Jones, J.*, at Spring Term 1870 of PITT Court.

The plaintiff declared upon a bond for money, payable to himself. It appeared that the name of the obligee had been in-
(472) serted by one Haddock, to whom the defendant had handed it for other signatures, and for registration, after the defendant had executed it, having been in blank at that time, and that the date was also altered after that time. The plaintiff offered to show by Haddock that the signers of the paper authorized him to fill the blank, and make the alteration of date, or assented to what had been done. His Honor excluded the evidence, and the plaintiff excepted.

Verdict for the defendant; Judgment accordingly; Appeal by the plaintiff.

Battle & Sons for the appellant.

The evidence offered would have shown that which was tantamount to a re-delivery; *Hudson v. Revett,* 5 Bing. 354 (15 E.C.L.); *Davenport v. Sleight,* 19 N.C. at p. 384.

Hilliard contra.

DICK, J. The instrument sued on was not the deed of the defendant when it was handed to Haddock, as there was a blank as to the name of the obligee: *Marsh v. Brooks,* 33 N.C. 409.

Haddock could not perfect the instrument by filling the blank with the name of an obligee, unless he did so in the presence of the defendants, and with their express assent; or by a written authority under their hands and seals. After the blank was filled, and the alteration made in the date, if the instrument had been presented to the defendants, and they had ratified the act of their agent, and authorized the delivery of the instrument to the plaintiff, then it would have been a valid bond: *Davenport v. Sleight,* 19 N.C. 381.

The plaintiff was bound to prove the due execution of the instrument as the bond of the defendants, to entitle him to recover judgment. On the trial he offered to show by Haddock "that (473) the signers of the paper authorized him to fill the blank, and make the alteration of date, or assented to what he had done."

This proposition was too general in its terms, as it might have included incompetent evidence; as, that the authority to the agent was by parol, or, that the assent of the defendant was given in the absence of the altered instrument. A party who offers evidence upon a trial ought to set it forth in distinct terms, so that the Court may pass upon its admissibility, and see that it is relevant to the matters at issue. When this is done, and the evidence offered is improperly rejected, an appellate Court can easily correct the error: *Whitesides v. Twitty,* 30 N.C. 431.

The evidence as offered was clearly inadmissible, and as the plaintiff had the right and opportunity of presenting the matter in the strongest light which the facts of his case would justify, we must take it for granted that he was not prejudiced by the ruling of his Honor.

The judgment must be affirmed.

Per curiam.

Judgment affirmed.

Cited: Street v. Bryan, 65 N.C. 622; *S. v. Purdie,* 67 N.C. 328; *Barden v. Southerland,* 70 N.C. 529; *Knight v. Killebrew,* 86 N.C. 402; *Sumner v. Candler,* 92 N.C. 636; *Humphreys v. Finch,* 97 N.C.

307; *Cadell v. Allen,* 99 N.C. 545; *Rollins v. Ebbs,* 136 N.C. 149; *Stout v. Turnpike Co.,* 157 N.C. 368; *Newbern v. Hinton,* 190 N.C. 111; *Bank v. Wimbish,* 192 N.C. 555.

(474)

ELLEN HARMAN, AND OTHERS *v.* MARGARET FERRALL AND JOHN O'ROURKE.

One who, at the death of the ancestor, had filed *a declaration of an intention* to become a citizen of the United States, but was *naturalized* subsequently to such death, is not capable of inheriting.

Where, at the death of the ancestor, those capable of inheriting were, *two* nieces, children of a brother who had died an alien; *four* children of another niece, also a child of that brother, who had died after being naturalized; and a *fourth* niece, a child of a sister of the deceased who had died an alien: *Held,* that the real estate was to be divided into four parts, of which the three nieces took one each, and the fourth was to be divided among the four children of the niece who had died after naturalization.

CIVIL action, for the partition of lands, tried before *Watts, J.,* at Spring Term 1870, of WAKE Court.

The facts were, that John O'Rourke, a citizen of this State, formerly of Ireland, died in Wake County in the Spring of 1867, seized in fee of the lands in question, and without lineal descendants. The plaintiffs in the action were Ellen Harman, Catherine Cassidy, and Laura, Frederic, Charles and Thomas Hinder. Of these the two first were citizens of the United States, and children of Matthew, a brother of John O'Rourke, who died before him, an alien; the four last were citizens, and grandchildren of Matthew, through his daughter Jane, a citizen, who died before John O'Rourke. The defendants were Margaret Ferrall, a citizen, and child of John O'Rourke's sister Margaret, an alien who died before him; and John O'Rourke, Junior, another child of Matthew, who had duly *declared his intention* to become a citizen in 1855, but who was not naturalized until the Fall of 1867.

These were the next of kin to the deceased, and the question was as to the proportions in which the land was to be divided, and
(475) also, whether the defendant O'Rourke was entitled to anything.

The plaintiffs insisted that the land was to be divided into four shares, one for the children of Jane Hinder, and one each for Ellen

Harman, Catherine Cassidy and Margaret Ferrall. Margaret Ferrall claimed one-half for herself, and that the other half should go to plaintiffs. The defendant O'Rourke claimed that he was entitled to inherit with the others.

His Honor ordered a partition to be made as prayed for by the petitioners.

The defendants appealed severally.

Battle & Sons for the appellant Ferrall.

1. O'Rourke is entitled to nothing, either as a naturalized citizen of the United States, or under the State Constitution of 1776. The declaration of an intention gives no rights. *Campbell v. Gordon,* 6 Cranch 176; *Baird v. Byrne,* 3 Wall. Jr. C. C. Rep.; *White v. White,* 2 Met. (Ky.) 185.

2. The right of representation as declared in Rule 3, Rev. Code, ch. 38, extends to collaterals in equal degree from ancestor last seized. *Cauble v. Clements,* 55 N.C. 82; *Haynes v. Johnson,* 58 N.C. 124.

This right is of universal application; Rule 9, same chapter, extends it to cases like the present: *Campbell v. Campbell,* 58 N.C. 246. See *McCreery v. Somerville,* 9 Wheat. 354.

Johnston Jones for the appellant O'Rourke.

O'Rourke is to establish, not that he was a fully naturalized *citizen* at the time of intestate's death, but that he was not an *alien,* within the meaning of the general law excluding aliens from the inheritance of the real estate. At the death of the ancestor, he had declared his intention, etc., and had also resided in the U. S. for seventeen years: See *White v. White (ubi supra)* (476) at p. 189, top. At that time, also, he owed no allegiance to any foreign power: See Webster's and Marcy's letters in *Kozta's* case, U. S. Senate Doc. No. 1, 1853-'4.

The title vested in O'Rourke, subject to be divested by an inquest of office, which cannot take place now, since his naturalization. In the cases cited upon the other side, the question was as to divesting a title which had vested *in the State,* and therefore could not be divested by a subsequent naturalization.

As the declaration, etc., imposed upon O'Rourke the burdens of citizenship, he ought with them to receive the benefits, excepting such as are political merely.

Rogers & Batchelor contra.

1. Naturalization does not *relate* to the time of the declaration. At the death of the ancestor the defendant O'Rourke was not entitled, and he could not become so afterwards; 2 Nott and McCord, 187, 20 Pick. 121. He is not within the principle of *Rouche v. Williamson,* 25 N.C. 141.

2. The land is to be divided *per capita* among the nieces, giving the share of the deceased niece to her children; *Clement v. Cauble,* 55 N.C. 82; *Campbell v. Campbell,* 58 N.C. 246; *Rutherford's heirs v. Wolf,* 10 N.C. 271. Compare act of 1801, c. 575, § 2, which governs this case, (Rev. Code, c. 38, §§ 8 and 9,) with act of 1808, (Rev. Code c. 38.)

DICK, J. The rules regulating the descent of real estate to collateral relations, were fully considered and defined in the two recent cases of *Clement v. Cauble,* 55 N.C. 82, and *Campbell v. Campbell,* 58 N.C. 246; and it is only necessary for us to
(477) apply these rules to the case before us.

John O'Rourke died in the Spring of 1867, intestate, and without any lineal descendants. He left surviving him a sister, Bridget O'Rourke, who resided in Ireland, and was an alien, and as such was incapable of inheriting the lands of the intestate. The plaintiffs and defendants are the collateral relations of the intestate, living in this country, and the objects of these proceedings is to ascertain the rights of the parties. The plaintiffs, Mrs. Harman and Mrs. Cassidy, are naturalized citizens, and daughters of Matthew O'Rourke, who was a brother of the intestate, and died many years ago without being naturalized. The infant plaintiffs, Laura, Frederick, Charles and Thomas, are natives and children of Jane Hinder, a daughter of Matthew O'Rourke. She was a naturalized citizen, and died before the intestate.

The defendant Margaret Ferrall is a naturalized citizen, and a child of Mrs. Fanning, who was a sister of the intertate, and died many years ago in Ireland, and was never naturalized. The defendant John O'Rourke, Jr., is a son of the aforesaid Matthew O'Rourke. In 1855, he filed his declaration of an intention to become a naturalized citizen of the United States, but did not take the final oath of naturalization until after the death of the intestate. He was not a citizen of the United States until he had complied with all the requirements of the naturalization Acts of Congress, and the disability of alienage was not removed, so that he could take lands by descent. Not being capable of taking by descent at the time of descent cast, he had no title, to be confirmed by relation, and his subsequent naturalization did not operate to in-

vest him with the title, which in the meantime had become vested elsewhere: *White v. White,* 2 Metc. (Ky.,) 185.

In determining the rights of the other parties, Matthew O'Rourke and Mrs. Fanning are to be considered as if they had never existed, except for the purpose of counting relationship. Their (478) children take in their own right, as they derived no inheritable blood from their ancestors. As such ancestors at the time of their death, were not capable of taking the inheritance, the doctrine of representation does not arise as to Mrs. Harman, Mrs. Cassidy and Mrs. Ferrall, and they take *per capita.* The children of Mrs. Hinder take *per stirpes,* as representing their mother, who, if living, would have taken one-fourth of the estate.

In the case of *Campbell v. Campbell,* there were four classes of children, all in equal degree to the *propositor.* As to two classes the doctrine of representation applied, as their ancestors, if living, would have been capable of inheriting, and each class took one-fourth. As to the other two classes, they took *per capita,* as their ancestors were aliens. As there were three children in each of these last mentioned classes, the result would have been the same, whether they took *per stirpes* or *per capita,* and it was not necessary to point out the distinction. Where the doctrine of representation applies, the claimants affected by it always take *per stirpes.*

There is no error in the ruling of his Honor.

Per curiam.

Judgment affirmed.

Cited: Hinton v. Hinton, 196 N.C. 343.

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(479)

J. DUNCAN v. W. A. PHILPOT.

An action brought in February 1868, for the penalty of one hundred dollars against a sheriff for neglecting to note upon process the day on which it was received, Rev. Code, c. 31, § 39: by the effect of §§ 47 and 48 of the same chapter, should be in the name of the State as plaintiff.

(How such actions are to be brought under the C.C.P., *quære?*)

DEBT, tried before *Logan, J.,* at Spring Term 1870 of MECKLENBURG Court.

The plaintiff declared against the defendant as sheriff, etc., for the penalty of $100 given by Rev. Code, ch. 31, § 39, because of

his having failed to note upon process the day on which he received it.

The defendant objected, that the suit could not be maintained in the name of the plaintiff, but should have been brought in the name of the State, etc. He also objected that there was no evidence to show that the defendant was sheriff.

Verdict for the defendant; Rule, etc.; Judgment and appeal.

Wilson for the appellant.
Dowd contra.

SETTLE, J. This is an action against the sheriff of Granville County, to recover the penalty of one hundred dollars for his neglect to note on process the day on which he received it: Rev. Code, ch. 31, sec. 39.

The defendant opposed two objections to the recovery of the plaintiff:

1. The suit should have been brought in the name of the State.

2. There was no evidence that W. A. Philpot was sheriff (480) of Granville County.

It will be observed that in *Hathaway v. Freeman,* 29 N.C. 109, cited upon the argument, the decision is based upon the act of 1777, Rev. Stat. ch. 31, sec. 43, which enacts that the sheriff "shall mark on each process the day on which he shall have received it" and "for neglecting to do so he shall forfeit one hundred dollars, *to be recovered by any person who will sue for the same.*"

The words "to be recovered by any person who will sue for the same," are omitted in the Rev. Code ch. 31, sec. 39, which is substantially a copy in other respects of the act of 1777; and although the 47th section of the thirty-fifth chapter of the Revised Code enacts that "where a penalty may be imposed by any law passed or hereafter to be passed, and it shall not be provided by the law to what person the penalty is given, it may be recovered by any one who will sue for the same, and for his own use," yet it is immediately followed by the 48th section, which enacts that "whenever any penalty shall be given by statute, and it is not prescribed *in whose name* suit therefor may be commenced, the same shall be brought in the name of the State."

The effect of these two sections is, that the suit must be brought in the name of the State, but the person who brings it will recover the penalty for his own use: *Norman v. Dunbar,* 53 N.C. 317.

Since the first point is in favor of the defendant, it is unnecessary to consider the second. This action was commenced before the adoption of the Code of Civil Procedure, and is therefore not

affected by it, but it may be well hereafter to consider how far the provision requiring all actions to be brought by the party in interest, has modified the former law.

Per curiam.

Judgment affirmed.

Cited: Middleton v. R. R., 95 N.C. 169; *Freeman v. Leonard*, 99 N.C. 280.

(481)

CARROLL, ADAMS & NEER v. MOSES HAYWOOD.

Where it is suggested in the Superior Court, that a certain case called for trial, was to abide the result in another case that had been determined in that Court: *Held*, that the finding by the Judge, in favor of the suggestion, can not be reviewed upon appeal.

ATTACHMENT, vacated, upon motion, by *Buxton, J.*, at Spring Term 1870, of CUMBERLAND Court.

The facts are stated in the Opinion.

The plaintiffs appealed.

T. C. Fuller and Phillips & Merrimon for the appellants.
Strange and N. McKay contra.

SETTLE, J. It appears that attachments sued out by five different parties, were levied upon the same goods, on the same day, and were returned to the same term of the County Court, to-wit: at March Term 1867; that at the same term, Moses Haywood filed a petition to be allowed to interplead, on the ground that the goods attached were his property; that the petition was entitled in the case of *Wm. Devries & Co. v. E. L. Phillips*, but service thereof was accepted by the plaintiffs in the present case, and also by the plaintiffs in three other cases, under the control of the same counsel, that only one bond was filed by the interpleader, referring to and securing all these claims, and which was accepted by the Court, and Haywood allowed to interplead in all the cases.

Although all of the five cases were set for trial on the same day, no substantial steps were taken in any of them, save in the case of *Devries & Co. v. Haywood, ante* 83, which after repeated trials, was determined in favor of the interpleader.

At the last term of the Superior Court of Cumberland, a
(482) question arose as to whether the suit of Carroll, Adams & Neer was to abide the decision of the suit of Devries & Co., or not.

His Honor held that such was the agreement in the case of Carroll, Adams & Neer, and also in the other cases of attachment levied at the same time, and entered judgments in all of them accordingly.

From this ruling, the plaintiffs appeal to this Court. The facts are fully set forth in his Honor's statement of the case, and we may say that we think they fully warrant the conclusion at which he arrived. This, however, was a question purely for the determination of the Superior Court, and we will not look behind the facts there found.

It is competent for a Court to suspend proceedings in several actions where it is manifest that precisely the same point is to be tried in all of the actions: 3 Chitty, Pr. 644.

Here the Court did not exercise a compulsory jurisdiction, but the ruling of his Honor amounts to a finding of the fact, that the parties did, by agreement, suspend proceedings in all the cases, save that of Devries & Co., with the understanding that the others should abide the result of the trial in that case.

Where an agreement was made that one of two similar suits should abide the event of the other, it was held, upon a dispute as to the terms of that agreement, that the decision of the Judge of the Superior Court thereon, was conclusive, and a judgment according to the facts ascertained by him, was affirmed: *State Bank v. Knox,* 13 N.C. 107.

Per curiam.

Judgment affirmed.

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(483)

THE STATE, EX REL. J. R. ERWIN v. L. H. LOWRANCE.

The office of the Clerk of the Superior Court of the County for which one is sheriff, is the proper place of deposit for the bond of such sheriff; *therefore,* a copy of such bond certified by such Clerk, is competent evidence of its contents.

Such a copy is competent (at least under the maxim, *omnia præsumuntur,* etc.,) even although the certificate do not state that it has been recorded.

ERWIN *v.* LOWRANCE.

A writ of *fi. fa.*, under the seal of the Court, requires no proof to render it admissible in evidence.

Where a sheriff is sued for failure to collect a debt under an execution, the measure of damages is the value of the property which he might have subjected by virtue of the execution, not the amount of the debt in his hands for collection, unless the former exceed the latter.

DEBT, upon a sheriff's bond, tried before *Logan, J.*, at Spring Term 1870, of MECKLENBURG Court.

The plaintiff declared for a failure by the sheriff to collect a debt, an execution for which had been in his hands, etc.

Upon the trial the plaintiff offered in evidence a copy of the bond certified by the Clerk of the Superior Court of Lincoln, of which county the defendant was sheriff. The defendant objected to the admission, but was overruled.

The plaintiff also offered in evidence a writ of *fi. fa.*, purporting to have issued from the late County Court of Mecklenburg, under the seal of that Court, and to be signed by its Clerk, and also, to have the signature of the defendant, as sheriff, endorsed to a return, "not collected." The defendant objected to the admission of this also, but was overruled.

The debt in execution was $1,046.67, etc. Under an alias *fi. fa.* the sheriff, (by Gen. Sickles' Order, No. 10,) had returned that the property in the debtor's possession was valued at $575. It was also in evidence that the sheriff had said that he could have made the money under the first *fi. fa.*, if he had not been deceived (484) by the debtor, etc.

The defendant requested the Court to instruct the jury that the value of the property in the debtor's possession, when the first *fi. fa.* should have been levied, was the proper measure of damages.

The Court declined to give this instruction, and told the jury that the debt in execution was the measure of damages.

Verdict for the plaintiff, for the amount of the debt, etc. Rule etc. Judgment, and Appeal by the defendants.

Dowd for the appellants.
Wilson contra.

SETTLE, J. This was an action upon the official bond of the defendant, who was sheriff of Lincoln County, tried in Mecklenburg County at the last term of the Superior Court. The plaintiff offered in evidence a certified copy of the official bond of the defendant, from the Clerk of the Superior Court of Lincoln County, under the seal of his office. To this the defendant's counsel ob-

jected, upon the ground that the certificate of the Clerk was not sufficient, especially as it did not show that the bond had ever been recorded. There is no express provision of law directing where and by whom the official bonds of sheriffs shall be kept; but "every County Court, a majority, or twelve of the Justices being present, shall demand and take the bonds prescribed by law, and cause the same to be acknowledged before them in open Court, and *recorded.*"

The Act of 1856-'57, ch. 36, directs all official bonds of sheriffs and constables, to be duly proved, certified and registered in the register's office of the counties where the same were given.

The second section enacts "that hereafter, upon the trial of any suit which may be pending in any Court of record in this
(485) State, whereby to charge any sheriff or constable and their sureties, for a breach of their official bonds, in case the original bond declared on is lost or destroyed, a certified copy of the same from the register, in whose office the same was registered, shall be received and read in evidence in place of the original." The Legislature seems to have passed this act as an additional security for preserving the evidence of sheriff's bonds, intending that it should be found both in the offices of the Clerk, and Register. By reference to the Rev. Code, ch. 19, secs. 9, 10 and 11, it will be seen that provision is made for having the evidence of Clerks' bonds preserved in two offices. Section 9 points out the manner of proving, and the place for depositing the bonds of the Clerks of the Superior, and County Courts. Section 10 requires the clerks in whose offices the said bonds shall be deposited, to have the same immediately registered in the Register's office of their respective Counties. Section 11 requires the Clerks to keep the originals in the same manner as they keep the records of their Courts.

Our conclusion is, that the Clerk is the proper person with whom the original bonds of a sheriff should be deposited, but they must be proved, certified and registered, as required by the act of 1856-'57, in addition to being *recorded* as required by the Rev. Code, ch. 105, sec. 13. It will be observed that a certified copy from the register, can be recorded and read in evidence, in place of the original bond, only when the original is lost or destroyed. Unless it is made to appear that the original is lost or destroyed, there is no provision making the certified copy of the register evidence. But we have seen that the clerk is required to make a record of the sheriff's bond. The manner of proving all records in Courts, other than those to which they belong, is by certified copies. The fact that these bonds are required to be registered, and in case of loss or destruction, that
(486) the register may give certified copies, does not prevent certified copies from the Clerk of the Court of which they are a

record, from being evidence. But it is urged that the certificate of the Clerk does not show that the bond had ever been recorded. It appears from the record that the execution of the bond was acknowledged in open Court, approved and accepted by the Court, and ordered to be registered and filed according to law. The doctrine *omnia presumuntur* etc., comes to the relief of the Clerk's certificate, even if it be conceded that it is not so full as it might have been, especially since these acts for recording and registering, are merely directory.

The second objection of the defence, to-wit: that the *fi. fa.* offered in evidence, was not properly proved, is untenable. It was sufficiently authenticated by the seal of Mecklenburg County Court.

On the question of damages, his Honor instructed the jury, that if they found for the plaintiff, they must allow the whole amount which plaintiff claimed, to-wit: the debt against Dillinger, the defendant in the execution, with interest. In this, there was error. The value of the property subject to execution, owned by the defendant in the execution, at the time the *fi. fa.* should have been levied, was the true measure of damages; and while the declaration of the defendant, to the effect that he could have collected the debt if he had not been deceived by the defendant in the excution, was proper evidence to go before the jury, to influence their minds in establishing the value of Dillinger's property, still it did not establish a rule of damages otherwise than as stated. There must be a *venire de novo.*

Per curiam.

Venire de novo.

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(487)

W. D. RUSSELL v. J. B. STEWART.

One who contracts to deliver 100 bushels of wheat, and after delivering 50 refuses to comply further with his contract, cannot recover for the amount delivered.

ASSUMPSIT, tried before *Logan, J.,* at Spring Term 1870 of MECKLENBURG Court.

The plaintiff testified that in the Fall of 1862 he had contracted to deliver to the defendant, at his mill, within two or three weeks, one hundred bushels of wheat, nothing being said as to the currency in which the price was to be paid, but he expecting to receive Con-

federate money; that he delivered fifty bushels at one wagon load, and in about a week afterwards carried the remainder to the mill (defendant being absent) and offered to deliver it if defendant would pay him three dollars per bushel in specie, but not otherwise; that the miller replied that he had no specie, but would pay Confederate money; that he would not receive the latter, and refused to deliver the wheat then with him; and that wheat was then worth one dollar and fifty cents in good money, or three dollars in Confederate money.

The defendant asked the Court to charge, that the demand of specie was under the circumstances an abandonment of the contract, and that therefore the plaintiff could not recover. This was declined, and under the instructions a verdict was found for the plaintiff, for $100.39, of which $69 is principal, etc.

Judgment accordingly; and Appeal by the defendant.

Dowd for the appellant.
Wilson contra.

(488) SETTLE, J. The plaintiff was the only witness, and, upon his own showing, the contract was executory and entire. He agreed to deliver to the defendant, at his mills, one hundred bushels of wheat, at the price of three dollars per bushel. He only delivered 50 bushels. The law is well established in this State, that, "where a contract is entire, and not made divisible by its terms, one of the parties cannot take advantage of his own default, either from laches or from wilful refusal to perform his part, for the purpose of putting the contract out of his way, so as to enable him to maintain assumpsit on the common counts, and thereby evade the rule;" that "while the special contract is in force, general assumpsit will not lie, and that the contract is considered to remain in force until it is rescinded by mutual consent, or until the opposite party does some act inconsistent with the duty imposed upon him by contract, which amounts to an abandonment." *Dula v. Cowles,* 52 N.C. 290;*Winstead v. Reid,* 44 N.C. 76; *White v. Brown,* 47 N.C. 403.

The harshness of this rule has sometime been the subject of criticism; but it is justified upon the ground that it is more important to compel parties to stand by their contracts, than it is, to relieve the few hard cases which arise under it.

But can *this* be called a hard case? The plaintiff says that when he sold the wheat, he expected to receive Confederate money in payment, although nothing was said about the currency in which it was to be paid. He further states that wheat was worth only about

one dollar and fifty cents in specie, and yet he demanded three dollars in specie, twice as much as it was worth, and twice as much as he expected to get for it, according to his own showing.

If the biter has been bitten, it will perhaps admonish him and others to stand firmly by their contracts in the future.

There was error.

Per curiam.

Venire de novo.

Cited: Brown v. Morris, 83 N.C. 256; *Jones v. Mial,* 89 N.C. 92; *Raby v. Cozad,* 164 N.C. 290.

(489)

CRONLY & MORRIS v. PATRICK MURPHY.

Upon a question whether a party, demanding of the lessor to be put into possession of premises that had been let to him, was ready and able to pay a quarter's rent in advance: *Held,* that the evidence of such party, that he was ready to pay if he had been put into possession; and that he did not hear an alleged demand of such rent by the lessor as a condition of putting him into possession, for if he had, he would have paid it, — was *some evidence* of such readiness and ability, and as such was to be left to the jury.

CASE, tried before *Russell, J.,* at January Special Term 1870 of NEW HANOVER Court.

The plaintiffs declared for breach of a contract to give them possession of certain premises, which they had leased from the defendant for one year, to begin in October 1865. The defendant resisted a recovery, upon the ground that the plaintiffs were not ready and able to pay in advance a quarter's rent, as had been stipulated for, and had been demanded by him of them at the time of their requiring possession. Upon this point, Cronly, one of the plaintiffs, who had demanded possession, testified that he did not hear the defendant make a demand for the quarter's rent at that time, for if he had, *he* would have paid it. He also testified that the plaintiffs were ready to pay if they had been put in possession.

His Honor charged that it was incumbent on the plaintiffs to show that when they demanded possession, they were ready and able to pay that part of the rent that was payable in advance; that there was some evidence of their readiness and ability, and it

was for the jury to say whether it satisfied them that the plaintiffs were ready and able to pay.

Verdict for the plaintiffs; Judgment accordingly; Appeal by the defendant.

(490) *Strange for the appellant.*
London contra.

DICK, J. There is only one question presented for our consideration by the record in this case: The counsel for the defendant asked his Honor to charge the jury, that the plaintiffs could not recover at all, because they had failed to prove their readiness and ability to pay the quarter's rent in advance at the time they were entitled to the occupation of the premises.

In questions of this character it is often a difficult matter for a Judge on the trial of a case to draw the line between defect of evidence and slight evidence; yet such a distinction exists, and should be observed as far as practicable: *Cobb v. Fogleman,* 23 N.C. 440. Where there is *any* relevant evidence, the Judge, on the trial, should submit it to the jury, that they may pass upon its sufficiency. If he submits a material fact to the jury, as to which there is no evidence, it is erroneous; for when the law does not presume a fact, it must always be sustained by proof at the trial: *Brown v. Patton,* 35 N.C. 446; *Wells v. Clements,* 48 N.C. 168.

We have examined the record in this case with care, and concur in the opinion of his Honor, that there was some evidence as to the question submitted to the jury. They have found the facts to be as alleged by the plaintiffs.

The jury are the arbiters in such matters, and the judgment must be affirmed.

Per curiam.

Judgment affirmed.

(491)

THE WESTERN RAIL ROAD COMPANY v. JOSEPH AVERY.

Where the charter of a Rail Road Company provided, that upon the failure by subscribers to its stock to pay instalments as called for, "the directors may sell at public auction" etc. such stock, and, in case enough were not produced thereby to satisfy the subscription, might sue for and recover the balance from such subscriber.

R. R. *v.* AVERY.

Held, that upon a failure by a subscriber to pay instalments as called for, it was optional with the company to bring suit against him without *making sale* as above *or*, to sell, and sue for the balance.

Also, that the plea of the statute of limitations barred a recovery of so much of such subscription as was included in calls made more than three years before suit was commenced.

ASSUMPSIT, tried before *Buxton, J.*, at Spring Term 1870 of CUMBERLAND Court.

The action was commenced on the 4th day of May 1859, and the plaintiff declared upon a subscription by the defendant for two shares of its stock, of one hundred dollars each, on the 26th day of June 1855. The pleas were, The General Issue, and, Statute of Limitations.

The evidence showed that *calls* had been made duly upon the defendant, of twenty per cent. upon his subscription, on the 1st of September 1855, and subsequently, from time to time, of other instalments, until 1st January 1857, when the residue had been required; and that, although repeatedly demanded, no part had ever been paid.

By the charter, Acts of 1852-'3, c. 147, § 9, it was provided that upon failure of subscribers to pay calls, "the directors may sell, at public auction," etc., their stock, and, in case such sale did not produce the amount subscribed, may sue for and recover the balance from such subscribers. In the present case no such proceeding had been resorted to.

The defendant submitted that suit could not be maintained without a previous resort to a sale of the stock; and also, that by the statute of limitations, a recovery was barred for the whole subscription, or at all events, for so many of the instalments (492) as had been called for at times more than three years anterior to the commencement of the suit.

His Honor overruled both objections, and, in accordance with his instructions, there was a verdict and judgment for the plaintiff, for the whole amount of the subscription, with interest.

The defendant appealed.

T. C. Fuller and Phillips & Merrimon for the appellant.
W. McL. McKay contra.

SETTLE, J. We are of opinion that the method prescribed for the collection of stock by the ninth section of the charter, is not an exclusive, but a cumulative remedy, and that the company had its option to pursue the course there pointed out, or to sue the defendant

upon his personal liability. If the charter had provided that no other remedy should be pursued, or if there had been a general law to that effect, the first position of the defendant could have been maintained, but in the absence of such provisions the law is settled, that the remedy given by the charter is only additional to the common law remedy; 1 Redfield on Railways, 162.

Upon the second point we have had more difficulty, but after a careful examination of authorities, we have arrived at the conclusion, that the statute of limitations commenced to run on each instalment, from the day upon which the call for its payment was made. When the defendant became a stockholder, he agreed to pay such instalments as the board of directors might, from time to time, call for, and when he failed to do so, he at once became liable, not only to the remedy prescribed by the ninth section of the charter, but also to an action of assumpsit for such instalments as had been demanded and were then due. The company elected to waive
(493) the remedy given by the charter. Of course then, the statute commenced to run when the cause of action accrued, to-wit: as to each instalment, when it became due by the call of the company: 3 Parsons on Contr. 93. If a bill or note be payable by instalments, the statute begins to run from the date of each instalment respectively: *Gray v. Pindar,* 2 B. & P. 427.

As there was error in the instructions of his Honor on this point, the defendant is entitled to a *venire de novo.*

Let this be certified.

Per curiam.

Venire de novo.

Cited: Redrying Co. v. Gurley, 197 N.C. 59.

WILLIAM H. HUGHES, EX'R, AND OTHERS v. CHARLES SMITH AND OTHERS.

A script purporting to be a holograph will, was found in a drawer inside of a desk, between a bag of gold coin and a bag of silver coin; and immediately above the drawer, in pigeon-holes, were found notes, bonds and other valuable papers, arranged in files; the drawer and pigeon-holes were secured by the same door and lock: *Held,* that the script was properly *deposited,* under the act defining the requisites of holograph wills.

The change in that act as found in the Revised Statutes, by which, as reproduced in the Revised Code, "or" has become "and," does not affect the construction previously given.

HUGHES *v.* SMITH.

CAVEAT, tried before *Watts, J.*, at Spring Term 1870 of NORTHAMPTON Court.

The script propounded purported to be a holograph, and the only question was, whether it had been found in a proper place of deposit. That place was an upright desk, with a door swinging on hinges at the bottom, and locked at the top. The door (494) protected a space occupied, above by pigeon-holes, and, below, by two small drawers which were closed but had no locks. In the pigeon-holes were found, — filed, and covered with a cloth-wrapper, — notes, etc., belonging to the deceased, to the value of seventy thousand dollars or more. The script was found in one of the drawers. Above it was a bag containing gold coin, ($177.50), and below it, a bag containing silver coin, ($56.00).

His Honor being of opinion that this was not a proper place of deposit, within the meaning of the statute, there was a verdict and judgment accordingly.

The propounders thereupon appealed.

Bragg and Peebles & Peebles for the appellants.
Smith and Barnes contra.

1. The requirements of the statute must be *strictly* complied with. *Graham v. Graham,* 32 N.C. 219, *Little v. Lockman,* 49 N.C. 494, *In re Cox's Will,* 46 N.C. 321, 1 Redf. Wills, 231.

2. The script must be found *among* the valuable papers and effects of the deceased. Rev. Code, c. 119, § 1.

DICK, J. The only question presented, is whether the holograph script propounded for probate, was found in such a place of deposit as to satisfy the requirements of the statute: Rev. Code, ch. 119, sec. 1. Similar questions have often been before this Court, and the principles by which they are governed, are well settled: *Little v. Lockman,* 49 N.C. 494; *Hill v. Bell,* 61 N.C. 122.

The requirements of the statute are sufficiently complied with if the script is found among the valuable papers and effects, under such circumstances as to show that the deceased regarded it as a valuable paper, and desired it to take effect as his will. The change of the conjunction "or," in the Revised Statutes, to (495) the conjunction "and," in the Revised Code, does not affect the construction of the statute. If the word "and" is taken in its strict conjunctive sense, the statute would be virtually repealed, or its benefits greatly diminished; as but few persons who manage their business with order and system, keep their valuable papers

and effects mixed up together. Notes, bonds, etc., are usually kept together in proper files, and currency, coin, jewels, etc., are deposited in a more secret place.

In the case of *Little v. Lockman, supra,* the script propounded, was found in the drawer of a bureau, among some useless papers and rubbish, and there were valuable papers and effects kept in another drawer of the same bureau. Under such circumstances the Court properly held that the script was not found in such a place of deposit as was contemplated by the statute. In our case the script was found in a drawer inside of a desk, deposited between a bag of gold coin, and a bag of silver coin, and just above the drawer, in pigeon-holes, were found notes, bonds and other valuable papers properly arranged in files. The drawer and pigeon-holes were secured by the same door and lock. This drawer was a very appropriate place for the keeping of the coin, as it was concealed from view when the desk was opened, and was such a place of deposit for the holograph script as to meet the strict requirements of the statute.

There was error in the ruling of his Honor, and there must be a *venire de novo.*

Per curiam.

Venire de novo.

Cited: In re Sheppard's Will, 128 N.C. 55; *In re Jenkins,* 157 N.C. 434; *Phosphate Co. v. Johnson,* 188 N.C. 426; *In re Westfelt,* 188 N.C. 709; *In re Will of Groce,* 196 N.C. 376; *In re Will of Williams,* 215 N.C. 267; *In re Will of Gilkey,* 256 N.C. 420.

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(496)

JOHN WHITE v. WILLIAM HUNT.

Where a debtor promised his creditor to leave a sum of money in the hands of a third person, in part payment of what was due, and did so, that third person agreeing to hold it for the creditor: *Held,* that upon his refusing to pay it, the creditor could bring an action against him for the money.

CIVIL action, commenced before a justice, tried by *Watts, J.,* at Spring Term 1870 of WARREN Court.

One Claiborne being indebted to the plaintiff, it was agreed between them that the former should leave with a certain person (the defendant) seventy-five dollars, in payment of the debt. The de-

fendant, having a settlement shortly after with Claiborne on account of work being done by the latter, fell into his debt more than the above amount, and agreed to retain the seventy-five dollars for the plaintiff, paying the residue to Claiborne. Within a few hours afterwards he discovered that the work had been so badly done that he would not owe Claiborne the seventy-five dollars; and in a conversation with the plaintiff, after admitting that the seventy-five dollars had been so left with him as above, refused to pay it, as he considered that he owed Claiborne nothing, but was rather his creditor.

These facts were found before his Honor, by special verdict. Upon them judgment was given for the defendant, and the plaintiff appealed.

Rogers & Batchelor for the appellant.

1. The Statute of Frauds does not apply. *Draughn v. Bunting,* 29 N.C. 10; *Rice v. Carter,* 11 *ib.* 298; *Stanly v. Hendricks,* 13 *ib.* 83.

2. The plaintiff can recover for money had and received. 1 Ch. Pl. 4, and cases above, also *Arnold v. Lyman,* 12 Mass. (497) 400; *Winslow v. Parker,* 61 N.C. 565. See "Novation" discussed, 1 Pars. Cont. 217.

Bragg and Eaton & Montgomery contra.

1. The contract is void by the Statute of Frauds. *Brittain v. Thrailkill,* 50 N.C. 329; *Rogers v. Rogers,* 6 *ib.* 300.

2. Claiborne, in fact, left no money with the defendant.

3. The promise was made under a mstake of facts. If the money had been paid to Claiborne, it could have been recovered back by the defendant, and the plaintiff is in no better case than Claiborne would have been. Sand. Pl. & Ev. 675; *Pool v. Allen,* 29 N.C. 120; *Nowell v. Marsh,* 8 *ib.* 441.

4. There is no *privity* between the parties to this action. *Williams v. Everett,* 14 East. 595.

5. There could be no extinguishment of the debt from Claiborne to the plaintiff, but upon a communication between all the parties. 9 B. & C. 591; Brown on Actions, 525. See 4 B. & C. 163.

READE, J. By an agreement between the plaintiff and his debtor Claiborne, the latter was to leave in the hands of the defendant, for the plaintiff, the sum of seventy-five dollars, as a payment *pro tanto*

of his debt. The debtor did leave the amount as promised, and the defendant accepted it for the plaintiff. The moment he did so it was a satisfaction of the plaintiff's claim against his debtor. The question is, what obligation did that impose upon the defendant to the plaintiff.

If he had refused to receive the money for the plaintiff, then the plaintiff would have lost nothing, because he would still have had his claim against Claiborne; but by receiving it the de-
(498) fendant consented to become the agent of the plaintiff, and the plaintiff's claim against Claiborne was discharged. This loss to the plaintiff induced by the defendant's accepting the money, was a sufficient consideration to imply a promise on the part of the defendant to pay the plaintiff: *Winslow v. Fenner & Co.*, 61 N.C. 565; *Dixon & Co. v. Pace*, 63 N.C. 603.

Judgment reversed, and judgment here for the plaintiff.

Per curiam.

Judgment reversed.

Cited: Peacock v. Williams, 98 N.C. 328.

DOE ON THE DEM. OF JAMES H. LASSITER v. A. H. DAVIS.

Where a conveyance of lands is made upon a valuable consideration, it is erroneous to make its validity as against creditors to depend upon the intention with which *the vendor* (alone) made it, *ex. gr. his* intention to *hinder*, etc., his creditors.

It seems to be otherwise where the conveyance is voluntary, merely.

EJECTMENT, tried before *Watts, J.*, at Spring Term 1870 of GRANVILLE Court.

The plaintiff claimed title under a sheriff's deed, by virtue of an execution in a suit by a creditor of one Merryman against the latter. Two months before the recovery of the judgment in that suit, *i.e.* in March 1867, Merryman sold the land to the defendant for ten thousand dollars. At that time he was insolvent, being indebted not only to the creditor above, but otherwise.

His Honor instructed the jury, amongst other things, that if, at the time the said deed to the defendant was executed, it was done by the said Merryman with intent to hinder, delay or defraud
(499) the plaintiff's lessor, or any other creditor of the said Merry-

man, then the said deed would be void, and that nothing which was done by the parties subsequently would give it validity; that though what was done after the execution of the said deed could not change the consideration upon which it was executed, yet it might throw light upon the intention of the parties in the execution of the same.

Verdict for the plaintiff. Rule, etc.; Judgment, and Appeal by the defendant.

Graham and Rogers & Batchelor for the appellant.
Bragg contra.

READE, J. His Honor instructed the jury, "that if, at the time the deed to the defendant was executed by Merryman, he, Merryman, had the intent thereby to hinder, delay or defraud the plaintiff who was his creditor, or any other of his creditors, the deed was void."

His Honor did not allow the character of the contract to govern, but simply the intent of *one* of the parties. If this were the law, then it would never be safe to purchase any thing — certainly not without inquiring into the intent of the vendor: and even then he might *declare* a good intent, and yet be *induced* by a bad one, and then the bad one would govern. In the case of *Devries v. Phillips,* 63 N.C. 64, his Honor below had charged that "if the conveyance were to pay a *bona fide* debt, it will be upheld, although the debtor made it with a fraudulent intent." This Court overruled his Honor, and said; "This charge is so broad we cannot sustain it." That might seem to sustain the charge in this case: but a charge must be understood with reference to the facts in the particular case; and in *Devries v. Phillips, supra,* there were badges of fraud upon the conveyance itself, and of course whatever was apparent upon the face of the deed between the parties, both parties were cognizant, of and participated in. In *Rose v. Coble,* 61 N.C. 517, this (500) Court said: "To render a contract void for fraud, the fraud must affect the *contract.* A contract is not the purpose of one, but the agreement of two minds;" and of course both parties must intend the fraud: see also *Hafner v. Irwin,* 23 N.C. 490; *Stone v. Marshal,* 52 N.C. 300.

The distinction seems to be this: 1. A "voluntary gift or settlement" is void, if it was the intent of the maker to hinder, delay or defraud, whether the party who takes the gift, participated in the fraudulent intent or not. 2. An absolute conveyance for a valuable consideration, is good, notwithstanding the intent of the maker to

defraud, unless the other party participated. The fraud must enter into and affect the *contract.*

There was error.

Per curiam.

Venire de novo.

Cited: Reiger v. Davis, 67 N.C. 190; *Hicks v. Skinner,* 71 N.C. 557; *Humphrey v. Ward,* 74 N.C. 787; *Worthy v. Caddell,* 76 N.C. 85; *Bruff v. Stern,* 81 N.C. 189; *Rollins v. Henry,* 84 N.C. 575; *Cannon v. Young,* 89 N.C. 266; *Savage v. Knight,* 92 N.C. 500; *Beasley v. Bray,* 98 N.C. 270; *Battle v. Mayo,* 102 N.C. 440; *Cox v. Wall,* 132 N.C. 741; *Calvert v. Alvey,* 152 N.C. 613.

STATE EX REL. W. A. SULLIVAN AND WIFE v. C. F. LOWE AND A. HARGRAVE.

A Clerk is not liable upon his official bond, for a failure by him to issue *ex officio* a notice to a guardian, to renew *his* bond.

CIVIL action upon an official bond, tried before *Cloud, J.,* at Spring Term 1870, of DAVIDSON Court.

The case was, that the defendant Lowe had been Clerk of the County Court of Davidson, and that the other defendant was one of his sureties. Whilst Lowe was Clerk, one Henderson Adams was guardian of the *feme* plaintiff, and the time for renewing his bond having come around, (August Term 1853,) he failed to do
(501) so. Thereupon, it was the duty of Lowe to notify him thereof: (Rev. Code, c. 54, § 10). He neglected to do so. Subsequently, Adams and the sureties upon his said bond failed, and the ward having suffered loss thereby, brought this suit, claiming that Lowe and his sureties, on account of the neglect above, were liable to indemnify him for his loss.

Under the instructions of the Court, the defendant had a verdict; and thereupon the plaintiff appealed.

Gorrell for the appellant.

Clement contra.

READE, J. The question is, whether a Clerk of a Court and his sureties, are liable upon his official bond, for the failure of the

Clerk to issue *ex officio,* a notice to a guardian to renew his bond. This question was before this Court in *State ex rel. Lee v. Watson,* 29 N.C. 289, and again in *State ex rel. Jones v. Biggs,* 46 N.C. 364.

In the first case, it was decided by a divided Court, that he was; and in the last case, by a divided Court, that he was not liable.

It was supposed by the plaintiff's counsel, that these conflicting decisions left it an open question, and he insisted that the first decision is the better law. We have considered it as an open question, and were attentive to Mr. Gorrell's learned argument, but we adhere to the decision that the Clerk and his sureties are not liable. The question was so fully discussed and considered in the cases referred to, that it would be superfluous to repeat the discussion here.

There is no error.

Per curiam.

Judgment affirmed.

NOTE.—The case of W. A. Myers and wife, against the same defendants, received a similar determination at this Term.

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(502)

McKESSON & HUNT v. MENDENHALL AND OTHERS.

In defence to an action upon a note, the defendants, by way of counterclaim, alleged that it was given to the plaintiffs for rent of a tract of land, and that other parties, claiming such land by title paramount to that of the plaintiffs, had sued one of the defendants, seeking damages for its occupation during the time for which the note was given; and thereupon, by order of court, the owners were made parties plaintiff to the suit; the original plaintiffs then elected to be non-suited: *Held,* upon an appeal by the interveners from this judgment of nonsuit:

1. That they had a right to take a non-suit;

2. That although non-suited, the action would go on for the interveners, and the persons non-suited would be bound by the result of the suit, as privies thereto.

A plaintiff may elect to be non-suited in every case where no judgment, other than for costs, can be recovered against him by the defendant, and when such judgment may be recovered, he cannot.

The defendants had a right to ask for a bond for costs from the interveners, as the parties non-suited ceased to be liable, except partially.

MOTION for a non-suit, heard by *Mitchell, J.,* at Spring Term 1870, of BURKE Court.

The principal facts are reported in S.C. *ante* p. 286.

Since the last term of this Court, in accordance with an intimation in its Opinion, as heretofore reported, the persons claiming to own the land (the heirs of McDowell,) were allowed by his Honor Judge Mitchell, upon affidavit filed, to become parties plaintiff, and file a complaint against all the original parties, and thereupon the former plaintiffs moved that they be permitted to take a non-suit. This was resisted by the McDowells, but was allowed by his Honor.

The McDowells appealed.

C. M. Busbee for the appellants.
Folk contra.

(503) Rodman, J. Under the opinion given in this case, *(ante* 286,) the infant heirs of McDowell by their guardian, were permitted at Spring Term 1870, of Burke Superior Court, to intervene, and become parties plaintiff. Thereupon the original plaintiffs elected to be non-suited, which was allowed, and from this the McDowells appealed.

The single question presented, is, the right of the plaintiffs to take a non-suit. We think they have it.

In 1 Tidd, Pr. 458, it is said that the judgment of *non pros.* or *non-suit,* (the two terms meaning the same thing, but the former being proper in actions by *bill,* and the latter in actions by original writ,) is founded on the statute 13 Car. II, which enacts that unless the plaintiff shall file his declaration within a certain time, a judgment of non-suit may be entered against him. Section 78 of our Code of Civil Procedure, contains a similar provision. It was also formerly usual before the jury gave their verdict, to *call,* or demand the plaintiff, in order to answer the amercement to which, by the old law, he was liable in case he failed in his suit, and it is now usual to *call* him whenever he is unable to make out his case, etc.: 2 Tidd, Pr. 867. The failure of the plaintiff to appear when called, is regarded as a renunciation of his action. It is sometimes said that a judgment of non-suit can only be at the instance of the defendant; but the cases cited for that only prove that the Court will not give it *ex mero motu,* but only at the instance of one of the parties; and the proposition can only be maintained to the extent that the Court will not allow a plaintiff to become non-suit to the prejudice of the defendant, and in a case in which, although nominally a plaintiff, he is substantially a defendant. As the plaintiff possessed the power of becoming non-suit when called before verdict, it became a general practice to allow him to do so at any time before verdict, when he desired from any cause to abandon his action. So long as

he is merely a plaintiff, the Court has no means by which he can be compelled to appear and prosecute his suit against (504) his will, and no injury can result from allowing him to abandon it. When, however, by the pleadings, he ceases to be merely an *actor,* and becomes also a defendant, as, for example, if a defendant pleads a set-off exceeding the admitted demand of the plaintiff, and demands judgment for the excess, the right ceases. For this reason it was at one time doubted whether a plaintiff could become nonsuit after a plea of tender, or payment of money into Court. But it is now held that he can: Tidd, Pr. 868. The principle would seem to be, that a plaintiff may elect to be non-suited in every case where no judgment other than for costs, can be recovered against him by the defendant, and when such judgment may be recovered, he cannot.

Can the interveners, or the defendants, in this case be injured by the plaintiffs' abandoning their action?

The action is on a note, and the defendants allege that the consideration of it was the demise of certain land to them by the plaintiffs, and that the heirs of McDowell, claiming by paramount title, have sued them for the use and occupation of the land during the term for which it was demised by the plaintiffs.

For the reasons stated in 2 Story Eq. Jur. § 812, the claim of the defendants for the intervention of the McDowell heirs, cannot be considered as strictly in the nature of a bill of interpleader. The practice, however, must, from the nature of the case, be very much as if it was. The right of the defendants to have the intervention stands on C.C.P. §§ 60 and 61, which declare in substance that all persons may be made parties whose presence is necessary for a complete determination of the matters in controversy.

The demand for intervention must be regarded as in the nature of a bill *quia timet.* The argument for that view, and the consequences claimed to follow from it, are as follows: (505)

1. Every demise implies a warranty for quiet enjoyment, unless the contrary be expressed: Smith's Landlord and Tenant, 208, 214. The plaintiffs warranted the quiet enjoyment of the defendants.

2. A recovery by the McDowell heirs against the defendants for use and occupation of the demised premises during the term, would be *pro tanto* equivalent to an eviction: Smith Land. and Ten. 129; *Jones v. Morris,* 3 Exch. 742.

3. The defendants (assuming that they have an express or implied warranty of quiet enjoyment from the plaintiff,) have a right to recoup from any sum due the plaintiff for rent, whatever may be

recovered from them under the paramount title of the McDowell heirs: Smith L. and T. *up sup.; Snead v. Jenkins,* 30 N.C. 27.

4. It follows from these premises, that the plaintiffs cannot retire from the controversy between the McDowell heirs and the defendants, but must remain present as parties, in order that they may be bound by the determination of the controverted points, which may be supposed to be; (1.) The paramount title of the McDowells, (2.) The value of the use and occupation of the defendants. This enumeration omits those questions which may be controverted between the plaintiffs and defendants, but in which the interveners have no concern.

The first of the above propositions is correct in law; how the fact may be is a question not before us. It is a question in which the McDowells are not interested, and which will be for decision between the plaintiffs and defendants, whenever the plaintiffs shall prosecute an action to recover upon their note for rent. As to the second and third propositions, we think they are law. The fourth we consider incorrect, in this: it is not necessary that the plaintiffs shall remain nominal parties to the action in order that they (506) may be bounded by its results. Notice to them, and an opportunity to take a part in the controversy, will suffice. They may cease to be nominal parties, but they remain privies, and as such will be bound. 1 Greenl. Ev. §§ 523, 536; *Hamilton v. Cutts,* 4 Mass. 349; *Perkins v. Pitts,* 11 Mass. 125; *Boyd v. Whitfield,* 19 Ark. 447; *Haight v. Hoyt,* 19 N.Y. (5 Smith,) 464.

The McDowells have no right in this action to recover any thing of the plaintiffs. Whatever claim they may have against the plaintiffs, either as trespassers, or for use and occupation, must be prosecuted in a separate suit; the defendants have no interest in it; it is foreign to the purposes of the intervention, and would be multifarious.

From this it follows that neither the defendants nor the interveners can be prejudiced by a withdrawal of the plaintiffs from the action. They may, if they choose, decline further to prosecute their claim, but they will be bound by the result of the issues between the interveners and the defendants, as if they had remained parties.

It may be proper to say, as the question was made on the argument, that the original plaintiffs cannot be liable for any costs of the interveners, except so far as these, if recovered against the defendants, may be properly regarded as a part of the damages from the eviction. The defendants have a right to require that the interveners shall give an undertaking for their costs, such as is required of plaintiffs.

Several other questions of interest were discussed at the bar:

1. Whether, supposing the demise from Gov. Manly to the plaintiffs invalid, it was ratified by the receipt of rent from the plaintiffs by the guardian, Mrs. McDowell.

2. Supposing the demise to have been thus ratified, whether upon the insolvency of the plaintiffs, the McDowell heirs can recover from the defendants for their use and occupation of (507) the demised lands.

These, and perhaps other questions, may come up for determination on the trial of the issues between the interveners and the defendants, and it would be premature to intimate any opinion.

There is no error in the judgment appealed from; the appellants will pay the costs of this Court. Let this Opinion be certified.

Per curiam.

Judgment affirmed.

Cited: S.c., 64 N.C. 286; *McKesson v. Jones,* 66 N.C. 263; *Pescud v. Hawkins,* 71 N.C. 300; *Purnell v. Vaughan,* 80 N.C. 49; *Whorton v. Comrs.,* 82 N.C. 16; *Bank v. Stewart,* 93 N.C. 404; *Bynum v. Powe,* 97 N.C. 377; *Weeks v. McPhail,* 128 N.C. 137; *Strouse v. Sawyer,* 133 N.C. 66; *Dawson v. Thigpen,* 137 N.C. 468; *Campbell v. Power Co.,* 166 N.C. 490; *Haddock v. Stocks,* 167 N.C. 73; *Cahoon v. Cooper,* 186 N.C. 28; *Caldwell v. Caldwell,* 189 N.C. 811; *Light Co. v. Mfg. Co.,* 209 N.C. 561; *Sink v. Hire,* 210 N.C. 403; *Scott v. Scott,* 259 N.C. 647.

W. S. CAFFEY v. OBED McMICHAEL.

In passing the accounts of a guardian, he cannot, except under rare circumstances, be allowed disbursements beyond the income of his ward.

Where a guardian had purchased a horse and buggy for his ward, and in so doing, had gone greatly beyond his income, but the ward used them for some time after he became of age, and then sold them, and received the money for them, — he must be taken as having ratified the transaction.

BILL in Equity, filed in 1860, in ALAMANCE, and removed to this Court, at June Term 1869.

The suit was by a former ward against his guardian, for an account; under an order of the Court, the account had been taken; and the plaintiff filed two exceptions thereto, viz:

1. That there was a mistake to a small extent, in crediting the guardian at February Term 1869;

2. That the guardian was allowed for year 1859, disbursements to the amount of $625.86, whereas the ward's income for that
(508) time was only $42.84.

Graham and Hill for the exceptions.
Scott & Scott contra.

SETTLE, J. The plaintiff's first exception is sustained. The guardian's return to February Term 1869, shows that he was indebted to his ward in a small amount, and we see nothing to justify the report, that the ward was indebted at that time, to the guardian.

As to the second exception: The power of a Court of Equity to apply the capital of a ward's estate for maintenance, either future or past, is conceded; but as a general rule, the Court will not order the capital to be expended for maintenance or education. In *Long v. Norcom,* 37 N.C. 354, it was held that the guardian was entitled to be reimbursed out of the capital of the estate, for his expenditures in behalf of his ward, who was of a very feeble constitution, and whose health, and indeed life required that he should leave the locality in which he resided.

The guardian has shown no circumstance in this case to take it out of the general rule. But he has expended almost the entire capital, without ever asking the permission of the Court of Equity to do so. It is no answer to say that it was done with the best of motives, and that the ward received the full benefit of these expenditures. The reply to that suggestion, is, that it is against the policy of the law to allow a guardian, of his own accord, and without the consent of the Court, to make such expenditures; and experience has shown, in a large majority of cases, that such indulgences to a minor prove far more injurious than beneficial. It is in truth, breaking down the very security which the law has attempted to throw
(509) around him before he arrives at years of discretion.

These principles lead to the conclusion, that the guardian was not justifiable in expending more than the profits of his ward's estate.

But as the ward retained a horse, buggy and harness, which he had purchased of his guardian, and used them for some time after he became of age, and finally sold and received the money for them, he must be held to have ratified this transaction; and the guardian is entitled to be credited by the amount which the plaintiff agreed to pay for this property. If a ward receives property during infancy, and either spends, consumes, wastes or destroys it, he can elect, upon

arriving at full age to avoid the contract by which he came into possession of the property, but a purchase of a chattel by an infant is confirmed by any unequivocal act of ownership exercised by him over the chattel after he is of age, as by selling or otherwise converting it to his use; so that he will be liable on a note given during infancy for the chattel: 1 Hare & Wal. Amer. L. C. 113; 2 Greenl. Ev., § 367.

There was error in confirming the report.

This being a case under the old system, and all the papers having been transferred to this Court, it will be referred to the Clerk here to reform the report in the particulars indicated by this opinion.

Per curiam.

Ordered accordingly.

Cited: Candler v. Jones, 172 N.C. 572; *Barger v. Finance Corp.,* 221 N.C. 65.

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(510)

E. A. WRIGHT v. J. D. FLANNER, EX., ETC.

Where an executor defendant at Spring Term 1867 had pleaded Fully administered, and a reference had been had under such plea, and a report made charging him with assets: *Held,* that the Court had no power at a subsequent term, in May 1870, to allow the defendant to strike out such plea, and to plead anew.

MOTION to amend pleading, heard by *Thomas, J.,* at May Special Court 1870, for WAYNE.

This was an action begun on the 15th December 1866, to which the defendant, at March Term 1870 of Wayne Superior Court, pleaded, that he had fully administered, and had no assets: it was referred to a referee to inquire and report as to the truth of this report; the referee reported, and it must be assumed, although it is not expressly stated, that his report showed assets in the hands of the defendant, applicable to the plaintiff's claims. At a Special Term in May 1870, the defendant excepted to the report, and moved for leave to withdraw his former plea, and to plead anew, which the Judge allowed; and from that order the plaintiff appealed.

Isler for the appellant.
Moore contra.

RODMAN, J. (After stating the case as above.) Every plea must be true at the time it is pleaded: the difference therefore between the issues made by the plea "fully administered" pleaded at March Term 1867, and the same plea pleaded in May 1870, is sufficiently obvious. Under the latter the defendant would have the benefit of any payment of debts of equal dignity with the plaintiff's, made by him since his first plea. We do not here say that there may not be circumstances which would justify a Court, under its (511) general power of allowing amendments of pleading, to allow an amendment with such an effect; but the circumstances would be peculiar, to make such an amendment equitable. It is suggested in the present case, that the Judge supposed himself constrained to allow the amendment, by section 80 of chapter 113 of the acts of 1868-'69. What the effect of that section might be, were it applicable in this case, it is unnecessary to consider. The act of 1870, chapter 58, page 90, ratified February 16th 1870, declares that the act above referred to, was intended only to apply to cases in which letters of probate or administration were granted subsequently to July 1st 1868. There are some exceptions in this act, which it is not necessary to notice. This act could scarcely have been known to the Judge at the time of his decision. But it governs this case.

How far the defendant may avail himself of the act of 1866, allowing preference in certain cases, we are not called on to consider.

We think there is error in the order appealed from. Let this opinion be certified.

Per curiam.

Error.

(512)

JOHN A. DODSON v. W. A. MOORE AND S. L. GILMER.

Where a contract for the purchase of tobacco required certain acts to be done in regard to it, (such as payment of the U. S. Tax, a permit etc.,) before it was accepted, and afterwards the defendant accepted it, knowing that such acts had not been done: *Held*, that he could not resist payment of the price agreed upon, by alleging that conditions had not been performed:

Nor, if the doing of such acts was suspended with the consent of the U. S. officers, and was *bona fide, and not intended* to defraud the government of its revenue, although the transaction may have been irregu-

lar, — could the defendant shelter himself from liability, by showing such omission to have been in violation of the law.

ASSUMPSIT, tried before *Cloud, J.*, at Spring Term 1870, of SURRY Court.

The plaintiff declared for the price of forty-one boxes of manufactured tobacco, sold to defendants as partners. The pleas were, General issue — Payment and set-off. There was evidence, by the testimony of plaintiff, tending to show that on the 14th day of September, William A. Moore, one of the defendants, agreed with the plaintiff, to purchase fifty-one boxes of manufactured tobacco of different qualities, at stipulated prices — forty-five boxes of which were to be delivered the next Monday, and the other six boxes to be delivered in a short time. The tobacco was to be duly branded and stamped, and the United States Revenue duly paid, and the proper permits, required by the officers of the United States, were to be furnished by plaintiff. The defendants were to pay $500 in thirty days, and the balance as soon as the tobacco could be sent off and sold.

On the day fixed, the defendants sent for the tobacco, — the plaintiff was not at home, but thirty-four boxes were deliv-
ered. A few days afterwards eleven boxes more were deliv- (513)
ered to defendants. The six boxes were never delivered, but were ready in two weeks. The tobacco was branded, and stamped, *Tax paid*, by a duly appointed inspector, but in fact, the taxes on the tobacco were not paid. One Job Worth, a deputy collector, took from the plaintiff, a bond for the payment of the taxes, to which the defendants were sureties, and the taxes were paid, a part in thirty days, and the balance in nine or twelve months afterwards. No permits authorizing the removal of the tobacco from the Factory, were furnished with the tobacco by the plaintiff. A part of the tobacco was afterwards seized in Macon, Ga., by one McBerny, a collector of United States Revenue. The grounds of seizure were not in evidence. Defendants told plaintiff the tobacco had been seized, and proposed, if plaintiff would go to Greensboro' and get the matter arranged so that the tobacco seized should be given up to them, they would pay in ten days for all that had not been seized, and in thirty days for all of it. Plaintiff went to Greensboro', but the tobacco was not released.

It was in evidence, by one John Worth, who was an Assistant Assessor of the United States Internal Revenue; that he was present when the thirty-four boxes of tobacco were delivered; that the manager of the plaintiff's factory was unwilling to let the tobacco go without the permits. He, witness, told him it would be all right. The

tobacco was then delivered to one C. W. Lewis. At the plaintiff's request, Worth, some days after the defendants had received the thirty-four boxes of tobacco, furnished the defendants with the permits for removing the tobacco, in the usual form, except there was no collector's seal; and he, the witness, signed the name "John Crane, by Job Worth deputy."

The defendants asked the Court to charge the jury, that the plaintiff must comply with his part of the contract before he could call upon the defendants to comply with theirs, and that un-
(514) less the plaintiff had satisfied the jury that plaintiff had delivered the tobacco, duly stamped, branded and the United States Revenue duly paid, accompanied with the proper permits, he was not entitled to recover.

The Court declined so to charge, but said, if the defendants received the tobacco, knowing the tax had not been paid, they would be liable.

The defendants asked the Court to charge the jury, that if the taxes had not been paid as required by law, before the removal of the tobacco from the factory, the selling and removing was in violation of law, and that, although defendants knew that the taxes had not been paid, the plaintiff could not recover. The Court refused, and charged the jury, — I take the law to be that the taxes must be paid before the tobacco is removed from the factory, and that it is against the law to remove it until paid, yet the plaintiff is entitled to recover.

Defendants asked the Court to charge, that if the tobacco was removed without the permits to remove required by law and the Treasury department, plaintiff would not be entitled to recover. The Court declined to do so. And charged the jury, that it made no difference, the plaintiff was entitled to recover; that the Court would assume that the law required the permits as insisted upon by the defendants, but that the defendants had received them — they had judged whether they were all right, and that the defendants should have the benefit of that point. Verdict and Judgment for the plaintiff. Defendants appealed.

Boyden & Bailey for the appellant.
Clement contra.

READE, J. If, by the terms of the contract, there was anything to be done by the plaintiff to the tobacco to facilitate its
(515) sale, which was not done, it was optional with the defendants whether they would receive it; and refusing to receive it, they

might have had redress against the plaintiff for a breach of the contract. But having received it with the full knowledge of its condition, and of all that was wanting, if anything was wanting, of compliance with the contract, the defendants cannot refuse to pay the price agreed on.

The defendants allege that the failure to pay the tax, and the giving a bond therefor, and the removal of the tobacco from the factory without the proper permits, was a fraud upon the government of the United States; and that, therefore, the plaintiff cannot recover. If it was an intentional fraud upon the United States, however ungracious it might be in the defendants to allege it, — they being parties to it — we would, as we said in *Haight v. Grist, post* 739, gravely consider whether we would enforce the contract. But it is not alleged in the pleadings, and does not appear in fact, that the plaintiff *intended* to defraud the United States. It is true that he did not pay the tax to the officer at the time, but he gave him a good bond therefor, and subsequently paid it. It is true also, that he did not furnish the "permits" at the time of delivery; but that was because he could not, and he objected to delivering the tobacco until he could do so, but the defendants insisted upon receiving it, and the United States officer sanctioned the delivery, and promised to furnish, and did furnish, the permits.

There may have been some irregularity in this liberal dealing by the Government officer with the plaintiff, but it seems to have been without a fraudulent purpose, and the defendants can take no advantage from it.

There is no error.

Per curiam.

Judgment affirmed.

Cited: Davis v. Evans, 133 N.C. 321.

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(516)

GEORGE SETZER v. THE COMMISSIONERS OF CATAWBA COUNTY.

Money lent to a County during the recent war, in order to procure salt for the use of soldiers' families and others, cannot be recovered; nor does it make any difference that the debt has been recognized by the County since the Surrender, and a part of it paid.

Quœre, Whether County officers who pay, and the creditor who receives payment of, such money, are not liable to repay it to the County?

SETZER *v.* COMMISSIONERS.

MANDAMUS, tried before *Mitchell, J.,* at Spring Term 1870, of CATAWBA Court.

The case made by the parties, showed that in 1862 the County authorities, pursuing the provisions of the Ordinance of Dec. 6th, 1861, borrowed a large sum of money from the plaintiff, in order, as was known to the plaintiff, to procure salt for the families of soldiers in the Confederate army, and for other destitute persons. The money was duly applied as designed. In 1867 the debt was recognized by the County, and having been *scaled,* was secured by notes, for about $1,267. Shortly afterwards $500 of this was paid.

The question was as to the liability of the County for a debt contracted for such a purpose.

His Honor gave judgment for the plaintiff; and the defendants appealed.

Bragg for the appellants.
Bynum contra.

I. A preliminary question is, What was the relation between North Carolina and the United States when this contract was made?

(a.) In *Thorington v. Smith,* 8 Wall. 1, it is settled that it was a *de facto* government, and that its *civil* administration was lawful, and it was the *duty* of the citizen to observe the laws of a
(517) peaceful character.

(b.) In *U. S. v. Rice,* 4 Wheat. 246, and in *U. S. v. Hayward,* 2 Gall. 485, and in *Wheat. Int. Nat. Law,* 337 and 345, 346, it is held that the conquest and military occupation of part of our territory by the public enemy, makes it foreign territory and subject to the laws arising out of that relation.

(c.) In *the Sarah Starr, Bl. Prize cases,* 69, it is settled that for all purposes of the war, it was a war with a foreign power, and involved all the usual consequences of international wars.

(d.) In the cases of the *Union Ins. Co. v. U. S.,* 6 Wall. 759, and *Armstrong's Foundry,* 6 Wall. 766, it is decided that the laws of *capture and prize* apply to the *Acts of Confiscation* of rebel property, — otherwise, the *law of nations.*

(e.) And in *Shanks v. Dupont,* 3 Pet. 260, it is held that the relation between the body politic and its members, continues the same, notwithstanding a change of government.

1. From these authorities are deduced clearly these conclusions: That we had a civil government in North Carolina competent to enact all civil laws not belligerent to the United States.

2. And that the law of nations governed the conduct of the war between the State and the United States.

3. They establish this further principle, if our case required it, that the law of nations, which is part of the common law, is as obligatory upon a nation dealing with its own subjects, as with foreign nations.

II. The second position, and main one, is, that this contract is not forbidden by the law of nations, or the law which governs a nation at war with its own subjects, in a state of rebellion, of the magnitude and acknowledged character of this.

The uniform decisions of the Courts of all nations for many ages, and the writings of eminent jurists, have settled what acts and things, constitute that "aid to a war," which is forbid- (518) den, so as to become the subject of judicial cognizance.

If two nations go to war, it is the duty of all others to stand off, and furnish no aid to either. If, however, the subjects of another government do furnish supplies calculated and intended to aid one party in the prosecution of the war, these supplies are called *"contraband of war,"* and become the subject of capture and prize.

The term *contraband* then embraces and was intended to embrace, every act or thing which is in "aid of" a war or rebellion, in a legal sense.

What then is *contraband of war?*

All merchandize is divided into three classes:

1. Articles manufactured and primarily and exclusively used for military purposes, in time of war:

2. Articles which may be and are used for purposes of war or peace, according to circumstances:

3. Articles exclusively used for peaceful purposes.

Provisions belong to the second class, and is our case. As to these the rule is, that they are contraband only when *actually* destined to the military or naval use of the belligerents. *Wheaton Int. Law* pp. 376-81. 1 *Kent. Com. Com.* pp. 134-41. *The Peterhoff*, 5 *Wall.* 58.

From these cases and the text books, is clearly derived this proposition, that salt is never contraband or in aid of war, unless *actually* destined to the military use of the belligerents, as, to a besieged *place, or the army.*

Take the illustration in *Leak v. Commissioners of Richmond County, ante* 132: Grant intercepts provisions going into Vicksburg, *a beseiged town.* They are clearly contraband. But if Vicksburg had not been besieged, and no hostile army there, it is equally clear, they would not be contraband. (519)

But we are met by the case of *Texas v. White, et al.*, 7 *Wall.* 739. We admit this to be good law, but it has no application

here, because the facts are totally different from *our* case, and the point here, did not arise there.

It is established, then, that the purchase of salt for the people of the county, was an act, lawful and innocent in itself; and he who affirms the contrary, must show it. We do not rest our case here, as we might, but assume the affirmative of establishing our innocence in fact.

The acts of Assembly are divisible into two classes: 1st. those in *aid of the war,* which are void, and 2nd, those of *civil administration,* which are valid, as settled in *Thorington v. Smith.* Note the facts in detail.

1. It is an "act for the supply of salt," and confined to that one purpose of distribution among the *home* people, without any reference to a military purpose, as in the *Texas* case.

2. No act touching military supplies was passed the same day or week, or in reference to it, as in the *Texas* case.

3. The Legislature observed the distinction between acts of a military and civil nature, and the Captions so designate them, generally, or the body of the act does. So much for the Legislature. Now as to the county:

1. The county is not sovereign, and has only limited delegated powers. Being a mere subordinate agent, the agent may be innocent, although the principal is guilty. Here all the facts establish the *unwarlike* and innocent purpose of the county.

2. The loan was made twelve months after the act, under the pressure of necessity, "great scarcity, and the people were in great need of salt," the case states. The motive then was not war, (520) but, to supply the urgent wants of our nature.

3. The most scrupulous provision was made to secure an equal and uniform distribution among all, black and white, at home, thus rebutting all hostile purpose.

4. The county passed *no act of secession,* no "series of war measures," but was a subordinate fraction of the State, and bound, willing or not, to obey; and without power to resist the State.

But the *county* might be guilty, and the *plaintiff* not. Look at him:

1. He was not in military service, and had no connection with the war. "What does not appear, does not exist."

2. His act was involuntary, the county went to him to borrow.

3. The county agent merely stated to him, that he wanted the salt for the people of the county — a non-military purpose.

4. No guilty knowledge of an unlawful purpose on his part, is shown. He was not bound to know a void act of the Legislature, and no actual notice is proved.

5. Finally, the claim is audited and allowed by the county Court in 1867.

Then, why should not this debt be paid?

If a famine had occurred in time of peace, (and history is full of instances,) a civil government, which folded its hands, stood aloof and said to the sufferers, "perish!" would have been looked upon by all mankind with horror and detestation. Is the duty less sacred, because the famine is in consequence of war and rebellion, and the government is *de facto,* and not *de jure?*

The distinction is one that the moral sentiment of mankind can never approve, and is unwarranted by authority.

The doctrine of what is "aid" to rebellion, may be carried so far as to contravene all the traditions and history of free government, and crush the very genius of liberty itself. (521)

It is an error which I am sure this Court will avoid.

PEARSON, C.J. The question is, Was the action of the wrongful State government, and of the county authorities, in respect to the manufacture of salt, and its distribution among the people during the war, *in aid of the rebellion.* This matter is fully discussed in *Leak v. Commissioners of Richmond Co., ante* 132, and the Court does not feel called on by any view of the question presented on the argument, to discuss it a second time. The full and learned argument of Mr. Bynum established the position that salt, except under special circumstances, is not contraband of war, and may, according to the law of nations, be furnished by citizens of a neutral nation to a belligerent, in the ordinary way of commerce. This position is not in point, and does not hit our case, — that of citizens owing allegiance to the government, aiding a rebellion. It is conceded in the authorities cited by Mr. Bynum, that in case of a blockade, — an attempt to introduce salt or other provisions, violates the law of nations, and the articles are lawful prizes; for the reason, that by the blockade, it is proclaimed to the world that starvation is resorted to as one of the means of compelling peace, and this being recognised by the law of nations as a means that a belligerent may resort to, any one venturing to run the blockade, does so at his peril. This doctrine is in point.

It was forcibly said by Mr. Bragg: "The late war was conducted on a scale of magnificent proportions. The whole South was in a state of siege — a blockade and military possession of ports, on the east and south! arms, on the north and west"

So, of course, the manufacture and distribution of salt by the wrongful authorities in possession of the State government, and the wrongful county authorities, was in contravention of the

(522) avowed policy of the government of the United States, and in aid of the rebellion, as tending to protract the struggle.

The position, that the action of the Justices in 1867, and the partial payments made to the plaintiff, ratified or confirmed the original transaction, is not tenable. An illegal act cannot be ratified or confirmed. The attempt to do so is itself illegal, and it may be a question whether the plaintiff and the Justices are not liable to a claim on the part of the county for the amount of county funds thus received without lawful authority, the payment by a county, city or town of any debt contracted directly or indirectly in aid of the rebellion, being forbidden by law.

There is error.

Per curiam.

Venire de novo.

Cited: Smitherman v. Sanders, 64 N.C. 524; *Logan v. Plummer,* 70 N.C. 392; *Brickell v. Comrs.,* 81 N.C. 243.

NOAH SMITHERMAN v. A. H. SANDERS AND OTHERS.

Money lent with the knowledge that it is to be used in equipping a military company about to enter the service of the Confederate States, cannot be recovered, the consideration being illegal.

That it was not lent for the express purpose of equipping such company, but merely because the plaintiff had money to lend, is immaterial.

DEBT, tried before *Tourgee, J.,* at Spring Term 1870, of RANDOLPH Court.

The plaintiff declared upon a note for $1,000, dated June 21, 1861. The defence was, that the consideration was illegal.

(523) It was shown that the defendants, who were some of the members of Randolph County Court, had met as such at the time that the note was given, for the purpose of raising money to equip a company of volunteers about to go into the military service of the Confederate States; that the plaintiff was present, and knew of their intentions; that application was made to him, to lend the money for such purpose to the County, upon a County bond; that he declined to do this, but agreed to, and did, lend it upon the private bond of the defendants, adding that they might do what they pleased with it. The money was thereupon obtained, and was used in equipping the company.

The defendants asked the Court to charge, (among other things,) that if the plaintiff knew for what purpose the money was borrowed, he could not recover.

His Honor instructed the jury that if the money was advanced on purpose to aid the rebellion, and if this was the object, or a part of the object of the plaintiff, he could not recover; but that if the plaintiff, having money to lend, wished to invest it upon good security, and lent it merely to obtain interest upon his money, then he could recover, although he knew that the defendants intended to use it for equipping a volunteer company to go into the Confederate army.

Verdict for the plaintiff. Judgment accordingly, and Appeal by the defendants.

Scott & Scott, and Mendenhall for the appellants.

The conduct of the plaintiff in lending the money, was inconsistent with his duty to the United States: *Leak v. Commissioners, etc., ante* 132; *Worthy v. Barrett,* 63 N.C. 199.

Gorrell contra. (524)

In order to vitiate the contract, the unlawful purpose must have been the motive or inducement thereto: *Phillips v. Hooker,* 62 N.C. 193; *Armstrong v. Toller,* 11 Wheat. 258, Story, Conf. 258; *Armfield v. Tate,* 29 N.C. 259; *Hodgesson v. Temple,* 5 Taunt. 181; *Dater v. Earl,* 3 Gray, (Mass.) 482; *Holeman v. Johns,* Cowp. 341; *Martin v. McMillan,* 63 N.C. 486; *Rindon v. Taber,* 11 How. 493.

PEARSON, C.J. This case is stronger than the Salt cases: *Leak v. Com'rs. Richmond, ante* 132; *Setzer v. Com'rs. Catawba, ante* 516; for here the plaintiff actually furnished money to equip rebel soldiers. So the act *per se* aided the rebellion, and amounted as much to treason against the government of the United States, as if he had furnished arms, or volunteered as a soldier. The fact that he declined to take a County bond, and required a bond executed by the Justices individually, is a subterfuge too flimsy to shield him from the consequences of his act. The legal effect was, he furnished the money to the County, taking the bond sued on as collateral security. If these defendants are compelled to pay the debt, of course they will expect to have recourse upon the county, and the transaction is the same as if he had looked to the county in the first instance. So, all of the persons concerned are *in pari delicto,* and the Courts

of the rightful government will not interfere in favor of any of them, but leave the matter as it stands.

The notion that the plaintiff furnished the money for the sake of investing in an interest-paying bond, with no concern as to what was done with it, is another subterfuge; for, as we have said, the act of itself aided the rebellion, and was an offence against the government. This is the principle of the decision in *Martin v. McMillan,* 63 N.C. 486. There, the fact of furnishing horses for the Confederate army, was an act which of itself aided the rebellion, (525) and amounted to treason. That was the ground of the decision, and the fact that the plaintiff said he was taking less than the value, for the sake of *the cause,* was merely a circumstance in aggravation. Here, the plaintiff does not act in aid of the rebellion, and has not the magnanimity to declare in favor of the side he was directly aiding, but tries to leave a hole at which he hopes to be able to creep out in case of danger.

Without a particular review of the ruling of his Honor, it is enough to say that it is not in accordance with *Martin v. McMillan, sup.,* the principle of which case governs this. His Honor ought to have charged, that if the plaintiff furnished the money, knowing it was to be used to equip rebel soldiers, the fact that he refused to take a county bond, and insisted upon having the bond of individuals, did not vary the case, and he could not recover; and the fact that he furnished the money for the sake of making an investment on interest, without being influenced by his knowledge of the purposes for which it was to be used, (provided the evidence presented the point,) did not vary the case, and still he could not recover for the act of furnishing the money with a knowledge that it was to be used to equip rebel soldiers, was of itself an act which aided the rebellion, and amounted to treason.

A, knowing that B intends instantly to shoot C, sells B. a loaded gun, — B kills C with the gun, — A is guilty of murder, and cannot be heard to say that he sold the gun for the sake of the price; for he was present, and knowingly aided and enabled B to commit the crime. His motive is not relevant to the inquiry; from the act itself, the law implies malice, and a wanton disregard of human life. Where the act of selling goods, or lending money, with the knowledge that the goods or money are to be put to an illegal use, does not, of itself, amount to a criminal offence — as selling goods knowing they are to be smuggled, or spirits, knowing it is to be retailed (526) without a license, the motive is material; and it is necessary to show that the illegal use was the motive and inducement for the selling or lending. Of this class is *Phillips v. Hooker,* 62 N.C. 193, and the cases cited. It is there held, that the act of receiving

Confederate notes in ordinary dealing not being of itself criminal, to constitute an offence, the act must be done with an intent to aid the rebellion. But when the act of selling goods or lending money with a knowledge that the goods or money are to be used in the commission of a crime, is of itself a crime, the motive is irrelevant, and the offence is complete without reference to the motive; as in the case of the loaded gun, selling horses for the use of the rebel army, or furnishing money to equip rebel soldiers. In these cases, the acts of themselves aid the commission of crime, and are *per se* criminal.

There is error.

Per curiam.

Venire de novo.

Cited: Critcher v. Holloway, 64 N.C. 527; *Martin v. McMillan,* 65 N.C. 200; *Logan v. Plummer,* 70 N.C. 393; *Lance v. Hunter,* 72 N.C. 179; *Fineman v. Faulkner,* 174 N.C. 15.

ANSON CRITCHER v. G. F. HOLLOWAY AND OTHERS.

A bond given in consideration of the loan of money with which to put a substitute into the Confederate army, is upon illegal consideration, and therefore cannot be enforced.

(READE, J., dissenting.)

DEBT, tried before *Watts, J.,* at Spring Term 1870, of GRANVILLE Court.

The cause of action was a bond for $1,600, dated February 3d 1863, the consideration of which was the loan of money, to be used, as the plaintiff knew, for the purpose of putting into the Confederate army a substitute for the defendant Holloway. (527)

His Honor instructed the jury that this formed an illegal consideration, and that the plaintiff, therefore, could not recover.

Verdict for the defendant, etc. Appeal by the plaintiff.

C. M. Busbee for the appellant.

Rogers & Batchelor contra cited *Martin v. McMillan,* 63 N.C. 486; *Turner v. N. C. R. R. Co., Ib.* 522; *Clemmons v. Hampton, ante* 264, and *Leak v. Comm'rs, ante* 132.

DICK, J. Money lent for the purpose of equipping soldiers for the Confederate army, cannot be recovered in the Courts of the rightful government: *Smitherman v. Sanders,* at this term. In our case the money was loaned by the plaintiff to the principal obligor, with a full knowledge that it was to be used for the purpose of sending a substitute to the Confederate army. If this object was illegal, then the plaintiff cannot recover.

The Confederate army was sustaining a rebellion against the rightful government, and it must necessarily follow that any act done voluntarily, and with a knowledge that it would have the effect of adding to the strength and efficiency of that army, was illegal. It was insisted in the argument, that the act of putting in one man as a substitute for another, did not add to the efficiency of the army. This may or may not have been so, but the transaction, both as to the principal and substitute, was illegal. If the principal had been conscripted and forced into the army, he would not have been guilty of rebellion; but if he furnished a substitute, that act would have been voluntary and illegal.

We will not consider further the nice distinctions presented in the ingenious argument of the plaintiff's counsel. The fact that the money furnished by the plaintiff placed a soldier in the Con-
(528) federate army, and was lent with a full knowledge that it was to be used for that purpose, vitiated the contract, and defeats the plaintiff's recovery: *Cannon v. Bryce,* 3 B. & Ald. 179, and the authorities cited in the brief of the defendants' counsel.

JUSTICE READE dissented.

Per curiam.
Judgment affirmed.

Cited: Sc., 64 N.C. 529; *Kingsbury v. Flemming,* 66 N.C. 525; *Kingsbury v. Suit,* 66 N.C. 603; *Cronly v. Hall,* 67 N.C. 11; *Logan v. Plummer,* 70 N.C. 393; *Lance v. Hunter,* 72 N.C. 179.

R. H. KINGSBURY v. WILLIAM R. GOOCH.

A bond given for money lent with a knowledge that it was to be used in hiring a substitute to go into the Confederate Army, is against public policy, and cannot be enforced.

Where a party desires to ascertain upon what particular points the verdict goes, he ought to request the Court to put such question to the jury before it is rendered.

(READE and RODMAN, JJ., *dissenting.*)

DEBT, tried before *Watts, J.*, at Spring Term 1870 of GRANVILLE Court.

The plaintiff declared upon a bond for the payment of two thousand two hundred dollars, dated July 28, 1862, with certain credits endorsed. The defendant pleaded, General issue, Payment and set off, Tender and refusal, Illegal consideration. The first plea was waived so far as it denied the execution of the bond.

It was shown that the consideration of the bond, was Confederate Treasury Notes, borrowed, as the plaintiff knew, for the purpose of enabling the defendant to put a *substitute* into the Confederate Army. There was also evidence that the defendant, (529) on the 18th of July 1863, had tendered to the plaintiff the whole of the amount then due, in Confederate money, and that the plaintiff had refused it.

His Honor intimated that the *tender* would not defeat the action, and instructed the jury that if the plaintiff knew for what the money had been borrowed, he could not recover.

The jury returned a verdict, — that they found *all the issues* in favor of the defendant. The Court enquired if they found *all* the issues in favor of the defendants. The jury remained silent, and the Court instructed the clerk to record the verdict as above. The defendant excepted, and submitted that the verdict was erroneous, inasmuch as the only issues submitted, were, Tender and refusal, and Illegal consideration, and that the jury meant to find only upon the latter. He thereupon moved for a new trial, for this reason; and also because, if the verdict were upon all the issues, it was against the evidence upon all but the last.

Motion overruled; Judgment, and Appeal by the plaintiff.

Hayes for the appellant.
C. M. Busbee contra.

DICK, J. The plaintiff cannot enforce the contract sued on, as he loaned the money to the principal obligor, with a knowledge that

it was to be used for the illegal purpose of hiring a substitute, to be placed in the Confederate Army: *Critcher v. Holloway, ante* 526. The plea of the general issue was waived on the trial, and the general verdict, although informal, is not erroneous. If the counsel of the plaintiff deemed it important to ascertain upon what particular point the jury found their verdict, he ought to have requested his Honor to put such question to them before the verdict was rendered: 3 Chit. Pr. 921.

There was no error, and the judgment must be affirmed.
(530)

JUSTICES READE and RODMAN dissented.

Per curiam.

Judgment affirmed.

Cited: Kingsbury v. Fleming, 66 N.C. 525; *Kingsbury v. Suit,* 66 N.C. 603; *Logan v. Plummer,* 70 N.C. 393.

B. M. ISLER v. J. T. KENNEDY.

A bond executed April 25th 1866, although given in satisfaction of a previous bond executed December 1st 1860, constitutes *a cause of action arising subsequent to May 15th* 1865, within the meaning of *General Order, No. 10,* issued April 11th 1867; *therefore,* a return upon an execution by a sheriff to May Term 1867, — "Levied, etc.; no sale, in obedience to Order No. 10, from General Daniel E. Sickles," was not a due return.

SCIRE *Facias* against a sheriff, for not making due return upon an execution, tried before *Thomas, J.,* at Spring Term 1870, of WAYNE Court.

At February Term 1867, of Wayne County Court, the plaintiff had recovered judgment against John Everett and others, upon a bond dated April 25th 1866; execution issued from such term, and at May Term the sheriff returned, "To hand March 15th 1867: Levied this fi. fa. March 16th 1867, on the plantation, etc.; no sale, in obedience to Order No. 10 from General Daniel E. Sickles, etc." At May Term, upon motion, judgment *nisi* was rendered against the sheriff for $100, for failing to make a due return, etc. Upon which this *scire facias* was issued. At February Term 1868, the Court refused to give judgment for the plaintiff, and thereupon she appealed to the Superior Court. At May Term 1870 of this Court,
(531) upon the trial, it was shown by John Everett that the bond

upon which the judgment had been given, had been executed exclusively in payment of a previous bond executed Dec. 1st 1860. His Honor thereupon dismissed the appeal, etc.

The plaintiff appealed to this Court.

Isler for the appellant.
Faircloth contra.

DICK, J. When a sheriff receives an execution, he should levy upon and sell the property of the defendant, or render a sufficient excuse in his return, for not performing his duty. What is a due return of process in form and substance, is a question of law, to be decided by the Court.

In our case the return endorsed on the execution was: "Levied this *fi. fa.* on the 16th of March, 1867, on the plantation, etc., of the defendant; no sale, in obedience to Order, No. 10 from General Daniel E. Sickles." As the State was then under military control, the sheriff was bound to obey General Orders, and the question of law for us to decide is, was the enforcement of this execution prohibited by said orders. General Orders, No. 10, may be found *ante* 105; and paragraphs Nos. 2 and 4 are applicable to the matter before us.

The bond which constituted the cause of action, was dated April 25th 1866, and the enforcement of the judgment was not prohibited by paragraph 2, and was expressly allowed by paragraph 4. For the purposes of said order the bond was the cause of action, and the date of the bond was the proper guide to the sheriff as to his duty in this respect: *Dean v. King,* 35 N.C. 20. The case of *Patton v. Marr,* 44 N.C. 377, is not in point. In that case the Court decided that "Enjoined" endorsed on an execution, although informal, was a *due return.* That word indicated with sufficient certainty, that the execution was stayed by the order of a (532) Court of Equity, and the sheriff had no discretion, but was bound to desist from the execution of the process, or incur the penalties of a contempt: *Edney v. King,* 39 N.C. 465.

The evidence of John Everett was clearly inadmissible, and ought to have been rejected: as the consideration of the bond sued on could not be inquired into in determining the question of law before the Court.

The sheriff, by improperly enquiring into the consideration of the bond, went out of the line of his duty, and gave an improper construction to said order; and he thereby incurred a penalty for

not making a due return of the process. There was error in the ruling of his Honor, and the judgment must be reversed.

Let this be certified.

Per curiam.

Judgment reversed.

Cited: Varner v. Arnold, 83 N.C. 209.

WILLIAM L. CHAPMAN v. G. W. WACASER.

"Ten days after peace is made between the United States and the Confederate States," used in a bond, to specify the time at which the money is payable, means *ten days after peace*, and does not render the ratification of a treaty of peace between the powers mentioned, a condition precedent to the payment.

(RODMAN, J., *dissenting.*)

Where a note payable as above, called for payment "in current money at that time," *the scale* is expressly excluded.

COVENANT upon a bond for money, tried before *Logan, J.,* at Spring Term 1870, of LINCOLN Court.

No statement is required.

(533) Under the instructions of his Honor, there was a verdict for the plaintiff, for the full amount of the bond.

Judgment accordingly; and Appeal by the defendant.

Hoke for the appellant.

Bragg contra.

SETTLE, J. This was an action of Covenant, upon the following instrument: "July, 1864. Ten days after peace is made between the United States, and the Confederate States of America, we, G. W. Wacaser and Wm. Parham, promise to pay Ambrose Cline the sum of one thousand dollars, without interest, in current money at that time, for value received. Witness our hands and seals.

G. W. WACASER, [Seal.]
WM. PARHAM, [Seal.]"

Mr. Hoke submitted a very ingenious argument to establish the position that the words "Ten days after peace is made between the

United States and the Confederate States of America," amount to a condition precedent, and that there must be a ratification of a treaty of peace between two contracting powers, and not a mere suppression of a rebellion by force, before the defendants can be called upon to perform their covenant. We were at first inclined to adopt this view, but upon consideration we are satisfied that the words relied upon to establish this construction, amount to nothing more than if the covenant had read "ten days after peace is made," or "ten days after the war." Confederate Treasury notes were worded, "Six months after a ratification of a treaty of peace between the Confederate States and the United States of America," etc., expressly for the purpose of making their payment depend upon success, and thereby aiding the Confederacy, by adding another strong motive for success with the people who (534) held her securities.

Here we are satisfied that no such motive actuated the contracting parties. They merely wished to fix a time of payment, and a currency; and it was agreed between them that whether the time should be long or short, no interest should accrue.

If then we read the covenant "ten days after peace is made," or "ten days after the war," we are relieved of all further difficulty, for the legislation which raises the presumption that certain contracts made during the war, are solvable in Confederate money, does not apply to this contract, since here the parties, by plain and unequivocal terms, have expressed on the face of the covenant, that it is not to be solvable in Confederate money, but in "current money," ten days after peace is made.

The principle governing this case is laid down in *Sowers v. Earnhart, ante* 96; there, however, the presumption that the contract was solvable in Confederate money, was rebutted by evidence; here, no such presumption can arise against the express provisions of such contract.

RODMAN, J. *(dissenting.)* I cannot concur in the opinion of the majority of the Court in this case, because I cannot bring myself to believe that the parties, in using the words "ten days after peace is made between the United States and the Confederate States," intended nothing more than "when the war is over." To put this construction upon them requires us to violate a well settled principle in the construction of contracts, viz: that every word must have its proper meaning and force, provided it can be done without destroying sense. Here, in the terms "peace is made," etc., we must give effect to the word "made." Peace is usually *made* be-

(535) tween hostile parties, by a treaty between them. It may *occur,* through a mutual cessation of hostilities, or through the destruction of one of them. But if in a fight between two men, one should kill the other, we should hardly say that "peace was made," much less, that it was *made between the contending parties.* If in such a case, the slayer, in giving an account of the affair, should say, "I made peace with my antagonist;" would that convey to a mind previously uninformed an accurate statement of the result? But here, peace is to be made between two parties; and that implies the concurrence of both in making the peace, and the continued existence of both, after, or at least, during, the making.

No act of Congress, no proclamation of the President of the United States, or of any official, or any decision of a Court, has yet said that peace has been made between the United States and the Confederate States; their language has always been, the rebellion is ended, or some equivalent expression, carefully excluding any participation of the Confederate States, as such, in the result.

I think the parties intended substantially a bet on the war; the lender bet that the Confederate States would succeed in establishing their independence, in which case he would get back his then deposited Confederate money, in what would be at least a legal tender; and the borrower thought the Confederate States would fail, in which case he would escape payment. At the date of this contract in July, 1864, Confederate money was, according to the legislative scale, 21 to 1; the $1,000 lent was therefore worth in gold at that time $47.60. Peace, if construed to mean a mere end of fighting, was certain, at some time, and probably no man living in America supposed the war would last ten years. Supposing money at compound interest at six per cent. to double in twelve years, it would be more than fifty years before the sum borrowed, could, on those
(536) terms, equal the sum agreed to be paid. The stipulation for so large a profit proves that the lender supposed he was taking a great risk; yet, according to the construction given to the contract, there was no risk except of a delay which could not in the nature of things be for many years. The case of *Boulware v. Newton,* 18 Grattan, was a bet somewhat like this, but not sufficiently like to be a guide.

Per curiam.

Judgment affirmed.

Cited: Hilliard v. Moore, 65 N.C. 540; *McNinch v. Hamsay,* 66 N.C. 230; *Williams v. Monroe,* 67 N.C. 134; *Brickell v. Bell,* 84 N.C. 84.

MEREDITH CREWS v. JAMES A. CREWS.

A verdict for "four hundred dollars in old bank money, interest from the 27th of May 1863, scaled at value at time," — is too uncertain to warrant a judgment thereupon.

DEBT, tried before *Watts, J.*, at Spring Term 1870 of GRANVILLE Court.

No statement is necessary.

The defendant appealed.

Rogers & Batchelor for the appellant.
Hayes contra.

SETTLE, J. The question for our consideration is, Did the verdict of the jury warrant the judgment which his Honor directed to be entered. The verdict is as follows, to-wit: "We find all issues in favor of the plaintiff, and assess his damages at four hundred dollars in old bank-money, interest from the 27th day of (537) May 1863, scaled at value at time." Thereupon the Court directed the clerk to enter the following judgment, to-wit: "That the plaintiff recover of the defendant the sum of four hundred and fifty-two dollars and seventy-four cents, the value of the bond declared on, of which three hundred and twenty-five dollars and thirty-seven cents is principal money, and the interest is one hundred and twenty-seven dollars and forty-one cents, and costs of suit."

We have examined the verdict and judgment together, with all the statements which accompany the case, but we are at a loss to discover the process of calculation by which his Honor determined the amounts of principal and interest, which he directed to be entered as a judgment. Indeed, we think the verdict so vague and uncertain in its terms as to afford no basis for a calculation: "A verdict finding matter uncertainly or ambiguously, is insufficient, and no judgment shall be given thereupon: Coke on Lit. p. 227 a.

Here the jury assessed the damages in *old bank-money,* by which we are to understand, the notes issued by old banks. But there were many banks whose notes circulated in this State, and they were of different values, some worth five, and others twenty-five cents in the dollar. Which bank shall we select as the standard to govern in this case?

We are left without chart or compass, to find our way as best we can.

Again the verdict says, *"scaled* at value at time." Scaled as what? Confederate money, or bank notes? If bank notes, we are

aware of no standard by which they can be scaled; and the words "at time" are equally as unintelligible. *Gibson v. Groner,* 63 N.C. 10, and *Mitchell v. Henderson, Ib.* 643, establish the rule that the value of all contracts must be estimated in United States Treasury Notes, and judgment be rendered for such amount solvable in currency.

Here there is no objection to the judgment on its face, but (538) it is not in pursuance of the verdict, which assessed damages in "old bank-money"; and as we have seen, was so unintelligible, that his Honor was not warranted in proceeding to judgment upon it.

Let it be certified that there was error, etc.

Per curiam.

Venire de novo.

Cited: McCaskill v. Currie, 113 N.C. 316; *Frick v. Shelton,* 201 N.C. 74; *Edge v. Feldspar Corp.,* 212 N.C. 247; *Cody v. England,* 216 N.C. 609.

VIRGINIA S. WHITEHEAD v. MARCELLUS WHITEHEAD AND OTHERS.

Where land was bought with money forming a portion of the separate estate of a wife, and by mistake the title was made to the husband, and subsequently, the land was sold under execution by creditors of the husband, and was bought by them, *with notice, etc.: Held,* that upon application by the wife, the purchasers would be declared trustees for her, and whether they purchased with *notice,* or without, was immaterial.

CIVIL action, tried before *Cloud, J.,* at Spring Term 1870 of ROWAN Court.

The facts were, that on the marriage of the plaintiff with the defendant Marcellus, in 1846, her property was conveyed to her separate use; in March 1848, a part of it was invested in lots in Salisbury, which, in April 1866, were sold, and the land, in question, purchased. This last was, by mistake, conveyed to the husband for his own use. In the Spring of 1869, the plaintiff's attention was first called to the mistake, she having supposed until then that it had been conveyed to Thomas Whitehead, as trustee for her. In 1868, Henderson and Ennis, who were also defendants in this case, obtained judgment against the husband; and, in September 1869, the premises in question were sold under execution, and bought

by the above judgment creditors, who had notice at that (539) time of the plaintiff's claim.

His Honor thereupon gave judgment as required by the plaintiff, viz, that the defendants be declared trustees for her, etc.

The defendants appealed.

Boyden & Bailey for the appellants.
John S. Henderson contra.

1. A husband who purchases an estate with trust money belonging to his wife, becomes a trustee for her: *Lench v. Lench,* 10 Ves. 517; *Pearson v. Daniel,* 22 N.C. 360; *Methodist Episcopal Church v. Jaques,* 1 John C. R. 450, 3 *Ib.* 77; *Pinney v. Fellows,* 15 Vt. 525; and he is trustee *pro tanto, if all* the money were not hers. Hill, Trustees, 522; *Oliver v. Piatt,* 3 How. U. S. 333; *Cheshire v. Cheshire,* 37 N.C. 569.

2. Purchasers at sheriff's sales take subject to all equities which affected the defendants in the executions: *Freeman v. Hill,* 18 N.C. 389; *Polk v. Gallant,* 2 *Ib.* 395; *Read v. Kinnaman,* 43 N.C. 13; *Ellis v. Tousley,* 1 Paige Ch. Rep. 280.

3. No advantage can be taken of the mistake: *McKay v. Simpson,* 41 N.C. 452; *Johnson v. Lee,* 45 N.C. 43.

READE, J. It was not controverted that the trust fund, held as the separate estate of the plaintiff, was appropriated to purchase the land in question, and that it was agreed that the deed was to be made to Thomas Whitehead in trust for the plaintiff; but, by mistake of the draftsman, it was made to Marcellus Whitehead without any declaration of trust. It is a well settled principle of equity that the plaintiff has the right to follow the fund, and to have the legal owner declared a trustee for her. (540)

The defendants, Henderson and Ennis, bought the land at sale under execution against Marcellus Whitehead the legal owner, with notice of the plaintiff's equity, and, of course, they are bound by it. Indeed, as they can take nothing under the sale but the interest of the defendant in the execution, they would be affected by the equity, without notice.

There is no error. Let this be certified, etc.

Per curiam.

Affirmed.

V. C. BARRINGER, GUARDIAN, ETC. v. W. J. HOLBROOK.

Where an appeal from a magistrate is regular in form, and the Court discovers no error in the proceedings, — the judgment should be one affirming that given below, and not, dismissing the appeal.

(Case where a note was allowed as a set off because of the express agreement of the parties.)

CIVIL action, tried, upon appeal from a Justice of the Peace, by *Logan, J.*, at Spring Term 1870 of CABARRUS Court.

The cause of action was a note given by the defendant to the plaintiff, for the hire of a slave for 1860. The slave belonged to one J. R. Russell, a ward of the plaintiff, and at the hiring, it was bid off by one R. E. Russell, another ward of the plaintiff. The plaintiff declined to take a bond for the price from the hirer, because of the relation between them, but told the defendant to give his bond therefor, and then to take a bond for the same amount from the hirer, payable to himself; and that upon a settlement he (plaintiff) would allow the latter bond as a set off to the one given to (541) him. These bonds were accordingly executed.

Upon the trial before the magistrate the set off was allowed, and the plaintiff appealed.

When the case was tried by his Honor, he ordered the appeal to be dismissed.

The plaintiff appealed again.

Boyden & Bailey, and Wilson for the appellant.
No counsel contra.

RODMAN, J. The set off alleged as a defence was made so by the express agreement of the plaintiff. The Judge below should have affirmed the judgment of the justice, instead of dismissing the plaintiff's appeal. The latter course would have been proper, if there had been any irregularity in the appeal itself, but that was not alleged.

Judgment of his Honor reversed, and judgment for the defendant.

Per curiam.

Judgment accordingly.

GILBERT P. SMITH v. JAMES A. WEBB.

Whether one possesses information *superior* to that of another, in regard to the subject matter of a contract, is a question of *fact*, and not of *law*.

CIVIL action, tried before *Russell, J.*, at December Special Term 1870, of NEW HANOVER Court.

The plaintiff had purchased of the defendant, some five hundred shares of stock in the Wilmington Manufacturing Company. The defendant, a citizen of New Jersey, was at the time (542) President of the Company, and the plaintiff a young man of twenty-three years of age, a resident of New Jersey. Before purchasing, the plaintiff had examined the books and machinery of the Company, and was satisfied with their condition. At that very time, as it turned out, the Company was insolvent.

His Honor left it to the jury, to find whether the plaintiff had been careless in making the purchase, stating that if he had been, he could not recover. It having been suggested that the defendant possessed information in regard to the subject matter of the contract, that was *superior* to that of the plaintiff; his Honor also left that question to the jury, saying that if that were so, they should find for the plaintiff.

Verdict, and Judgment for the defendant. Appeal by the plaintiff.

London for the appellant.

The question whether one of two parties to a contract possesses *superior information,* is an incident to the more comprehensive question of *reasonable diligence,* which is conceded to be a question of *law*. It is, therefore, itself a question of *law: Beavan v. Byrd,* 48 N.C. 398. See *Fields v. Rouse,* 48 N.C. 72.

Strange contra, cited *McFarland v. Newman,* 9 Watts 57, and *Brittain v. Israel,* 10 N.C. 225.

READE, J. The allegation was, that the defendant had deceived and defrauded the plaintiff by misrepresentations, and that he was enabled to do so by reason of superior and exclusive information, which he possessed in regard to the subject matter of the contract. There was conflicting evidence.

His Honor charged the jury, that if the defendant had deceived the plaintiff by false representations, and was en- (543)

abled to do so by superior and exclusive information of the subject matter, the plaintiff was entitled to recover; and the jury found for the defendant.

The plaintiff excepted, upon the ground, that whether the defendant had such superior and exclusive information, was not a question of fact for the jury, but a question of law, for the Court. This is the only question presented in the case. It was pressed with considerable zeal by the learned counsel, because, as we suppose, of the large amount involved; but really there seems to us to be no foundation for the exception, and it cannot be made plainer by discussion.

Whether one party has superior and exclusive information of the subject matter of a contract, and is thereby enabled to deceive, and does deceive the other, is purely a question of fact. It may be that the jury found against the weight of the evidence in this case, but we cannot consider that.

There is no error.

Per curiam.

Judgment affirmed.

WILLIAM J. MOYE, ADM'R., ETC. v. WILLIAM J. POPE.

A question as to the value of certain cotton, the consideration of a note given at an administrator's sale in Greene County in 1863, is to be settled with reference to the *time and place* of its sale and delivery; and evidence as to what it was worth within the Federal lines, (whither it could not be transported but in violation of law,) or as to what it was sold for, is incompetent.

CIVIL action, tried before *Jones, J.*, at Spring Term 1870, of PITT Court.

The action was brought upon a note for $403.00, payable (544) at six months, dated October 15, 1863, and given for the price of two bales of cotton bought at an administrator's sale in Greene County. The price bid was fifty cents a pound.

On the day of sale, the defendant asked the plaintiff if he would accept Confederate money *then*, and the latter replied that the law required him to take a bond and security, and sell upon a credit of six months. He did not say what he would take when the note became due.

The plaintiff asked of several witnesses what was the value of cotton within the Federal lines, but upon objection by the defend-

ant, the questions were ruled out, as also was another question by him, as to what the defendant afterwards received for the cotton. To these rulings he excepted.

The plaintiff asked the Court to instruct the jury:

1. That there was some evidence of a special contract to pay for the cotton in good money; and,

2. That there was evidence of the value and price of cotton at the time and place of sale.

The Court instructed the jury to ascertain the value of the cotton at the time and place of sale, taking into consideration the whole of the testimony.

Verdict for $108.84, of which $80 is principal money. Rule, etc. Judgment accordingly. Appeal by the plaintiff.

Howard and Battle & Sons for the appellant, cited *Cherry v. Savage, ante* 103; *Laws v. Rycroft, ante* 98, and *Coppell v. Hall,* 7 Wall. 542.

Hilliard contra, cited *Robeson v. Brown,* 63 N.C. 554; *Garrett v. Smith, ante* 93, and *Coppell v. Hall, (ubi supra.)*

READE, J. The value of the cotton at the time and place of sale and delivery, was the question. As tending to show the value, the plaintiff offered to prove the price of cotton on the (545) other side of the military line between the Confederate and United States forces.

It was unlawful to trade across the line. There was no market to which the defendant could take the cotton beyond the line, without violating the laws of both governments. The Courts will not investigate the hazard of committing crime, or the value of successful adventure against the laws. The evidence was, therefore, properly ruled out.

For the same purpose the plaintiff offered to prove the price at which the defendant sold the cotton. But it did not appear when or where he sold; and, therefore, it could throw no light on the question, and was irrelevant.

There was no evidence to support the first special instruction asked for by the plaintiff, to wit, that there was a special contract to pay the amount bid in *"good money."*

The second special instruction was in substance given as asked for by the plaintiff.

There is no error.

The plaintiff is entitled to judgment here for the same amount as the judgment below, but he is not entitled to the costs of the

appeal, as it was his appeal. Judgment against the plaintiff for the costs of this Court.

Per curiam.

Affirmed.

Cited: Warehouse Co. v. Chemical Co., 176 N.C. 510.

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(546)

ELIZABETH A. SMITH v. JOHN E. AND JANE S. GILMER.

Land having been devised charged with the payment of a sum of money to a minor, the devisee also being appointed guardian of the minor: *Held*, that the fact that the guardian *charged himself* with such money in his returns to Court, was no discharge of the lands.

In such case the widow of the devisee, before she can be called on to contribute, is entitled (in aid of dower) to have the whole of the personal estate of the deceased, and, after that, all of his real estate not included in her dower interest, applied to the discharge of the debt.

DOWER, tried before *Tourgee, J.,* at Fall Term 1869 of GUILFORD Court.

The land sought to be subjected to dower was three tracts, viz: The McMurry tract, the Chrisman tract, and a tract of some 756 acres acquired by the deceased, W. R. Smith, under the will of his father, Eli Smith. No question was raised in regard to the liability of the two former tracts. The questions as to the latter were, as to the extent to which they were charged with pecuniary legacies left to various persons in the will of Eli Smith. William R. Smith died in 1868, and Eli Smith, in 1862.

The portions of the will of Eli Smith which it is necessary to state in this connection, are:

"1st. I give and devise to my granddaughter, Jane S. Gilmer, and the heirs of her body, $2,500.00, to be held in trust by her guardian," with certain directions for its investment, and also contingent bequests in case of her death, etc.

"2nd. I devise and give to my grandson, John E. Gilmer, $2,-500.00 in money, to be paid to him by his guardian when he becomes 21 years of age," with other directions as above.

4th. A similar legacy to his grandson Wm. M. Gilmer.

"6th. I also give and devise to my son Wm. R. Smith, all and every parcel of the lands, whatsoever and wheresoever, I may

die in possession of, upon the condition that the said Wm. R. (547) Smith pay over to my grandson, Wm. M. Gilmer, the sum of $1,500, over and above the legacy hereinbefore specified for said grandson, etc. Also, all the rest, residue and remainder of all my estate, real and personal, etc., etc., I do give, devise and bequeath unto my said son Wm. R. Smith, and his lawful heirs," etc.

William M. Gilmer died in 1864, having attained full age, and the defendant John was appointed his administrator, both of the defendants being his heirs and next of kin.

The defendants claimed that the land was charged with the payment of all the above legacies in the event which occurred, to-wit: the loss of the personalty by the events of the war. The plaintiff, whilst contesting this, on the other hand claimed, amongst other things, that the land had been discharged from the $1,500 due to W. M. Gilmer, by the fact that Wm. R. Smith, who was appointed his guardian by the will, had made his return as such to Court, *charging himself* with said sum, as money received by him for said ward.

His Honor gave judgment for dower as prayed for in the petition; and the defendants appealed.

Bragg, Mendenhall and J. I. Scales for the appellants.
Scott & Scott contra.

SETTLE, J. We are of opinion that none of the legacies in the will of Eli Smith are a charge upon the land devised to William R. Smith, except the legacy of $1,500 to William M. Gilmer, contained in the 6th item of the will. This is clearly a charge upon the land, and the devisee took the same *cum onere,* immediately upon the death of the testator: *Doe v. Woods,* 44 N.C. 290.

But the plaintiffs insist that, as the intestate William R. Smith, who was testamentary guardian of William M. Gil- (548) mer, charged himself with this legacy in his guardian return to the County Court, he thereby relieved the land, and made it a charge only upon his personal estate. We do not assent to this proposition. The manner in which a ward's estate shall be invested is pointed out in the Revised Code, ch. 54, sec. 23, and if a guardian takes it upon himself to disregard the requirements of this act, he does so at his peril.

This brings us to the main question raised by the pleadings: Is the plaintiff, Elizabeth Smith, entitled to dower in the *lands devised* to her deceased husband? We have seen that these lands vested in her husband, the intestate, *cum onere,* immediately upon the

death of the testator. She is therefore entitled to have all the personal estate of the intestate applied to the payment of this charge of $1,500, in exoneration of her dower; and if that is not sufficient, the remaining two-thirds of the land and the reversion in the one-third covered by her dower, must be applied to the extinguishment of this charge, before the widow can be called upon to contribute anything out of her dower: *Thompson v. Thompson,* 46 N.C. 430; *Caroon v. Cowper,* 63 N.C. 386.

It follows that the widow takes dower, as her husband took the fee simple, *cum onere,* being entitled to be exonerated as above.

Of course, if the $1,500, with interest as directed in the will, consumes the whole estate, personal and real, there is nothing left for the widow's dower; but upon the idea that the estate is sufficient to meet both demands, the judgment of the Superior Court is affirmed.

Per curiam.

Judgment affirmed.

Cited: Creecy v. Pearce, 69 N.C. 68; *Ruffin v. Cox,* 71 N.C. 256; *Overton v. Hinton,* 123 N.C. 6; *Chemical Co. v. Walston,* 187 N.C. 826; *Brown v. McLean,* 217 N.C. 557.

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(549)

JERE. PEARSALL v. MARX MAYERS.

Where a vendor of land brings an action for possession against his vendee, who has been let into possession the title being reserved: the latter may set up the contract of sale, and ask for an account of the payments upon the purchase money *by counterclaim* in the same action.

A *parol* submission to arbitration of the title to land, is void.

In a case where there was a question between the parties as to the kind of currency in which a contract for money was solvable, and upon taking an account, it appeared that the debtor had overpaid the debt: *Held,* that he could not recover the surplus from the creditor, as money paid *by mistake.*

Where the vendor of land lets the vendee into possession, reserving the title, he has no claim upon the latter for rents and profits, as the interest upon the unpaid money is in lieu of that.

(Directions for stating *cases* upon appeal.)

PEARSALL *v.* MAYERS.

CIVIL action, for possession of land, tried before *Russell, J.*, at Spring Term 1870, of ONSLOW Court.

The defendant, by counterclaim, set up a contract for the purchase of the land by himself, in May 1863, at $2,000, the payment of $1,000 thereof in Confederate currency, the giving a note for the remainder, and various payments thereupon since the Surrender, in U. S. currency; also, that a submission, (by parol,) of the matters arising out of the transaction between the parties, had been made by them to certain persons, who had awarded, (by parol,) that upon an account, the plaintiff owed to the defendant $51.00; and judgment for this amount was demanded by the defendant.

The parties differed as to the manner in which the price of the land was solvable, and the plaintiff claimed that the payments made by the defendant were to be set off by the rents and profits of the land in his possession.

Under the instructions of his Honor, there was a verdict and judgment for the defendant, for $51.00. (550)

The plaintiff appealed.

Battle & Sons for the appellant.
No counsel contra.

PEARSON, C.J. There may be many objections to the "Code of Civil Procedure," but this case furnishes an instance of a partciular in which it is a decided improvement upon the old mode of procedure. The case is this: In 1863, the plaintiff sold to the defendant, a tract of land at the price of $2,000, and executed a bond to make title when the purchase money was paid. The defendant paid $1,000 in Confederate notes, and gave a bond for $1,000 payable in one year, and was let into possession. The defendant since the war, has made several payments in greenbacks. The parties differ as to whether the purchase money has been fully discharged, and that depends upon the kind of money in which the bond is payable, and the scale and rate of depreciation.

To settle this controversy according to the old mode, the plaintiffs might have brought an action of ejectment, and taken a judgment at law. The defendant would then have filed a bill in equity, and obtained an injunction to restrain the plaintiff from issuing a writ of possession; the matter would have been referred to the master, to find how much of the purchase money, if any, remained unpaid, and after disposing of the exceptions to his report, that fact would have been fixed; whereupon, if the purchase money had been fully paid, a decree would have been entered, that the plaintiff make title, and the injunction be made perpetual; if there remained a bal-

ance of the purchase money unpaid, a decree that the plaintiff pay such balance by a day fixed, and on payment, the defendant
(551) make title, and should the amount not be paid, that the land be sold, etc.

According to the new mode, the vendor brings his action for the land; the vendee sets up his contract of purchase as a counterclaim, alleging payment of the purchase money in full, and demands judgment for title; the plaintiff replies, denying that the purchase money has been paid in full. The matter might then be referred to find the fact as to the purchase money, or it might be submitted to a jury, (as in this case,) and a judgment be entered, corresponding with the decree in the old mode. Thus the controversy is settled in *one action;* instead of an action in a Court of law, and then a suit in a Court of Equity.

The defendant, however, not content to rest on the bond for title and payment of the price, sets out a submission to arbitration, and an award in his favor for title, and $51.00 over-paid, and demands judgment for the $51.00, as well as for title. The plaintiff objects to the submission and award because not in writing, and sets up a claim for use and occupation of the premises. His Honor admitted evidence of the submission and award. In this, there is error; when the controversy involves title to land, the submission must be in writing. This is settled: *Crissman v. Crissman,* 27 N.C. 498.

As the case goes back for another trial, it may be well to say that this Court is inclined to the opinion, that the defendant will not be entitled to judgment for the amount he may have overpaid. Money paid by mistake, as in counting, or in making calculations, may be recovered in an action for "money had and received to plaintiff's use;" but when a man makes a payment, and, — for the sake of being on the safe side in a matter involving questions that admit of doubt, as in regard to Confederate money, and payment in greenbacks, chooses to pay what turns out to have been too
(552) much, there is no principle of law upon which he can recover back the excess; for the money was paid without mistake, for the use of the other party, and in no sense can be considered as "had and received for the use of" the plaintiff. So if one tenders money, and brings it into Court, and it is accepted, although it be in excess, the party may retain the whole.

It may likewise be well to say: This Court is inclined to the opinion, that the plaintiff will not be entitled to make any charge for "use and occupation." Where a mortgagor remains in possession, or a vendee is let into possession, he is entitled to the rents and profits, in lieu of interest. A mortgagee or vendor who takes possession, is entitled to receive rents and profits, but will be required, in

taking an account of the mortgage money, or the purchase money, to account for rents and profits, or for use and occupation.

We observe, that in this instance, and many others, the attorneys who settle the case for this Court, and the Judge, when he states the case at the *request* of the attorneys, have set out a recital of what is contained in the complaint, and in the answer and replication. This is "labor lost," and makes the papers unnecessarily prolix and voluminous; for the "record proper" is sent to this Court, and the Court can see what is contained in the pleadings and judgment. All that need be added is, when testimony is rejected, a statement of what the party offered to prove, and enough of the evidence to show the materiality of the evidence rejected; when the instructions are excepted to, a statement of the instructions refused or given, and enough of the evidence to show that the point was presented by the case, and was not hypothetical; and, when the exception is confined to the record proper, — as upon demurrer or motion in the nature of a motion in arrest of judgment, no statement need be made, for there is no *postea*, and the error, if any, appears on the face of the record proper. (553)

Per curiam.

Venire de novo.

Cited: Wellborn v. Simonton, 88 N.C. 268; *Dail v. Freeman,* 92 N.C. 357; *Dempsey v. Rhodes,* 93 N.C. 127; *Shell v. West,* 130 N.C. 170; *Gray v. Jenkins,* 151 N.C. 80; *Cutler v. Cutler,* 169 N.C. 484.

JOHN GREEN v. DEMPSEY BROWN.

A note for money dated May 9th 1863, is liable to the operation of the *scale law*, notwithstanding that it is payable in "good bankable currency."

COVENANT, upon a note given as the price of a horse, tried before *Cloud, J.*, at Spring Term 1870, of DAVIDSON Court.

The note was a plain one, for "four hundred dollars in good bankable currency," payable at twelve months, with interest from date, and was dated May 9th 1863.

The main question below was, whether it was liable to be *scaled,* or was payable in specie. Upon this point witnesses were examined; and his Honor charged the jury that if they were to be believed, the expression, "in good bankable currency," meant currency equivalent to gold and silver.

Verdict and judgment accordingly; the defendant appealed.

Gilmer for the appellant.
Mendenhall and T. J. Wilson contra.

SETTLE, J. The bond upon which this suit is brought, was executed during the war, and if nothing had been said as to the (554) currency in which it was solvable, the presumption would have been, under our recent legislation, that it was solvable in Confederate money. Is this presumption rebutted, when the parties in endeavoring to fix a currency in which it may be discharged, use terms so indefinite as to be unintelligible? We think not.

The words "good, bankable currency" must be interpreted according to the state of the facts and the popular understanding of these terms at the time the note was given: *Laws v. Rycroft, ante* 100.

From this standpoint we have endeavored to reconcile these terms, but have been unable to do so. Bankable currency may have meant either bank notes, or Confederate Treasury notes, for the banks were dealing in both in 1863 and 1864. But when they prefix the word "good" to the "bankable currency" of that period, we are as unfortunate as the witnesses who were examined to explain these terms, and confess our inability to understand them. Indeed there was no such thing at that time as "good bankable currency." They could not have used the word "good" in the sense of par, for none of the currency then used was at par. It may be that they employed the word "good" as distinguished from counterfeit; this, however, is all conjecture. But viewing the transaction in the light of that day, we can safely say that they did not intend by these terms to make the bond payable in gold and silver. The result will be, if we discard these words as unintelligible, that the bond will stand like all others of that date, and the presumption will be that it is solvable in Confederate currency; but as it was given for a horse, that fact may be shown, and the value of the horse will be the value of the contract.

There is error. Let this be certified, etc.

Per curiam.

Reversed.

(555)

C. L. SUMMERS, ADM'R., ETC. v. L. C. MCKAY AND GEO. F. SHEPHERD.

Where a note was given in 1862 in consideration of the loan of Confederate money, and in 1863 the payee endorsed it to the plaintiff in payment for a tract of land: *Held*, in a suit against the payee and the maker, that the *scale* to be applied was the value of Confederate money in 1862, and not that of the land afterwards purchased by the payee.

CIVIL action, tried before *Mitchell, J.*, at Spring Term 1870, of IREDELL Court.

The plaintiff declared upon a note for $1,000, dated May 26, 1862, given for Confederate Treasury notes, by the defendant McKay to the defendant Shepherd, and endorsed by the latter, October 13, 1863, to the plaintiff. Upon the trial the defendants offered to prove that the endorsement was made in consideration of a tract of land bought by Shepherd of the plaintiff at an administration sale, and that the value of such land was $80. To this the plaintiff objected, but the evidence was admitted by the Court.

Verdict and Judgment accordingly; and the plaintiff appealed.

W. P. Caldwell for the appellant.
Furches contra.

Since the passage of the *scale* laws, a plaintiff in cases like the present is put upon his general assumpsit, or equity; and can recover only the value of what was sold, that being the real consideration: See *Laws v. Rycroft, ante* 100.

SETTLE, J. McKay, the maker of the bond, certainly has no right to complain, if he is required to stand by his obligation, as interpreted by the ordinance of October 18th 1865, and the acts of 1866, chapters 38 and 39. He put his negotiable paper upon the market, and it is a novel idea that he can afterward dis- (556) charge it by paying the price which a third party may have paid for it. Yet this is the argument, and it is contended that as the payee Shepherd, assigned this bond to the plaintiff in consideration of, and in payment for, a tract of land, the obligation of the maker is thereby changed from what it was when made in May 1862, and what it continued to be up to the assignment in October 1863; and that he is only liable for the value of the land.

Instead of reducing, or in any way changing the original liability of the maker, the payee, by his endorsement, identified himself with the prior contract, and became a surety for the same. The effect of

his endorsement was not to drag the maker down to his level, but to raise himself up to that of the maker.

It was said upon the argument, that it would be a hard case, to hold the endorser liable for more than the value of the land; if that be conceded, still it is not so hard a case as thousands of others, where sureties have to pay the debts of their principals, and never receive a cent for their own benefit.

It is evident that the endorser took the risk of assigning this bond for the land, upon the idea that the maker was good, and stood, between him and all danger. In this calculation he, like many others who have become sureties, was mistaken.

All that the plaintiff asked, was the scale of the bond, and interest from the time it fell due.

To this he was clearly entitled, and there was error in the instruction of his Honor to the contrary.

Per curiam.

Venire de novo.

Cited: Sanders v. Jarman, 67 N.C. 88; *Wooten v. Sherrard,* 68 N.C. 338; *Boykin v. Barnes,* 76 N.C. 319.

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(557)

E. P. PEGRAM v. THE COMMISSIONERS OF CLEVELAND COUNTY.

A creditor of a County, (by coupons upon County bonds issued in 1857,) applied for a *Mandamus* to compel the levy of taxes for the satisfaction of his debt: *Held,*

1. That the remedy asked for, was, under the circumstances, the proper one, and,

2. That the "equation of taxation" established by the Constitution of 1868, (Art. V. § 7,) does not apply to prevent a County from providing for the payment of its debts existing when that Constitution was adopted.

MANDAMUS, tried before *Logan, J.,* at Spring Term 1870, of MECKLENBURG Court.

The plaintiff alleged that he was holder of coupons of bonds issued by Cleveland County in 1857; that the act authorizing the bonds had directed that taxes should be levied by the County authorities, in order to pay the coupons as they became due; that he had demanded payment, and had been refused; thereupon he asked

for a *mandamus,* directing a tax to be levied for his satisfaction, etc.

The defendants answered, stating that the County was without money to meet the demand; that the State Constitution (Art. V, § 7,) forbids their levying a tax for the purposes of the plaintiff, etc.

To this the plaintiff demurred.

His Honor overruled the demurrer, and the plaintiff appealed.

Jones & Johnston, for the appellant.
Wilson contra.

PEARSON, C.J. The matter set out in the return is not a sufficient cause against the writ of *mandamus.* (558)

1. *Mandamus* to compel the levy of taxes is the appropriate remedy: *Winslow v. Comm'rs. Perquimans, ante* 218. An action will lie against the Commissioners of a County for a money demand; but it appears that in other cases *mandamus* is the proper remedy.

2. The fact that the Commissioners had no funds in hand, is a very cogent reason for levying a tax in order to raise funds to meet the liability of the County.

3. In *University R. R. Co. v. Holden,* 63 N.C. 410, all of the Justices of this Court agreed that the "equation of taxation" established by the Constitution, does not restrict the power of State taxation to meet the interest of the public debt. On the same principle, Art. V, sec. 7 of the Constitution does not restrict the power of County taxation to meet the interest of the debt of the County, and such taxation does not require the special approval of the General Assembly.

Besides, it is alleged in the petition, and not denied by the return, that the act of February 1857, under which these bonds were issued, makes it the duty of the Justices of the County to provide means for paying the interest annually, by levying taxes. The Commissioners succeed to the rights and duties of the Justices. So the power to levy this tax is ample, and the neglect or refusal to do so, must be ascribed to unwillingness rather than a want of power.

Order overruling the demurrer reversed. It is declared to be the opinion of this Court that the writ of *mandamus* should be issued as prayed for. This will be certified, to the end that his Honor may direct the writ to be issued.

Per curiam.

Ordered accordingly.

Cited: Sc., 65 N.C. 114; *Uzzle v. Comrs.,* 70 N.C. 565; *Hughes v. Comrs.,* 107 N.C. 605; *R. R. v. McArtan,* 185 N.C. 206; *Casualty Co. v. Comrs.,* 214 N.C. 238.

(559)

WILLIAM HOWARD AND WIFE v. FRANKLIN BEATTY.

A bond dated April 3, 1865, payable at twelve months, "in current money," is presumed to be subject to the *scale* laws.

In a case where land had been sold by an executor during 1864, no money having been paid by the purchaser, and subsequently the executor repurchased the land and agreed to pay the purchaser's debt on account of it; and thereupon, a year after the purchase (in April 1865) he agreed with one of the heirs to pay her one-half of her share in Confederate money, and to give a note payable as above for the other half; *Held*, that this note was not liable to be *scaled* by proving the value of the land:

Also, that there was evidence to warrant a jury that it was not to be *scaled* at all, but that the Court erred in deciding *itself* that such note was not to be scaled.

Although, in some cases, a jury may correct a miscarriage on the part of the Court, by finding a proper verdict; yet, in no case will a suggestion that the Court has found a fact truly, atone for such an invasion by it of the province of the jury.

CIVIL action, tried before *Mitchell, J.*, at Spring Term 1870 of CATAWBA Court.

The plaintiffs complained on account of the non-payment of a bond executed by the defendant to the *feme* plaintiff, payable at twelve months, "in current money," and dated April 3d 1865; upon this was endorsed, "credit by one note of Freeman Howard for two hundred and two dollars and twenty-five cents, to be paid in gold or silver or its value in currency dated January 1st 1866, this 12th March 1869."

It appeared that the defendant, as executor of one Millegan, in February 1864, had sold certain lands to Elisha Sherrill; of the purchase money, one thousand and twenty-six dollars was due to the *feme* plaintiff as one of Millegan's heirs. The land was to be paid for in "current money" at twelve months, but no note was given for the price. The defendant afterwards bought this
(560) land from Sherrill, and took his place as debtor to the heirs.

In April 1865, the defendant offered to pay Mrs. Howard her share, in Confederate money. This she declined to take. He then offered to give her a note, as above, for one-half, if she would take the other half in Confederate money: telling her that in his opinion, "the money would be good in twelve months, and would be a fair price for her land:" or, as another witness said, "the money would then be better, because, if it did not get better, the war would end." This proposition was agreed to, and was executed.

Thereupon his Honor refused to allow evidence to be introduced

of the value of the land for which the note was given; and the defendant excepted.

He instructed the jury that they should find a verdict for the face of the note in United States Treasury Notes, subject to the gold value and premium of the note endorsed as a credit, etc.

Verdict, and Judgment accordingly; and the defendant appealed.

Bynum for the appellant.
Moore contra.

SETTLE, J. The bond upon which this action was brought, was executed on the third day of April 1865, *flagrante bello,* and is, therefore, embraced by the legislation which declares, that the presumption shall be that money contracts of that date are solvable in Confederate money. But it is contended that no such presumption can arise in this case, because the parties fixed, in the bond, the currency in which it was to be discharged, to-wit: "current money."

Suppose the promise had been, to pay five hundred and thirteen dollars *in currency,* leaving out the word money. We think that it would clearly have come within the spirit of those (561) remedial enactments. If it had been, to pay five hundred and thirteen dollars *in money,* then it would have fallen within both the letter and spirit. How can the coupling of the two words make a difference? But it is said that the presumption, that a bond given on the third of April 1865, is solvable in Confederate currency, when in point of fact there was no currency, is a violent one. That may be so, but *ita lex scriptu est,* and this continued to be the presumption on all money contracts, up to the 1st of May 1865. But "it shall be competent for either of the parties to show, by parol or other relevant testimony, what the understanding was in regard to the kind of currency in which the same are solvable; and in such case, the true understanding shall regulate the value of the contract."

His Honor was correct in ruling out the testimony in regard to the value of the land. The executor had sold the land twelve months before the execution of the bond upon which this action is brought, to one Sherrill, and had repurchased the same from Sherrill. The plaintiffs were only interested in the fund arising from the sale of the land by the executor, who, we take it, was authorized to sell, as no objection is heard to the contrary.

So far then as the parties to this bond are concerned, the land is out of the question.

But the defendant, who, as we have seen, was the assignee of

Sherrill, undertook to settle with the heirs for their interest in the fund.

After the lapse of twelve months, during which time there had been no note or other written security, he proposed to discharge the plaintiff's claim in Confederate money. This was objected to by the plaintiff, and finally a compromise was effected, by which the defendant paid one-half the claim in Confederate money, and gave his note for the other half, payable at the end of twelve months
(562) in "current money." The defendant states that he finally acceded to this proposition. He says that "he told the plaintiff that he thought that the money would then be better, because, if it did not get better, the war would end," and this is further explained by his answer, in which he says that he "put in the words, current money, expressly for his own protection against *specie demand.* Greenbacks not then being known."

All that occurred between the parties in relation to the compromise was material and relevant, as showing what the understanding was in regard to the kind of currency in which the bond was solvable; as was also the fact that the defendant, as late as the twelfth day of March 1869, assigned to the plaintiff a note for two hundred and two dollars and twenty-five cents, bearing date first January 1866, and payable "in gold or silver, or its value in currency," and at that time, only claimed to have it entered as a credit upon his bond, and we may add, that the evidence sent to this Court, together with the defendant's answer, it seems to us, explains the transaction very satisfactorily. The presumption, raised by law is rebutted. The compromise by which the defendant paid half the debt in worthless Confederate notes, and protected himself against *a specie demand,* was a sufficient consideration to support the new promise to pay in current money.

We are inclined to think that upon the defendant's own showing the proper conclusion was arrived at; but, unfortunately for the plaintiff, his Honor withdrew all these questions from the jury, and passed upon them himself.

He should have submitted the evidence in respect to the understanding, and the compromise that was effected between the parties, to the jury, with proper instructions thereon. If a Judge charge the law incorrectly, and yet the jury, by their verdict, find contrary to the charge, and in accordance with the law, the error of the
(563) Judge furnishes no ground for a new trial, but a Judge has no right to withdraw questions of fact from the jury, and if he decide on facts or inferences, which ought to have been left to

the jury, although he may find correctly, yet he has invaded the peculiar province of the jury, and this is error.

Let it be certified that there is error, etc.

Per curiam.

Venire de novo.

Cited: Parker v. Carson, 64 N.C. 565; *McKesson v. Jones,* 66 N.C. 262; *Davis v. Glenn,* 72 N.C. 520; *Johnson v. Miller,* 76 N.C. 442; *Brickell v. Bell,* 84 N.C. 84.

SQUIRE PARKER AND THOMAS PARKER v. J. H. CARSON, ADM'R, ETC.

The word "*or*," in a bond payable to "Squire Parker *or* Thomas Parker," construed to mean "*and*," from evidence introduced to prove the *consideration*, under the *scale* laws.

A bond given in 1863, in consideration of the sale of land although payable "in currency," is to be *scaled* by reference to the value of the land, and not to that of Confederate money.

In an action of *Debt* upon such bond, the judgment was for "$2,494.79, of which sum $1,902.00 is principal:" *Held*, that as the *scale* law applied, there was no error in such judgment.

DEBT, tried before *Logan, J.*, at Spring Term 1870, of RUTHERFORD Court.

The plaintiff offered in evidence a bond for $1,902, dated May 25th 1863, payable Nov. 27th 1864, "to Squire Parker or Thomas Parker, in currency," and executed by the defendant's intestate.

The defendant objected to the evidence, but was overruled, and therefore excepted.

The plaintiff also offered to show that the note was given for land owned by the plaintiffs jointly, and by them sold to the defendant. This also was objected to by the defendant, but was admitted, and the defendant again excepted.

The defendant requested the Court to charge that the measure of damages was the value of Confederate money or (564) bank bills, and not that of the land sold. The Court declined to do so, and instructed the jury that that measure was, the value of the land.

Verdict accordingly; Rule, etc.; Judgment, and Appeal.

Battle & Sons for the appellant.
Bynum contra.

The first objection taken by the defendant in this Court, is that the bond is made payable to Squire Parker *or* Thomas Parker. It is conceded that a bond, being a deed, cannot like a bill or promissory note, be made payable to *A B or bearer;* it must be made to some certain obligee, to whom it may be delivered. After it is completed, it may be assigned, by virtue of our statute, by the obligee to the bearer or otherwise, just like a note: *Marsh v. Brooks,* 33 N.C. 409.

But under the liberal and salutary provisions of the ordinance of the 18th October 1865, and the acts of 1866, chapters 38 and 39, by which the rigid rules of the common law are greatly relaxed in certain cases, we have had a full explanation of this transaction.

It appears that the defendant's intestate gave this bond to the plaintiffs for a tract of land, of which they were the joint owners. A joint bond for their joint land was unquestionably the object of all the parties, and doubtlessly they employed the very language which they thought would most clearly effectuate their purpose; in this, however, they were not fortunate. But we think that sufficient appears to authorize the construction that *or* means *and* in this connection.

This construction doubtless carries out the intention of (565) the parties and meets the ends of justice.

The next objection is, that the value of the land should not have been shown, because the bond sets forth the nature of the contract, to-wit: to pay "in currency." In *Howard and wife v. Beatty, ante* 569, where the promise was to pay in "current money," it is said, that if the promise had been to pay in "currency," the presumption would clearly have been that it was solvable in Confederate money. But of course, upon a proof that property was the consideration, the value of the property is the guide for the jury in ascertaining the value of the contract.

The third objection, that the judgment is appropriate to an action of assumpsit, while the writ is in *debt,* is also answered by the legislation referred to in the first part of this Opinion. The spirit of all those enactments, and especially of the act of 1866, chapter 38, making it admissible to prove the value of the property which constituted the consideration of the bond, is in favor of the judgment in its present form.

We do not see how it could have been otherwise than as sound-

ing in damages, since the value of the property was the measure of the value of the contract.

Per curiam.

Judgment affirmed.

Cited: Wooten v. Sherrard, 68 N.C. 338; *Outlaw v. Farmer,* 71 N.C. 33; *S. v. Pool,* 74 N.C. 406.

(566)

J. H. CARSON v. THE COMMISSIONERS OF CLEVELAND COUNTY.

The *Board of County Commissioners* is not *the representative* of the former *County Court,* even as regards matters of administration; *therefore,* a suit pending against the latter, at the time of its dissolution, cannot be *revived* against the former.

Quœre, whether a suit for *mandamus* can be *revived* in any case.

MANDAMUS, before *Logan, J.,* at Spring Term 1870, of MECKLENBURG Court.

The plaintiff had taken out the process against the Justices of the (late) County Court of Cleveland, in 1867, and they had answered. The suit was continued, (a part of the debt claimed having been paid from time to time,) until the adoption of the present Constitution abolishing those Courts. At Spring Term 1869, notice was issued to the Commissioners of the county, requiring them to show cause why they should not be made parties to the suit.

At the last term, the plaintiff moved for a peremptory *mandamus* to them, but this was refused by the Court, and the plaintiff appealed.

Dowd for the appellant.
Wilson contra.

PEARSON, C.J. The order that notice issue to the Commissioners of the County of Cleveland, to show cause why they should not be made parties to a proceeding by writ of *mandamus* heretofore directed to the Justices of the County, is based upon two mistaken ideas; the one, that the writ of *mandamus* may be revived, like an ordinary action — no precedent can be cited to support it; the other,

that the Commissioners *represent* the Justices of the County, as an executor or administrator represents his testator or intestate.

It is true, the County Court is abolished by the Constitu-
(567) tion, and may be said to be "civilly dead;" but the Commissioners are not its representatives. The one corporation simply succeeds and takes the place of the other, in respect to certain of its functions. The County Court exercised both judicial and administrative powers. The former have devolved upon the Superior Courts, the Judges of Probate, and the Justices of the Peace, — the latter devolved upon the County Commissioners, to whom county affairs, taxes, bridges, roads, poor-houses, and the like are entrusted. So the Commissioners are, in respect to administration matters, the *successors,* not the representatives, of the County Courts.

It follows, that proceedings against the Justices of the County Court cannot be revived, either by motion or *scire facias,* against the Commissioners of the County, so as to bind them by the proceedings, answer, etc., had under a writ of *mandamus.*

The instance of the incumbent of a benefice, a corporation sole, furnishes an analogy: Proceedings in equity against a deceased incumbent, although it concerns the church property, cannot be revived against his successor; it must be by *original* bill in the nature of a supplemental bill: 3 Dan. Chan. 13. If a writ of *mandamus* can be revived at all, which I very much doubt, it cannot be by bill of revivor or motion to revive, but it must be by some original process, which my researches have not enabled me to find. We concur in opinion with his Honor: "A suit against the Justices cannot be renewed against the Commissioners."

Order refusing the motion, affirmed.

Per curiam.

Affirmed.

Cited: Thomas v. Comrs., 66 N.C. 523; *School Comm. v. Kesler,* 67 N.C. 445.

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(568)

JACOB HARSHAW'S EXECUTORS v. N. W. WOODFIN AND W. F. McKESSON.

Under the C.C.P., a covenant not to sue the defendant, may be made available by the latter, by way of counterclaim, to defeat an action brought in violation thereof.

HARSHAW *v.* WOODFIN.

A transaction in which one creditor consents, upon receiving security by way of mortgage, to give indulgence to his debtor, is not therefore fraudulent as to other creditors.

CIVIL action, tried before *Mitchell, J.*, at Spring Term 1870, of BURKE Court.

The action was brought upon a bond executed by the defendants, payable to the plaintiffs' testator at twelve months, and dated November 1, 1860.

The defendants, by way of counterclaim, set up a transaction between the defendants and the testator, in 1867, by which the defendant Woodfin, who was the only principal in the note, executed a mortgage of lands to the testator, securing the debt in question, and thereupon received of the testator an instrument under seal, which, after enumerating certain debts, including the above, proceeded thus: "The above are secured in a mortgage this day, with agreement for indulgence three years, and one-third then to be paid; at four years, one-third to be paid, and the remainder in five years, and in the meantime no suit to be brought."

His Honor being of opinion thereupon that the plaintiff had no right to sue at the time that the action was commenced, they submitted to a non-suit, and appealed.

Battle & Sons for the appellants.

To enforce in a court of law a covenant not to sue, resort must be had to an action thereupon; it is no *bar,* especially where it is a covenant not to sue *for a certain time* only: 1 Shep. Touch. 164; *Deux v. Jeffries,* Cro. Eliz. 352; *Turner v. Davies,* 2 (569) Wms. Saund. 150, n. 2.

Malone contra.

Under the C.C.P., the present defence, being an *equitable* one, may be resorted to in the action upon the bond; see also, in another view, *Stinson v. Moody,* 48 N.C. 53.

DICK, J. We had occasion at this term to consider the distinction between a "release" and a "covenant not to sue:" *Russell v. Stokes.* Under the old system, a covenant not to sue for a time specified, was not a bar to an action on the debt or claim, and the plaintiff was entitled at law to proceed to judgment; but a court of equity would, by way of a specific performance of the covenant, enjoin an execution against the party to the covenant, (or a surety and other

principal obligor, except for aliquot parts of the debt,) on the ground that otherwise the covenantee would be exposed to an action.

In this case, McKesson, the surety, consented to the delay given to Woodfin, and the creditor covenanted not to sue, provided the debt was paid in three, four or five years, and was secured by a mortgage on real estate. The mortgage and covenant to this effect, were executed at the same time. This action was commenced before the expiration of three years, the time of the first payment, and the defendants rely on the covenant as a counterclaim in bar, and as a full defence. We have seen that under the old system the covenant could not have been made available as a plea in bar, and the defendant's only remedy was in a Court of equity. Under the new system, full relief is given in one Court, and in one action, and no sufficient reason was suggested in the argument, why the cov-
(570) enant is not a bar to this action, on the ground that the plaintiff, by suing before the time stipulated, was acting in violation of his covenant. This seems clear where there is only one principal obligor, who sets up the covenant as a counterclaim; how it would be in the case of a principal co-obligor not a party to the covenant, is a question not presented.

This arrangement between these parties was valid, and in no degree liable to the objection that it tends to defraud creditors. The equity of redemption was open to the other creditors, and a purchaser would have an election either to pay the mortgage debt, and call for title, or else, to take the benefit of the extended credit. This circumstance would doubtless enhance the value of the equity of redemption, and in this way be of a benefit, instead of an injury to the other creditors. Thus they have no right to complain in the distressing times through which the country is passing, if a creditor is disposed to give indulgence, provided his debt is secured. Other creditors have it in their power to force a sale of the mortgaged premises whenever they see fit.

Per curiam.

Judgment affirmed.

JOHN N. DAVIS v. DRURY MORGAN.

An endorsement in blank by the payee of a note, is presumed to have been intended as a transfer thereof; but this presumption may be rebutted, *ex. gr.*, by parol proof that it was intended to show a receipt of the money, from an agent of the maker.

CIVIL action, tried before *Buxton, J.*, at Spring Term 1870, of UNION Court.

The plaintiff brought the action upon an endorsement on a note, made by the defendant in blank, and filled up as pay- (571) able to the plaintiff, previously to the trial. The defendant introduced parol evidence, going to show that when the plaintiff paid to the defendant the money due upon the note, he did so in behalf of its *maker*, to take it up for him, and not as a purchaser, and that the endorsement was understood by the parties not to bind the defendant for its payment.

His Honor left it to the jury to find what the understanding of the parties was, when the endorsement was made, telling them, if the latter was meant only as a receipt, to find for the defendant.

Verdict for the defendant; Rule, Etc.; Judgment, and Appeal.

Dowd for the appellant.
Battle & Sons contra.

READE, J. It was submitted to the jury, as a question of fact, whether the plaintiff paid off the note as the agent of the maker, and for him, or whether he purchased it for himself, and took the endorsement of the defendant as a transfer for value; and the jury found for the defendant. The question for our consideration is, whether that was a question for the jury, or, whether the legal effect of the endorsement was not to transfer the note, with the defendant's liability, to the plaintiff.

Unexplained, the legal effect of the endorsement was to transfer the note, with the defendant's liability, to the plaintiff, but the endorsement was subject to explanation, and parol evidence was competent to *explain* it. If the note had been paid off by the maker, the endorsement would have amounted only to a receipt for the money, and the note would have been without vitality for any purpose. It is the same if paid off by the agent of the maker, and (572) parol evidence was competent to prove the agency: *Runyon v. Clark*, 49 N.C. 52.

There is no error.

Per curiam.

Judgment affirmed.

Cited: Mendenhall v. Davis, 72 N.C. 154; *Hill v. Shields,* 81 N.C. 254; *Comrs. v. Wasson,* 82 N.C. 313; *Adrian v. McCaskill,* 103 N.C. 187; *Coffin v. Smith,* 128 N.C. 255; *Sykes v. Everett,* 167 N.C. 605.

CHARLES W. LYNAM v. WILLIAM H. CALIFER AND OTHERS.

Where a seal was attached, *by mistake and ignorance,* to the name of a firm signed to a note given for value, the mistake was corrected in equity, and the plaintiff was allowed to recover as if there had been no seal.

BILL in equity, heard by *Watts, J.,* at Spring Term 1870, of GRANVILLE Court.

The plaintiff stated that in 1866 he had bargained to the defendant Califer a quantity of tobacco, at the price of $270; and that they applied to the defendant Long, to become surety upon the note which Califer was to give; that Long agreed that if his partner, the defendant Reed, were willing, the firm name, "Long & Co.," might be signed thereto, and referred them to Reed; and that having gone to Reed, who lived at some distance, he signed the name of the firm. He also stated that, by mistake and through ignorance on his part, a seal was added to the signature; that Califer had become insolvent, and that upon demanding the money from the other defendants, they declined to pay, upon the ground that Reed had no authority to execute a bond for the firm. The prayer was that
(573) the defendants be declared liable, etc., and for further relief.

The defendants Long & Reed put their defence mainly upon an allegation that the plaintiff and Califer had misrepresented the amount of the note, as being about $100, instead of $270.

There was a decree *pro confesso* as to Califer.

Upon the trial it was agreed to refer the questions of fact to his Honor for decision.

He found the facts to be substantially as stated in the bill; that the note was drawn at the home of Reed, and that there was no misrepresentation, etc.

Judgment for the plaintiff, etc.; Appeal by the defendant.

Graham and C. M. Busbee for the appellant.
Rogers & Batchelor contra.

SETTLE, J. This was a bill in equity seeking to correct a mistake, by putting out of the way a seal which was attached to the signatures of a firm name; and also to enforce the payment of the debt.

All questions of fact as well as of law were submitted, by agreement of parties, to the decision of his Honor. The facts found are fully set forth in the statement of the case transmitted to this Court, and clearly justify his Honor in decreeing the relief which he granted. Indeed the bill and answers (without regard to proofs, upon which his Honor also acted) make a strong case for relief. It is against conscience for the defendants to take advantage of a mere mistake in attaching a seal to the name of their firm. The power of the Court to grant the relief prayed for, is discussed in *McKay v. Simpson,* 41 N.C. 452; and in *Womack v. Eacker,* 62 N.C. 161.

Per curiam.

Judgment affirmed.

Cited: Kornegay v. Everett, 99 N.C. 34; *Williams v. Turner,* 208 N.C. 203; *Allsbrook v. Walston,* 212 N.C. 227.

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(574)

JONATHAN HARRIS v. JOSEPH A. DAVIS.

In an action of covenant, for the non-payment of a certain amount borrowed in bank bills, the measure of damages is, the value of such bills when obtained, in coin, and evidence as to the value of the property which the covenantor afterwards purchased therewith, is not competent.

COVENANT, tried before *Tourgee, J.,* at Spring Term 1870 of GUILFORD Court.

The plaintiff declared upon a bond for the payment of money at one day after date, dated December 12th, 1863. It was admitted that the consideration therefor was a loan of bank bills; and the only question between the parties was as to the measure of damages. The plaintiff submitted that he should be allowed to prove the value of the property (mills), which had been bought by the defendant with the bills so borrowed. The Court rejected the evidence, and the plaintiff excepted.

Verdict, and judgment, for the plaintiff, for the value in coin, increased by the depreciation in greenbacks, etc.

The plaintiff appealed.

Gorrell for the appellant.
Scott & Scott contra.

READE, J. As the covenant was to be performed by payment of the amount in bank-bills, it was necessary to show the value of the bank-bills at the time of the breach of the covenant: and to show their value the plaintiff offered to prove that the defendant used them in paying for a mill which he had bought, and also to prove the value of the mill.

Coin being the *standard* of value, it is evident that to ascertain the value of any thing else, it must be compared with the standard.

When the value of bank-bills was at issue, the question was, (575) how much coin would they purchase; how were they rated in the money market; what was their "general character" as a purchasing or debt-paying medium. The plaintiff insists that he was within this rule, when he offered to prove the value of the mill for which they were paid — to prove first that the bills were paid, and then to prove what the mill was worth. This, to say the least, would seem as if taking two steps instead of one. But that would not be all. There must be the further inquiry into all the circumstances of the sale, whether it was a good or a bad bargain, what was the inducement to the sale, and what the inducement to the purchase: and many other collateral questions would have to be considered which neither party would come prepared to meet. If a man's character is at issue, it would certainly affect it to prove that, upon a certain occasion, he committed perjury or larceny; but such proof would not be allowed, because it is not to be supposed that a man is prepared, without notice, to explain every act of his life, but only his general character. So here, it is not to be supposed that the defendant came prepared to prove what was the value of his mill, and what was his inducement to give too much, or the seller's inducement to take too little, for it, or whether it was a good or a bad bargain. There would be no certainty in trials, and no end to litigation, if the Courts were to tolerate such latitude in the evidence.

The only proper enquiry was, what was the "general character," and value, of the bank-bills. There is no error.

The plaintiff having appealed from a judgment in his favor, and the judgment being affirmed, he will pay the costs of the appeal.

Per curiam.

Judgment affirmed.

(576)

W. F. ATKINSON AND ANOTHER v. S. P. COX.

Where a complaint demanded judgment that a previous judgment obtained by the defendant against the plaintiff should be set aside, on the ground that it had been entered upon an understanding that certain deductions should be allowed, which, subsequently, the plaintiff therein had refused to allow; and the answer took issue upon these allegations: *Held*, that, until the issue made between the parties had been decided, the case was in no situation to warrant the Judge in setting aside the previous judgment.

(Heilig v. Stokes, 63 N.C. 612, approved.)

CIVIL action, tried before *Thomas, J.*, at Spring Term 1870 of WAYNE Court.

The defendant, at Fall term 1869 of Wayne Court, had obtained judgment for some seventeen hundred dollars against the plaintiffs. The present action was instituted for the purpose of setting such judgment aside, and, in the meantime, to have a restraining order. The latter order was made in February 1870, upon a statement in the complaint that the judgment, in question, had been entered with an understanding that certain deductions, which were set forth, should be allowed, and that the defendant since had refused to comply, etc.

The answer, filed at Spring term 1870, took issue upon the allegations of the complaint. Motions were thereupon made: 1, by the plaintiff, to set aside the judgment, and 2, by the defendant, to vacate the order of restraint.

His Honor declined to allow the second motion, and ordered that the judgment be set aside, etc.

The defendant appealed.

Dortch and Faircloth for the appellant.
Strong contra.

PEARSON, C.J. We are, at a loss to see the ground on which his Honor felt himself authorized, on complaint and answer to enter final judgment, that the former judgment of the de- (577) fendant as plaintiff, against the plaintiffs, as defendants, should be set aside, and the defendants be allowed to demur or answer. It is true, a judgment entered by fraud or surprise on the defendant, may be set aside, and the defendant be allowed to plead *de novo;* but this relief is sparingly exercised, and never until the parties are fully heard, and the fact of fraud or surprise clearly proved: *interest reipublicœ ut sit finis litium.*

In this case there was nothing to act on but the complaint and answer. The plaintiffs do not allege fraud or surprise, and the judgment was entered in open Court, in the presence of both parties, or their attorneys; but the plaintiffs allege that the judgment was entered with the understanding, that the parties would afterward come to a settlement, and any deduction that ought to have been allowed, or any set-off or counter-claim to which the defendants were entitled, should be credited on the judgment. The defendant denies that there was any such understanding, and avers that the judgment was made upon consideration, and after the necessary calculations were made by the parties. So, here is an issue of fact. No evidence except complaint and answer was filed, and the issue is not disposed of either by the finding of the Judge, or the verdict of a jury.

The judgment, which sets aside a former judgment, precludes any further inquiry in respect to the motion to dissolve the injunction. That ought to have been heard upon the complaint and answer (treated as affidavits,) and any additional affidavits that the parties might file, and the *questions* of fact on motion, as distinguished from *issues* of fact on the final hearing, might have been passed on, in order to dispose of the motion: *Heilig v. Stokes,* 63 N.C. 612.

Per curiam.

Judgment reversed.

Cited: Farrar v. Staton, 101 N.C. 85.

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(578)

SAMUEL ROWLAND AND WIFE v. ROBERT S. PERRY.

In all actions whose object is to bind real estate belonging to a wife, service of the summons must be made *personally upon her,* as well as upon her husband.

In an action which involved the question, whether a conveyance of land to a wife was not based upon a consideration paid by her husband, and was not, therefore, to be subjected to claims by his creditors, the summons was directed to both husband and wife, but the copy was delivered to the husband alone: *Held,* that the judgment rendered therein against the wife by default, must be vacated.

MOTION, to vacate a judgment, made before *Watts, J.,* at Spring Term 1870 of WAKE Court.

ROWLAND *v.* PERRY.

This is a motion by Isabella, wife of Samuel Rowland, to vacate a judgment taken by default against her husband and herself, in the Superior Court for Wake County, on the ground that the summons in the action was not personally served on her, and that she had no notice of such action. The summons was directed to the said Samuel and Isabella, and a copy was delivered to the husband, but it is admitted that no actual service was made upon the wife. The object of the action was to procure from the Court a declaration, that a certain conveyance of land from one Hogg to the said Isabella, in fee, was upon a consideration paid by the husband: and that the said Isabella was thus a trustee for her husband; and to subject the said land to sale under a judgment and execution against the husband, in favor of the plaintiff, Perry.

His Honor refused to grant the order applied for, and the plaintiffs appealed.

Rogers & Batchelor, and Fowle & Badger for the appellant.
Haywood and Mason contra.

RODMAN, J. (After stating the facts as above.) Both the husband and wife were necessary parties to the action in (579) which the judgment was rendered. Section 82, C.C.P., directs that the summons by which an action shall be commenced, shall be served by delivering a copy thereof, as follows:

1. If the suit be against a corporation to the president, etc.
2. If against a minor, to him and also to his father, etc.
3. If against an insane person, to his committee.
4. "In all other cases, to the defendant personally."

The counsel for the plaintiff, however, contends that where a wife is sued with her husband, personal service on the husband is personal service on the wife, and fulfils the requisition of the Statute: and he cites to that effect from several works on Practice, of acknowledged merit: 1 Tidd. Pr. 194, 3 Chit. Gen. Pr. 263. It seems to us that all those authorities are confined to personal actions, or at least to those in which the inheritance of the wife would not be bound. For the wife, it is said that the land in question, is her separate estate by the Constitution, Art. X, Sec. 6; or by the Act, Rev. Code, ch. 56, § 1; and her counsel have referred us to two cases in which it was held that where the suit would affect the separate estate of a wife, she must be made a party by actual personal service of the process on her: *Jones v. Harris,* 9 Ves. 486; *Ferguson v. Smith,* 2 John. Ch. 139. In addition to these, we have found two cases more recent, *(Kent v. Jacobs,* 5 Beav. 48; *Salmon v. Green,* 8 Beav. 45,) to the same effect. We do not think it necessary to de-

cide whether or not the constitution is retrospective, so as to give to married women separate estates in the property which they held at its adoption.

When a suit against a married woman is of such a character, that a judgment against her will necessarily bind her inheritance, it certainly comes within the same principle as it would, if it affected her separate estate. The reasons which require an actual ser-
(580) vice in the one case, are of equal weight in the other. Since the disuse of real actions, it is scarcely possible that a judgment in an action at law can directly affect the wife's inheritance. To ascertain the practice in such cases, we must consult the older authorities; and it will be found that where a real action was brought against husband and wife, touching her inheritance, the husband was not regarded as representing her, as was the case in personal actions; at least, so we understand the doctrine, found in Viner's Abridgment, translated from Brooke and other authorities:

"The husband alone shall not demur for his wife, by the opinion of the Court. Toth. 136, cites 36 Eliz.: *Sterling v. Green.*" Viner, Baron and Feme, 187, C. b. 38.

"In assise the baron pleaded joint tenancy with his feme, and had process to bring in his feme; *quod nota,* and she came and joined, and maintained the exception." Viner, Baron and Feme 193, D. 6, 2.

"Dower by the baron and feme, — the tenant said that the first baron had nothing after the Espousals: *prist,* and the demandant did not deny it, by which the tenant prayed that they should be barred, and *non allocatur:* for this shall be prejudice to the feme after the death of the baron; by which they acknowledged to the tenant by fine, and the feme was examined; *quod nota,* for she shall not be examined upon a confession of action, therefore, *non recipitur; note the diversity.*" Br. Baron and Feme Pl. 20, cites 44 Ed. 3, 12.

A bill was exhibited against husband and wife for matters chiefly concerning the wife; they both put in their answer, and then the husband died; this is an abatement of the cause, so that the plaintiff shall not proceed upon a bill of revivor, for the widow shall not be compelled to abide by the answer of her husband made for her, or which he made whilst she was *sub potestate viri.* Anon. 3
(581) Salk. 84; Roscoe, Real Actions, 9.

Mrs. Rowland is entitled to have the judgment vacated as to her. Our opinion on this point, makes it unnecessary to notice any of the other questions raised.

Mrs. Rowland will recover her costs in this Court, and the case

is remanded to the Superior Court of Wake, for such further proceedings as may be proper.

Per curiam.

Error.

Cited: Gulley v. Macy, 81 N.C. 366;

THE STATE v. JERRY JOHNSON.

The act of 1868-'9, c. 178, sub-c. iv., giving to Justices of the Peace, power to hear and determine criminal actions for certain petty offences, and among them, "assaults, and assaults and batteries, where no deadly weapon was used, and no serious damage was done, and where the punishment imposed by law does not exceed fifty dollars fine, or one month's imprisonment," — is not unconstitutional.

As that act confines the jurisdiction of the Justice to such offences as are committed within his township, it cannot be exercised in counties where townships have not been laid off.

In such cases, the pleadings must show affirmatively, everything necessary to confer the jurisdiction relied upon therein.

ASSAULT and battery, tried before *Jones, J.,* at Spring Term 1870, of WASHINGTON Court.

The defendant pleaded, Former Conviction; and, in support thereof, relied upon the fact that he had been tried and convicted for the same offence, by a Magistrate of the county. The *plea* did not state that the Magistrate who tried him, was a Justice of the Peace in and for the township in which the offence was committed. The *case* stated that at that time the county had not been laid off into townships.

His Honor, being of opinion that the defence was made out, ordered the defendant to be discharged. The Solicitor (582) for the State appealed.

Attorney-General for the State.

No counsel contra.

RODMAN, J. It is objected to the conviction in this case:

1. That the act of 1868-'69, conferring summary jurisdiction over certain petty offences on Justices of the Peace, is unconstitutional;

2. That the Justice did not have jurisdiction in this case, because the offence is not alleged to have been committed in his township.

1. The Constitution, Art. IV, § 33, provides, "The several Justices of the Peace shall have exclusive original jurisdiction under such regulations as the General Assembly shall provide" — of all criminal matters arising within their counties, where the punishment *cannot* exceed a fine of fifty dollars, or imprisonment for one month."

The act of 1868-'69, ch. 178, sub-ch. IV, gives to Justices of the Peace, power to hear, try and determine in the manner therein prescribed, criminal actions for certain petty offences, and among them, "assaults, and assaults and batteries, where no deadly weapon was used, and no serious damage was done, and where the punishment imposed by law does not exceed fifty dollars fine, or one month's imprisonment." Sections 6 and 7, impose some limitations on the jurisdiction, which it is not necessary here more than to refer to.

Prior to the passage of this act, every assault was punishable by fine and imprisonment, at the discretion of the Court, and therefore, *might* be punished beyond the jurisdiction of a Justice; and (583) it is argued, that this act does not expressly limit the punishment of any defined class of offences, but does so, if at all, only by implication, and therefore, not sufficiently. It may be that it would have been a more methodical arrangement, for the Legislature to have defined certain crimes in one statute, devoted to that subject, and to have enacted that the punishment of those coming within such definition, should not exceed the limit above mentioned; and then, in another statute, devoted to the subject of criminal Courts and their jurisdiction, to have enacted that Justices of the Peace should have jurisdiction of the crimes so defined. But when the intention is clear, a statute cannot fail of effect, merely because perhaps some of its provisions might be put in a more appropriate place. We think the intention sufficiently appears from the statute in question. Sections 4, 6 and 7, separate with sufficient clearness certain assaults from the general class, and give to a Justice jurisdiction over these. The act might have gone on, and said expressly, that "the punishment of these shall not exceed, etc." —; but taking the language of the act, in connection with the Constitution, it seems to us that a plain and necessary implication limits the punishment as clearly as express words could. It must be noted that the act in question, although in one sense it is a penal law, as dealing with penalties, yet, as it mitigates them, it is not a penal law in the sense of requiring to be strictly construed.

What the evil was, which was sought to be remedied by the act, is plain. That the time and attention of the Courts of record were unduly occupied in the trial of petty offences, was a complaint long before the abolition of slavery. Whether or not there was an actual increase of such offences, after that event, there was certainly a vast increase of them cognizable by the Court. Previously, the great majority of such offences, when committed by slaves, were tried in the domestic form; afterwards, all these were poured into the Courts, and occupied their time and attention, to the exclu- (584) sion of civil actions, so completely that it amounted in many cases to a denial of justice. Now, the determination of controversies respecting property and civil rights, is just as much due to the people as the trial of persons charged with crime, and the Courts must do both, to satisfy the people with them and with the government. Nor was the evil of an exclusive jurisdiction in the Superior Courts, less to the offenders, than to the people generally. Often, persons accused of petty crimes were unable to find bail, and were imprisoned before trial much longer than was deemed an adequate punishment after they were found guilty. The expense of the system, was also most burdensome. The slow and costly process of trial by Court and jury, is only required in cases of difficulty or importance. Considerations like these have sufficed in every state and country, to give a summary jurisdiction of petty offences to local officers. In this case the dangers to be guarded against were two:

(1.) The Justice might punish with unmerited severity, even within the narrow limits of his power. This was provided against by giving to the defendant, the power to appeal;

(2.) The Justice, through ignorance, or by a corrupt collusion with the offender, might punish the gravest offences with a mere nominal penalty, to the scandal of justice, and the detriment of the public morals; this was provided against, as it is in the English law, by requiring that in every case, the party injured should make the complaint. When he thinks the offence so slight as to demand no punishment greater than what a Justice can inflict, the State may well agree to consider it so; and if he thinks otherwise, the jurisdiction remains with the Superior Court. The act has not been in force long enough to permit an opinion of its effects, from experi- (585) ence, but it seems well adapted to the ends in view, viz: 1. To relieve the Superior Courts of the pressure of petty business, and give them the time to perform the important duties for which they were more especially created: 2. To relieve the taxpayers from a heavy burden of unnecessary costs: and 3. To give petty offenders a speedy trial, and, (if guilty,) a speedy, but light

punishment, in the place of a long imprisonment on the mere suspicion of guilt.

2. The second objection is more difficult, and indeed we think it fatal to the plea. The plea does not state that the offence of which the Justice took jurisdiction, was committed within his township; and it could not do so, as the case states that the county had not been divided into townships. It is a familiar principle, that when the judgment of an inferior Court, not of general jurisdiction, is pleaded, every thing must be shown necessary to give the Court jurisdiction. The act, sections 6 and 7, expressly confines the final jurisdiction of the Justice to offences committed within his township; it was competent to the Legislature so to confine it, and we cannot extend it. For this reason, we think there was error in the judgment below.

Let this opinion be certified.

Per curiam.

Reversed.

Cited: S. v. Drake, 64 N.C. 590; *S. v. Perry,* 64 N.C. 598; *S. v. Davis,* 65 N.C. 300; *S. v. Pendleton,* 65 N.C. 619; *S. v. Gardner,* 72 N.C. 381; *S. v. Huntley,* 91 N.C. 619; *S. v. Ivie,* 118 N.C. 1229.

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(586)

THE STATE v. WALTER SCOTT.

One who borrows a horse with an intention, existing at the time, of stealing him, is guilty of larceny; and no change of mind after such taking will purge the offence.

A charge which *substantially* conforms to the instructions asked by a party, is sufficient; the Judge need not adopt *the words* of such instructions.

LARCENY of a horse, tried before *Tourgee, J.,* at Spring Term 1870, of ORANGE Court.

It was shown that the defendant borrowed the horse of his owner, at that time in Hillsboro', in order to ride to a place about one mile from town. He was directed by the owner to hitch the horse on coming back, *about* a certain place; not where he was when taken. The defendant, however, on coming back, hitched the horse at a different place, behind a grocery; and afterwards rode him off, and never returned him.

The defendant asked his Honor to charge, that if the owner lent the horse to him, he was not guilty of larceny. His Honor declined to do so, and instructed the jury that if they believed from the testimony that the defendant borrowed the horse, with an intention, existing at that time, to steal him, or if, after returning the horse as described, he afterwards took, and carried him off, without the owner's knowledge or assent, he was guilty of larceny.

Verdict, *Guilty;* Judgment accordingly.

The defendant appealed.

No counsel for the appellant.

F. H. Busbee for the Attorney-General contra.

SETTLE, J. His Honor charged the jury "that if the defendant borrowed the horse with an intent, existing at the time of the borrowing, to steal him; or, if he returned the horse to (587) the place he was directed and afterwards rode him off, he was guilty of larceny." The charge is in the alternative, and the error is supposed to exist in the first proposition, to wit: "that if the defendant borrowed the horse with an intent existing at the time of the borrowing, to steal him, he was guilty of larceny." There can be no doubt as to the soundness of this proposition; it is fully sustained by authority: 2 East. P. C. 691, 2 Bish. Cr. Law, § 818, and cases there cited. And it is also settled, that the question of intention, is for the consideration of the jury. The transactions constituting the *res gestæ* in this case, all took place during the same day, and the whole case was submitted to the jury.

It may be suggested, that the fact that the defendant returned the horse to the prosecutor, after riding him a mile and back, rebuts the idea of any intention to steal him. If the felonious intent existed at the time of the borrowing, which was a question for the jury, the offence was not purged by delivering the horse back to the owner: 2 Bish. Cr. Law, § 805. This apparent fair dealing may have been a part of his device, in order to avoid suspicion. This, too, was a matter for the jury, and they have found the facts against the defendant.

The defendant asked his Honor to charge that "if the prosecutor loaned him the horse, he was not guilty of larceny." A party has no right to require a Judge to charge in any particular terms; and in this instance it would have been improper for his Honor to do so without explanation. Although the case states that his Honor refused the charge prayed for, still, upon examination, it will be seen that his charge embraced every thing to which the defendant was entitled.

He told the jury that if they believed, from the testimony,
(588) (and we must suppose that the charge was given in reference to the testimony, and all the circumstances of the case,) that the defendant borrowed the horse, with an intent existing at the time of the borrowing, to steal him, he would be guilty of larceny. They were required by this charge to find not only the borrowing, by which he obtained the possession, but also the intention, existing at the time of the borrowing, to steal the horse. A fair construction presents at once the other proposition, that unless they do so find the borrowing, coupled at the same time with an intention to steal, the mere borrowing would not be larceny. This we think is a fair construction of his Honor's charge on that part of the case.

The second branch of the charge, to wit: that if they believed that the defendant returned the horse as directed by the owner, and afterwards took and carried him off without the knowledge or assent of the owner, he was guilty of larceny, is a proposition too plain to admit of argument. If the possession of the defendant was determined by the return of the horse, all privity was severed, and the subsequent taking was larceny; as much so as if any other person had taken the horse.

Upon the whole record we find no error. Let this be certified, etc.

Per curiam.

Judgment affirmed.

Cited: S. v. Boon, 82 N.C. 650; *S. v. Hinson,* 83 N.C. 642; *Bost v. Bost,* 87 N.C. 481; *Moore v. Parker,* 91 N.C. 281; *Wilcoxon v. Logan,* 91 N.C. 453; *S. v. McRae,* 111 N.C. 666; *S. v. Lyerly,* 169 N.C. 378.

(589)

THE STATE v. WILLIAM DRAKE.

The Superior Courts have jurisdiction of all offences except such as have been heard, or are pending, before a Justice, according to the terms of the Act of 1868-'9, c. 178.

An indictment for an act which is criminal when committed upon Sunday, must state that the act in question was committed upon Sunday; but if it do so, no exception can be taken to it for referring to the same day by a wrong day of the month.

It is immaterial that the indictment use the expression, "the Sabbath" instead of "Sunday."

STATE *v.* DRAKE.

INDICTMENT, for hunting with a gun upon Sunday, tried before *Watts, J.*, at Spring Term 1870, of NASH Court.

The indictment charged the offence to have been committed "on the 1st day of October 1868," etc., "on the Sabbath day," etc., etc.

A special verdict having been found in accordance with the indictment, his Honor gave judgment for the defendant, and the Solicitor for the State appealed.

Attorney General and W. R. Cox for the State.
C. M. Busbee contra.

SETTLE, J. This indictment is founded upon the act of 1868-9, ch. 18, which enacts "that if any person or Persons whosoever shall be known to hunt in this State on the Sabbath with a dog or dogs, or shall be found off of their premises, on the Sabbath, having with him or them a shot gun rifle or pistol, he or they shall be subject to indictment, and upon conviction shall pay a fine not exceeding fifty dollars at the discretion of the Court," etc.

The first objection is to the jurisdiction of the Superior Court: the defendant contending that, as the punishment does not exceed fifty dollars, the offence is cognizable only by a Jus- (590) tice of the Peace.

The general rule is, that the Superior Court has jurisdiction of all offences; the exceptions to this rule are rare.

The act of 1868-'9, ch. 178, confers and regulates the jurisdiction of Justices of the Peace in certain cases, and provides that no justice shall have final jurisdiction to determine any criminal action or proceeding for any offence whatsoever, unless it shall appear on the complaint, and upon the proof before him:

"1. That the offence was committed within his Township,

2. That the complaint is not made by collusion with the accused, and that it is made by the party injured by the offence,

3. That it is made within six months after the commission of the alleged offence. The complaint shall be in writing and under oath, but need not be in any parteiular form."

It certainly was not the intention of the Legislature to enact that, unless these prerequisites are complied with, the guilty parties are to go unpunished, and the Superior Courts are ousted of their general jurisdiction. The only purpose was, to confer a limited jurisdiction upon Justices of the Peace; restricted within the narrow limits prescribed by the act. If from any cause the Justice of the Peace has not exercised his jurisdiction, the Superior Court takes cognizance by virtue of its general jurisdiction: *State v. Johnson, ante* 581.

Again, it is objected, that, whereas the indictment charges that the defendant "on the first day of October 1869, etc., was found off of his premises on the Sabbath day, having with him a shot gun," etc., the said first day of October did not in point of fact fall on the Sabbath. Ordinarily the day of the week need not be stated,
(591) but if the offence consists in doing a particular thing on Sunday, the indictment must aver that it was Sunday on which it was done: 1 Bish. Cr. Pro. 521. But the statement of the day of the month in an indictment for committing an offence on Sunday, though the doing of the act on that day is the gist of the offence, is not more material than in other cases; and hence if the indictment charge the offence to have been committed on Sunday, though it name as *the day of the month* one which does not fall on Sunday, it is good: Whart. Cr. Law, § 263.

It was suggested upon the argument that the statute uses the word *Sabbath* instead of *Sunday,* which is the term usually employed in our previous legislation.

The words are not strictly synonomous; the one signifying Saturday, the seventh day of the week, the Jewish Sabbath; the other, the first day of the week, commonly called the Lord's day.

But, by common usage, the terms are used indiscriminately to denote the christian Sabbath, to-wit: Sunday.

In *State v. Williams,* 26 N.C. 400, Ruffin, C.J., uses the words as synonymous.

There was error in the ruling of his Honor upon the special verdict.

This will be certified, etc.

Per curiam.

Judgment affirmed.

Cited: S. v. Anderson, 80 N.C. 430; *S. v. Bryson,* 90 N.C. 748; *S. v. Wynne,* 116 N.C. 984.

(592)

THE STATE v. RIDLEY MABREY.

Where, upon some words between husband and wife he threatened to *leave* her, and used to her very improper language, when she started to go off, and he caught her by the left arm, and said he would kill her, drawing his knife with the other hand; then, holding her, struck at her with the knife, but did not strike her, and again drawing back as if to

strike, his arm was caught by a bystander; but after all, no injury or blow was inflicted: *Held*, to have been a case in which the Courts will interfere, and that the husband was guilty of assault.

ASSAULT, tried before *Watts, J.*, at Spring Term 1870, of HALIFAX Court.

The jury found, by a special verdict, that on the 7th day of June 1869, at the house of the defendant, etc., the latter and his wife had some words and he threatened to leave her; after some very improper language by him, she started off, when he caught her by the left arm, and said he would kill her, and drew his knife and struck at her with it, but did not strike her; that he drew back as if to strike again, and his arm was caught by a bystander, whereupon the wife got away and ran about fifteen steps; that the defendant did not pursue her, but told her not to return, if she did he would kill her; that he did not strike her, or inflict any personal injury, and that he was a man of violent character, etc., etc.

His Honor thereupon being of opinion that the defendant was not guilty, there was a Verdict and Judgment accordingly; and the Solicitor for the State appealed.

Attorney-General for the State.
R. B. Peebles and Rogers & Batchelor contra.

READE, J. The facts present a case of savage and dangerous outrage, not to be tolerated in a country of laws and Christianity. We rigidly adhere to the doctrine, in *State v. Rhodes,* (593) 61 N.C. 453, and precedent cases in our reports, that the Courts will not invade the domestic forum, to take cognizance of trifling cases of violence in family government; but there is no relation which can shield a party who is guilty of malicious outrage or dangerous violence committed or threatened. In *State v. Rhodes,* the jury had been charged that "the husband had the right to whip his wife with a switch no larger than his thumb." In combatting that error, the Court said: "A light blow, or many light blows with a stick larger than the thumb, might produce no injury; but a switch half the size might be so used as to produce death. The standard is the *effect produced,* and not the manner of producing it, or the instrument used." Those words were used as applicable to the facts in that case. But on the argument at the bar in this case, they were perverted to mean that in any case, no matter what weapon was used or from what motive or intent, unless permanent injury were inflicted, the Court would not interfere therefore, *here,* although death was threatened and a deadly knife used, yet as it was averted

by a bystander, the Court will not interfere. We repudiate any such construction of the *State v. Rhodes*.

Upon the special verdict there ought to have been judgment against the defendant.

Let this be certified, etc. There is error.

Per curiam.

Error.

Cited: S. v. Fulton, 149 N.C. 496; *Price v. Electric Co.,* 160 N.C. 455; *Odum v. Russell,* 179 N.C. 8.

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(594)

THE STATE v. JEREMIAH WORTHINGTON.

What a man says when charged with a crime, is competent evidence for him; *therefore*, what was said by a man charged with having stolen goods in his possession, who thereupon showed them, is competent.

It was also competent, as part of a conversation, the first part of which had necessarily been given in evidence by the State.

In such cases, the record ought to show *what* it was that the defendant said, — so as to show its importance, and that its rejection prejudiced him; it ought also to present what had been said by the person who charged that he had stolen goods in his possession.

(Observations by the Court, upon the importance of counsel's bestowing care in making up *cases* for this Court.)

INDICTMENT, with two counts, (1,) for larceny, and (2,) for receiving stolen goods, tried before *Jones, J.*, at Spring Term 1870, of PITT Court.

It was shown that one Cobb, also indicted with the defendant, had stolen cotton from the gin of one Wilson, on the night of October 16, 1869, and that this was traced by Wilson to the store of the defendant, upon the next morning, about daylight. Wilson, at that time, went into the store, and was shown by the defendant a lot of cotton. On the same day he sent for it, and it was delivered up.

Some testimony was introduced by the defendant, which it is not material to state here. He then offered to prove what he said to Wilson, at the time when he showed him the cotton. This was objected to, and was excluded by the Court. The defendant excepted.

His Honor instructed the jury as to Worthington, that the only

question was, whether he had received the cotton with a guilty knowledge, that if they were satisfied that he did, they should find him guilty upon the second count; otherwise, they should (595) find him not guilty.

Verdict, Guilty; Rule, etc.; Judgment, and Appeal.

Johnson for the appellant.
Attorney-General contra.

PEARSON, C.J. There is error in the rejection of what was said by the defendant, when he showed the cotton to Wilson, who claimed it as his cotton, and charged that it had been stolen out of his gin the night before. This evidence was admissible on two grounds. It was part of a conversation. The State having offered in evidence the first part, as a matter of course the defendant was entitled to have the whole of the conversation put before the jury. When a man who is at liberty to speak, is charged with a crime and is silent, his silence is a circumstance tending to show guilt: *State v. Swink,* 19 N.C. 9. It follows, that if he denies the charge, or says anything in explanation, these declarations may be given in evidence in his favor, to pass before the jury for what they are worth. The State having opened the door, lets in all that was said on both sides.

The general rule is, (and his Honor seems to have acted upon it): "The declarations of a defendant are not evidence for him." One exception is made to the rule: "When the State offers in evidence a part of the conversation, the whole should be heard."

If a man be charged with a crime, he is not allowed to offer the conversation in evidence; that would be manufacturing evidence for himself, and such evidence is excluded by the general rule. But if the State proves a part, the whole is admissible under the exception.

In our case, there is an additional ground: What was said by Wilson, and what was said by the defendant at the time he showed the cotton, then in his possession, to Wilson, was a (596) part of the act, and his showing the cotton could not be proved by the State without letting in what was said at the time on both sides; for, showing the cotton was only a part of the act — the *whole* act or *res gestæ* included what was said as well as what was done. The Attorney-General did not refer to any case excluding the declarations of a defendant at the time he is found in the possession of stolen property. On the contrary, in all of the cases that we have examined, the declarations at the time are received as of course. If the defendant be silent, or hesitates, or gives inconsistent statements, it is a circumstance against him; if he is self

possessed, and gives a clear and consistent explanation, it is a circumstance in his favor: *State v. Scipio Smith,* 26 N.C. 402.

Upon opening the case, the record was found to be defective in three particulars:

1. It did not set out what Wilson said when the defendant showed him the cotton. This omission may not have been fatal to the point which the defendant wished to present, for we are inclined to the opinion, that when one is found in the possession of stolen goods, he is entitled to give in evidence, what he, at the time, says in explanation of the fact of his being in possession. There may be no express charge made against him, but the fact of his being in possession of stolen goods, makes a charge by implication, "unless he can give a rational account how he obtained them:" *Smith's* case, supra. It was, however, better to supply the omission, as it must have been an oversight in making up the case, for it is not at all probable that Wilson said nothing when the cotton was showed to him, and it is still less probable, that the witness "kept back" what he said, or that he would have been permitted to do so by the presiding Judge, with a view of excluding what the defendant said in reply.

2. It did not set out "the declaration of the defendant," (597) which he proposed to give in evidence. This omission would have excluded the point; for unless the matter which the party offers to prove, is set out, the error, in rejecting it, does not appear on the record. "The declarations may have been irrelevant, and so, harmless. It is necessary that the appellant should show in his exception, some error to his prejudice; otherwise, the Court cannot undertake to set aside the solemn verdict of the jury:" *State v. Cowan,* 29 N.C. 239.

3. The verdict was general, and found the defendant guilty on both counts, to wit, He is guilty of stealing the cotton, and he is guilty of *receiving* the cotton, knowing it to have been stolen. This is inconsistent and absurd. No judgment could be rendered on it. When several counts of an indictment set out different ways in which the crime was committed, the jury need not find in which of the ways it was committed, but may find a general verdict: *State v. Williams,* 31 N.C. 140; but when the indictment charges two distinct offences, of such a nature that if the defendant be guilty of one, he cannot be guilty of the other, no judgment can be rendered on a general verdict. These difficulties are all put out of the way by amendment. It is proper to refer to it as showing a commendable liberality on the part of the counsel. It would disgrace the administration of the law if a guilty man should avoid judgment by an omission in entering the verdict, or if one charged with a crime

should be deprived of a trial according to law, by an oversight in making up the case.

We refer to it also for the purpose of again calling the attention of the members of the bar to the importance of seeing to it that cases for this Court are made up so as to present *the points,* without encumbering the record with unnecessary matter. An attorney often serves his client as effectually by attending to the making up of the case, as by conducting it skilfully before the Court (598) and jury. His duty does not end when the verdict is entered.

There is error.

Per curiam.

Venire de novo.

Cited: S. v. Rawles, 65 N.C. 338; *Street v. Bryan,* 65 N.C. 622; *S. v. Purdie,* 67 N.C. 328; *S. v. Baker,* 70 N.C. 531; *S. v. Howard,* 82 N.C. 628; *S. v. Keath,* 83 N.C. 628; *S. v. Williford,* 91 N.C. 532; *S. v. McNair,* 93 N.C. 630; *S. v. Rhyne,* 109 N.C. 795; *Saunders v. Gilbert,* 156 N.C. 470; *S. v. Davis,* 177 N.C. 576; *S. v. Rumple,* 178 N.C. 721.

THE STATE v. WASHINGTON PERRY.

Justices of the Peace have not *exclusive* jurisdiction of the offence of *receiving stolen goods under the value of five dollars;* but only jurisdiction *concurrent,* under certain circumstances, with that of the Superior Court.

INDICTMENT *for receiving stolen goods,* tried before *Watts, J.,* at Spring Term 1870 of FRANKLIN Court.

The defendant was charged with having received ten pounds of bacon, of the value of six pence, knowing it to have been stolen: Having been convicted, upon motion the judgment was arrested for want of jurisdiction.

The Solicitor for the State appealed.

Attorney-General for the State.

Rogers & Batchelor contra.

DICK, J. The question as to the extent of the jurisdiction of the Superior Courts and of Courts of Justices of the Peace in criminal

matters, was fully considered and determined in the case of *State v. Jerry Johnson, ante* 581.

In certain offenses specified by statute, the party injured in person or property has an election to prosecute the offender in either of said Courts. A Justice of the Peace has not exclusive juris-
(599) diction of the offence of receiving stolen goods under the value of five dollars. He may exercise such jurisdiction, and his action may be final, where the offense was committed in his township, and the party injured files a complaint within six months after the commission of the alleged offense.

In this case the Superior Court had jurisdiction, and the motion in arrest of judgment, ought not to have been sustained by his Honor.

There is error. Let this be certified, that the Court below may proceed to judgment.

Per curiam.

Error.

THE STATE v. W. M. UNDERWOOD.

An appeal by the defendant in a criminal case to the Supreme Court, vacates the judgment below; *therefore*, in such a case, where the Supreme Court had decided that there was *no error*, and, upon the transcript being returned, the Solicitor moved for judgment: *Held*, that the defendant upon producing an unconditional *pardon*, had a right to be discharged without paying costs.

MOTION, for discharge, by a defendant in a case of larceny, made before *Buxton, J.*, at Fall Term 1869 of UNION Court.

The defendant had been convicted of larceny, and having appealed to the Supreme Court, judgment had been rendered there, that there was no error (63 N.C. 98,) and a transcript had been sent down accordingly. Thereupon, the Solicitor for the State moved for judgment; but the defendant, having produced an unconditional *pardon* from the Governor, moved that he be discharged, and that without paying costs. The Solicitor resisted the latter part of such motion. His Honor allowed the motion, and the Solicitor appealed.

(600) *F. H. Busbee for the Attorney-General.*
No counsel contra.

SETTLE, J. It has been a common practice in this State to grant pardons upon condition that the defendant pay all costs, etc.

Here, however, there is a general pardon of the offence, without condition. This was pleaded in open Court, after a prayer by the Solicitor for judgment. His Honor was of opinion that the effect of the pardon, was to discharge the defendant, and that he had no power to impose costs or any other condition. In this opinion we concur.

In *Baldry v. Packard,* Cro. Charles 47, cited upon the argument by the Attorney-General, which was a suit in the Spiritual Court for defamation, in which the parties had become interested in the question of costs; and, so in *Hall's* case, 3 Coke 103, it is held that while all proceedings in the Ecclesiastical Court *ex-officio,* are for the King and, while, therefore, he may pardon any or all suits there pending, still after sentence given and costs taxed for the party, the pardon shall not discharge them. But, if the pardon had been obtained before the sentence, then the pardon had discharged the whole, for then the Court could not have proceeded to any sentence of the principal, and by consequence, not as to the costs which are but accessory. It is true that it is there resolved, that, although an appeal suspends the sentence for divers purposes, yet, by the first sentence *the party,* notwithstanding the appeal, had an interest in the costs which could not be discharged by the King's pardon, and, that, therefore, as to this purpose, the first sentence is not suspended by the appeal. But we are not disposed to adopt this reasoning, in a case like ours, which is simply a prosecution in behalf of the State. We think that the appeal to the Supreme Court vacated the judgment of the Superior Court for all purposes, and the defendant's being pardoned before judgment, puts an end to the whole matter. How it would have been had the (601) pardon not been granted until after judgment, we will not undertake to decide until the case is properly before us.

Per curiam.

Affirmed.

Cited: S. v. Mooney, 74 N.C. 99.

THE STATE v. JACOB MANUEL.

Whether a witness of tender years has sufficient intelligence and sense of the obligation of an oath, to be competent, is a matter within the discretion of the Judge who presides at the trial, and therefore, cannot be reviewed upon appeal.

A prisoner has no right to except on account of the court's having taken a recess during the trial, from one evening to the next morning; *nor*, because the Court declined to provide that, during such recess, the witnesses for the State should be kept separate.

MURDER, tried before *Buxton, J.*, at Spring Term 1870 of CUMBERLAND Court.

Upon the trial, a witness named Parker, who said he was "going on" twelve years of age, was introduced by the State, and being objected to by the prisoner for want of intelligence and regard for the obligation of an oath, said, upon preliminary examination, in answer to questions put to him: That he had been to Church once or twice in his life, but never to Sunday-school: that he had heard that there was a God, and also a place of eternal punishment, but did not know whether there were such; that the number of days in the week were *six;* that persons, who swore to lies, would go to the devil, and also be placed under arrest by the Court; that he believed it would be a sin to come into Court, and tell a lie; that he believed that there is a God, and that He will send liars to
(602) the devil. He also said that he could count *forty,* but upon trying, after counting correctly to *thirty-eight,* he skipped to *forty-one.*

He was thereupon admitted, and the defendant excepted.

At night-fall of the first day, the State not having examined all of its witnesses, the Court proposed to adjourn. The defendant objected to any adjournment until the State's witnesses had been gone through with. Upon the Court's overruling this objection, the defendant further requested that the witnesses for the State should be kept separate during the recess. His Honor, however, believing that proper means to elicit truth had already been resorted to, declined this application also.

Verdict, Guilty; Judgment, and Appeal by the defendant.

No counsel for the appellant.
F. H. Busbee for the Attorney-General contra.

SETTLE, J. The first exception made by the prisoner, to-wit: to the introduction of the witness, Parker, who was "going on" twelve years of age, was disposed of by his Honor after a full investiga-

tion. This was a matter resting solely in the discretion of his Honor, and we cannot review his ruling, in this Court. It may not be improper to say that we think from the evidence transmitted to this Court, that his discretion was properly exercised.

At night-fall the prisoner contended that the Court could not adjourn until morning, without his consent, and insisted upon proceeding with the trial. If this were so, the decisions of our Courts would frequently turn upon the physical powers and the endurance of the prisoner, rather than upon the law and justice of the case. True, there are certain steps during the progress of a trial which cannot be taken without the consent of the prisoner, *e.g.* the discharge of the jury before they render their verdict, except under overruling circumstances amounting to a necessity. (603) Perhaps it is upon this idea that the prisoner founds his exception. But it is wholly inadmissible. The usual adjournments from day to day, and for refreshment, are altogether at the discretion of the presiding Judge.

Again the prisoner excepts, because his Honor declined to take steps to keep the witnesses separate during the night. They had been separated during the trial in the day. The separation of witnesses, at any time, is a matter for the discretion of the Court, and even if his Honor had refused to order their separation at the trial, it would have furnished no just ground of exception. Because of the importance of the case to the prisoner, we have noticed all of his exceptions *seriatim*. We have also carefully examined the record, and have not been able to discover any error. The judgment of the Superior Court is affirmed.

Let this be certified, etc.

Per curiam.

Judgment affirmed.

Cited: S. v. Edwards, 79 N.C. 650; *S. v. Finger,* 131 N.C. 782; *S. v. Pitt,* 166 N.C. 270; *S. v. Tate,* 169 N.C. 374; *S. v. Merrick,* 172 N.C. 872; *Lanier v. Bryan,* 184 N.C. 238; *S. v. Satterfield,* 207 N.C. 121; *S. v. Jackson,* 211 N.C. 203; *S. v. Gibson,* 221 N.C. 254; *S. v. Merritt,* 236 N.C. 364.

(604)

THE STATE v. E. J. KREBS AND G. F. KIMBALL.

General words in an act of incorporation, do not authorize the Company to do acts which by the public law are indictable; plain and positive words are necessary to convey such a privilege; *therefore* the charter of "the North Carolina Real and Personal Estate Agency," in providing that "the said agency shall have the right and power to *sell and dispose* of any real or personal property placed in their hands for sale, *in any mode or manner the agency shall deem best*," (Private acts of 1868-'9 c. 42, did not authorize the Agency to sell property by means of a lottery.)

INDICTMENT for promoting, etc., *a lottery*, tried before *Russell, J.*, at Spring Term 1870, of NEW HANOVER Court.

The defendants claimed a right to sell and dispose of personal and real property, among other ways, by lottery, under the private act of 1868-'9, c. 42, which chartered the North Carolina Real and Personal Estate Agency; and the question was, whether such authority was given therein. The clause relied upon is given in the Opinion.

His Honor was of opinion that it was not.

Verdict and Judgment accordingly; and Appeal by the defendants.

Strange and Phillips & Merrimon for the appellants.
Attorney-General contra.

PEARSON, C.J. It is an indictable offence, punished with fine and imprisonment, "to expose or set to sale any house, land or goods," etc., by means of a lottery: Rev. Code, ch. 34, sec. 69.

The charter of the "North Carolina Real and Personal Estate Agency has," among others, this provision: "And the said Agency shall have the right and power to *sell* and *dispose* of any real
(605) or personal property placed in their hands for sale, *in any mode or manner the Agency shall deem best:*" Private acts of 1868-'9, ch. 42, (p. 59.)

Taking the act of incorporation by itself, the words are broad enough to authorize the Company to sell property by means of a lottery, and to establish agencies for that purpose in every county in the State.

Without room for doubt the General Assembly had power to confer this exclusive privilege upon the "North Carolina Real and Personal Estate Agency," if in its wisdom it was deemed promotive of the public good; and I dare say the draftsmen of the bill, and probably many of the members who voted for it, intended to au-

thorize the "Agency" to use "lotteries" as a means of disposing of property.

But that is not the question. The question is, do the words in the act of incorporation confer the privilege of selling or disposing of property by lottery, taking the act of incorporation in connection with the law of the land, and construing it by the precise rules of law, and the rules of construction established by the decisions of the Courts.

1. *On principle:* By the general law lotteries are prohibited, and any person using a lottery as the means of disposing of property, is subject to fine and imprisonment. When therefore it is said that the General Assembly confers on the "North Carolina Real and Personal Estate Agency" the exclusive privilege of violating the law of the land, it is reasonable for the Courts to require that this intention should be expressed in plain and positive words, and if general words only are used, it will be taken as of course that a privilege conferred by a private act of the General Assembly, is subject to, and restricted by the general law. It would be indecent for the Court to suppose that the members of the General Assembly meant to confer this privilege, and resorted to general words because of the fear of their constituents, and of public opinion. If it was the intention to confer on this Company the exclusive privilege (606) of selling and disposing of property "by means of lotteries," is was so easy to say so in plain words, that the Court cannot give this effect to general words, without by implication supposing that the General Assembly used general words *covertly;* that is, in plain English, on purpose to confer a franchise to sell property by lottery, and did not say "lottery" for fear of shocking the moral sense of the community.

2. *On authority:* In regard to the construction of charters like this, see *R. & G. R. R. Co. v. Reid, ante* 155, and the cases referred to by Cooley on Constitutional Limitations, 395.

3. On the whole our conclusion is, that general words in an act of incorporation do not authorize the Company to do acts which by the public law are indictable; plain and positive words are necessary to confer such a privilege.

It is a wonder that so great a nuisance should have been tolerated by the public authority for so long a time. The general repealing clause in the charter has no effect, inasmuch as the enacting clause, by the construction put on it, does not confer the privilege.

There is no error.

This will be certified to the end that the Judge of the Superior Court may pronounce sentence, etc.

Per curiam.

No error.

Cited: McAden v. Jenkins, 64 N.C. 801; *S. v. Jones,* 67 N.C. 217; *R. R. v. Wicker,* 74 N.C. 224.

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(607)

THE STATE v. DANIEL R. McINTOSH.

Upon the trial of issues in proceedings for bastardy the defendant is a competent witness.

SPECIAL proceedings *for bastardy,* tried before *Cannon, J.,* at Fall Term 1869 of YANCEY Court.

Upon the trial of the issues, the defendant tendered himself as a witness, but his Honor excluded him, as incompetent. The defendant excepted.

Verdict, *Guilty;* Judgment accordingly, and Appeal by the defendant.

Phillips & Merrimon for the appellant.

F. H. Busbee contra.

DICK, J. A proceeding in bastardy, is a civil action, as distinguished from a criminal action: Const. Art. IV, § 1.

Under the Code of Civil Procedure, it is a special proceeding, as distinguished from a civil action proper. In such special proceeding a party may be examined as a witness in his own behalf: C.C.P. §§ 342-3; *State v. Waldrop,* 63 N.C. 507; *State v. Pate,* 44 N.C. 244.

There was error in the ruling of his Honor, and there must be a *venire de novo* upon the issue submitted.

Let this be certified.

Per curiam.

Venire de novo.

Cited: S. v. Hickerson, 72 N.C. 422; *S. v. Crouse,* 86 N.C. 619; *S. v. Ballard,* 122 N.C. 1028; *S. v. Liles,* 134 N.C. 737.

(608)

THE STATE v. HARVEY AVERY.

Where one, who suspected his wife of unfaithfulness, followed her stealthily as she was going to a neighbor's, and having come up with her as she was talking with a man with whom she had previously been on terms of criminal intimacy, she ran away, and he fell upon the man with a stone and knife, and killed him: *Held*, to be murder.

MURDER, tried before *Mitchell, J.*, at Spring Term 1870 of BURKE Court.

The deceased was Andrew Caldwell, and when killed, he was talking with the wife of the prisoner, who was upon her way to a neighbor's. The prisoner had gone part of the way with his wife, and then turned back towards home, but concluded that he would follow his wife, and watch her. Upon his wife's discovering him, she ran off, telling the deceased to run also. He did not, and when the prisoner came up, the latter attacked him with a stone and a knife, and inflicted the wound of which he died. It was shown that, about a year previously, there had been criminal intercourse between the deceased and the wife.

It is not important to state the other occurrences upon the trial, excepting, that in arguing the cause, the prisoner's counsel referred to the late cases of Sickles, McFarland and others of a similar character. In commenting upon this the Court said, that the verdicts of the juries in those cases were not law in North Carolina; that those verdicts were noted only for their errors and eccentricities, and that a jury would act in reckless disregard of their oaths, to allow such cases to influence their verdict.

Verdict, *Guilty;* Rule, etc.; Judgment, and Appeal by the prisoner.

Malone for the appellant.
W. P. Caldwell contra.

DICK, J. According to the evidence in this case, the prisoner was guilty of murder. Influenced by jealousy, he fol- (609) lowed his wife stealthily to her place of assignation, and then slew the deceased with a deadly weapon. The killing was deliberate, and prompted by a spirit of revenge. If the prisoner had come suddenly upon his wife and the deceased in the woods, and in the *furor brevis* excited by the suspicious circumstances, had immediately slain the deceased, the killing would have been mitigated to manslaughter: *State v. Samuel,* 48 N.C. 74.

The counsel for the prisoner asked his Honor to charge that "if the jury, from all the circumstances, believed he was in danger of his life from deceased, he was excusable in slaying the deceased." His Honor stated that if there was any evidence of such a tendency, it had escaped his notice. He then submitted the whole of the evidence to the jury, with proper instructions. The prisoner certainly has no right to complain of the charge, as it was more favorable than he had any right to expect.

"The counsel, in the argument of the case to the jury, referred to the cases of Sickles, McFarland, and others of a similar character," and exception was taken to the comments of his Honor upon these cases. We think his Honor's comments were appropriate, correct in law, and in accordance with a virtuous public sentiment. The time has not yet come, and we hope never will, when the Courts of this State will fail to administer a just punishment for acts prompted by malice prepense and a spirit of revenge, and our people applaud them as a species of wild justice.

This case was fairly submitted to the jury, and we cannot disturb the verdict. There is no error.

Let this be certified, so that the Court below may proceed to judgment.

Per curiam.

Judgment affirmed.

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(610)

THE STATE v. JAMES SHIRLEY.

In a case where there was some evidence tending to show that a person who interfered to prevent the prisoner from shooting another, had been killed *accidentally*, the Judge who presided at the trial instructed the jury, "If one is about to do an unlawful act, and a third party interferes to prevent it and is killed, it is *murder: Held*, that as this proposition included cases of *accidental* homicide, it was erroneous.

MURDER, tried before *Jones, J.*, at Spring Term 1870, of EDGECOMBE Court.

The prisoner was charged with shooting his wife, at their home, which was also the home of a son-in-law of theirs. It appeared that the prisoner and the deceased were sitting outside of the door, and the son-in-law and his wife, inside, by the fire. A child of the son-in-law had a fall, and cried, and the prisoner became vexed at, what

he thought, the negligence of the child's parents. He continued to grow more angry, and after awhile, cursed and threatened the son-in-law. The latter then went out of doors, and offered to *take off his coat, and let the prisoner whip him.* Thereupon the prisoner ran into the house, got a stick, started out, and reached the edge of the door, when the deceased shoved him back into the house. The deceased and others who were present shut the door; and the deceased went into the house. The prisoner then threw the stick down, and took his gun, telling the deceased that if she did not let him go out, he would shoot her. The deceased spoke to the son-in-law, through the cracks between the logs, telling him "to go away and not have any words with him." The gun thereupon went off, and the deceased fell dead.

One of the witnesses testified that a daughter of the deceased cried out upon this, "You have killed mother," and the prisoner replied, "You are a damned liar! I have just knocked (611) the bark off of her throat." Another witness said she did not see the prisoner fire, but did see him take the gun from his shoulder, and said, "Lor! Mary is dead!" and ran out.

Doctor Williams testified, that he was called to the deceased, and examined the wound; that it was a gun shot wound in the left side of the cheek, carrying away the jaw, and penetrating and lodging in the lobe of the brain; that a portion of the neck was included, the wound being equidistant between the chin and the ear; that the wound indicated that at the discharge of the gun, its breech was lower that its muzzle; that the deceased was a woman of ordinary size, and that the lower lobe of the brain is about two inches above the burr of the ear.

In commenting upon the remarks that had been made upon the trial by the prisoner's counsel: to the effect that the gun might have been discharged otherwise than as stated, since the shot coursed upwards, — his Honor said, That the direction that shot would take, at all times was difficult to account for, — it depended upon the substance and the structure they first encountered, — that if they encountered a bone, it depended upon the angle at which the discharge took place, whether they would course up or down.

He also charged the jury, that if one is about to do an unlawful act, and a third party interferes to prevent it and is killed, it is murder.

Verdict, *Guilty;* Rule, etc.; Judgment, and Appeal by the prisoner.

Howard for the appellant.
Attorney-General contra.

PEARSON, C.J. If the prisoner discharged the gun on purpose, it is murder; if it went off accidentally, as if by a jerk or a
(612) sudden motion in a scuffle with the deceased, who had interfered to prevent him from going out of the house, or pushed him back to prevent his shooting Harris, it is not murder. The offence cannot be murder unless there was an intent to kill, although the killing without an intent to do so, would not be homicide by misadventure, and excusable, but would amount to manslaughter, because of the prisoner's violence and want of care.

There is error in the instruction, "If one is about to do an unlawful act, and a third party interferes to prevent it, and is killed, it is murder." *State v. Benton,* 19 N.C. 196, is relied upon to sustain the instruction. In that case the intention to kill was manifest. There the Court use this strong language: "The prisoner turned from the first victim of his contemplated vengeance, advanced, and, without a word of warning, plunged a knife into him, and killed him: it is murder." The ruling in this case is thus stated in Battle's Digest 687: "If one man assails another, and is about to commit an unauthorized act of violence upon him, and a third person interferes to prevent it, and is killed by the assailant, it is murder." This is accurate in respect to the facts of that case, and the error of his Honor is, in laying it down as a general principle, applicable to a case where the facts may be different in regard to the very gist of the matter — to-wit, an intentional killing. An intent to kill or do great bodily harm, is necessarily involved in the idea of murder: *State v. Hoover,* 20 N.C. 268; Foster 219.

So the question is, Was there any evidence to raise the point, that the prisoner did not discharge the gun on purpose? The testimony of Dr. Williams furnishes "natural evidence" tending to show that the gun was not discharged in the usual way — the range of the shot coursing upwards from the lower jaw-bone, and lodging in the lobe of the brain, two inches above the burr of the ear, the
(613) parties standing on the floor. Taking this to be the fact, it was for the jury to say how far it contradicted the evidence on the part of the State, and whether it did not lead to the conclusion, that the parties were in a scuffle, the breech of the gun lower than the muzzle, and that it went off by accident. In this connection the remarks of his Honor as to the effect of shot encountering a hard substance, would have been pertinent, not as being *his opinion,* for none but experts are allowed to express opinions in matters of scientific speculation, but as a subject to be considered by the jury in coming to a conclusion in respect to the facts of the case, in connection with the evidence as to the deceased having pushed the prisoner back from the crack, while he had the gun in his hands,

his exclamation "Lor! Mary is dead!" and all of the other testimony and circumstances of the case.

A decision of the case as now presented, does not call for further comment. On a second trial the facts may be more fully developed. Should the case come to the Court again, the facts and the rulings of his Honor should be more satisfactorily set out.

Per curiam.

Venire de novo.

Cited: S. v. Elwood, 73 N.C. 636; *S. v. Vines,* 93 N.C. 495; *S. v. Cole,* 132 N.C. 1085.

(614)

THE STATE v. TA-CHA-NA-TAH.

The Cherokee Indians who reside in North Carolina, are subject to its criminal laws.

Cohabitation between an Indian man and woman, according to the ancient customs of their tribe, which leave the parties free to dissolve the connexion at pleasure, is not marriage, and, therefore, the parties to such relation, may be compelled to testify against each other.

There is but one law of marriage for all the residents of this State.

A number of Indians had been together at a dance-house, and a fight had occurred there, to which the prisoner and the deceased were parties; at the breaking up of the dance, the prisoner and another, who was also charged with the murder, were walking together towards their homes, when the deceased came up, and another fight ensued, between the prisoner and his companion on one side, and the deceased, upon the other, in the course of which the killing occurred: *Held,*

1. That these facts constituted no evidence of a *combination* between the persons charged, to commit the homicide:

2. That it was error to instruct the jury, that if there were previous malice on the part of the prisoner towards the deceased, then, even in case the prisoner fought in self-defense, he was guilty of murder; and, as the Court to which the prisoner appealed could not tell how much the latter may have been prejudiced by the charge, even where the verdict was for manslaughter only, a new trial should be granted.

MURDER, tried before *Cannon, J.,* at Spring Term 1870, of JACKSON Court.

The prisoner, Ta-cha-na-tah, together with one Johnson Ta-yah-lu-tan-hih, (not upon trial,) described as Cherokee Indians, were

charged with killing Ches-qua-nut, also an Indian, the former being charged as principal, and the latter as aiding and abetting. From the testimony, it appeared that the prisoners and the deceased, and a number of other Indians were assembled at a dance-house, and the appellant and his brother Sums-key had a quarrel
(615) there with the deceased, in which Sums-key knocked the deceased down. The two prisoners and Sums-key, in company with several others, then left the dance-house, and were proceeding on their way home, when they were overtaken by the deceased, in company with some others. There was evidence to show that when the deceased came up, he attacked Sums-key, and knocked him down, and then attacked the appellant. Appellant and deceased were fighting, each having a piece of a fence rail. While the fight was going on, the prisoner, Johnson, went behind the deceased, and stabbed him in the back, from which he died.

Ta-ch-na-tah was convicted of manslaughter, and adjudged to imprisonment in the penitentiary, and he appealed.

Phillips & Merrimon for the appellant.
F. H. Busbee for the Attorney-General contra.

RODMAN, J. (After stating the case as above,) The first objection taken, is, to the jurisdiction of the Court over the accused, by reason of his being a Cherokee Indian. The objection was not urged by the counsel for the appellant.

Prima facie, all persons within the State are subject to its criminal law, and within the jurisdiction of its Courts; if any exception exists, it must be shown. On examination of the Treaty of New Echotah, Georgia, on the 29th of December 1835, between the United States and the Cherokee Indians, we find, that, Article XII, it was provided, that individuals and families who were averse to moving West of the Mississippi River, might remain, and become citizens of the States where they resided. Our civil laws have been extended over these Indians, at least, ever since 1838: Rev. Code, ch. 50, sec. 16; and this statute applies as well where the contract is between two Indians, as where one of the parties is white: *Lovingood*
(616) *v. Smith,* 52 N.C. 601. Unless expressly excepted, our laws apply equally to all persons, irrespective of race.

2. A woman named Uh-wat-tah was offered as a witness on the part of the appellant, and was objected to by the State, because she was his wife; she was rejected by the Judge. It was admitted by the State, that the rites of matrimony had never been performed between them according to the laws of North Carolina, or in any other form, but they merely cohabited together as man and wife,

which, it was proved, was in accordance with the ancient customs of the tribe, according to which, couples were recognized as man and wife, *but could dissolve that connection at pleasure,* and marry again. It was also proved that many years before 1866, the tribe had professed Christianity, and that since that time, most of the marriages had been solemnized by a Justice of the Peace.

There is but one law of marriage in this State, which applies equally to all citizens. Our law regards marriage only as a civil contract. Every one is at liberty to superadd to that whatever sanctities his religion may require. Even if it be true, that by the law of North Carolina, a marriage *per verba de presenti* followed by cohabitation, but without any form or ceremony whatever, is to be deemed valid, (as to which we express no opinion,) yet it can never be held that mere cohabitation, with an understanding that it may cease at pleasure, can constitute a marriage, or carry with it the rights and disabilities of that relation. In *State v. Harriss,* 63 N.C. 1, it was held that those who had previously cohabited while slaves, might become married by proper acknowledgment before a Justice of the Peace. But that can have no bearing on the present case.

3. The appellant requested the Judge to instruct the jury, that there was *no* evidence of a combination between him and Johnson. The Judge declined to do so, and told the jury that their being together was some evidence of a combination; and it (617) must be supposed that he meant of a combination either to murder or to assault the deceased.

The presence of Johnson in company with the appellant at the occurrence of the homicide, and Johnson's inflicting the mortal blow while the appellant was engaged in the affray with the deceased, are the only circumstances which are set forth, which can be supposed to tend to show a combination. Without undertaking to consider whether the circumstances do not explain the common presence of the two prisoners consistently with their innocence of any unlawful combination, we do not think that the mere coincidence of the presence of the appellant and of Johnson, upon which the Judge puts it, was any evidence of an unlawful combination. The language used by the Judge would include every person who happened to be near by on occasion of a homicide, and impose on him the burden of proving that he was not an accomplice.

4. The appellant requested the Judge to charge, "that if the appellant fought deceased merely to save his own life, and did only what was necessary for that purpose, acting strictly in defence, then it was not in malice, though a previous ill-will by prisoner be shown, it not being shown that he enticed or procured the deceased to make the assault."

His Honor replied to this: "That if there was malice, the defendant was guilty." And afterwards, in response to a request on the part of the State, his Honor instructed the jury, "that if the appellant fought with deceased only in defence of his life, but yet had malice towards the deceased, then he was guilty of murder; but if with sudden passion, he was guilty of manslaughter."

We must understand the Judge when speaking of malice, to refer to malice existing antecedently to the affray, as evidenced by the previous quarrel, and not to any malice which might be inferred from the circumstances of the affray itself.

(618) The question, whether, where an antecedent grudge exists, and the parties between whom it exists meet and an affray ensues, and one is killed, the killing shall necessarily, or by a presumption of law, be referred to the antecedent grudge, so as to make the killing murder; or, whether the existence of malice in giving the mortal blow, shall be matter of inference for the Court or jury, from all the circumstances, of which the antecedent grudge is one, was considered with great care and ability in *Jacob Johnson's* case, 47 N.C. 274; and we think the rule there announced cannot be shaken. The latter view was there asserted. We think the instructions of his Honor differ widely from that view, and they seem to be founded on, what is said in that case to be, a mistaken view of *Madison Johnson's* case, 23 N.C. 354. His Honor refused the instruction asked for, that if the appellant fought only in self-defence and to save his own life the homicide was not malicious, although a previous ill-will were shown, and told the jury that if there was malice, (by which we understand malice implied in law from the antecedent quarrel,) the appellant was guilty of murder. In this we think there was error. It is true the jury convicted the appellant only of manslaughter, but the instructions were erroneous, and we cannot see that they did not operate prejudicially to the appellant. Our opinion on these exceptions makes it unnecessary to consider the others, which may not arise again.

There is error. Let this be certified.

Per curiam.

Venire de novo.

Cited: S. v. Brittian, 89 N.C. 501; *S. v. Horn,* 116 N.C. 1046; *S. v. Wolf,* 145 N.C. 443; *Frazier v. Cherokee Indians,* 146 N.C. 482; *S. v. Price,* 158 N.C. 649; *S. v. Pollard,* 168 N.C. 125; *S. v. Bush,* 184 N.C. 780; *S. v. Rideout,* 189 N.C. 164; *S. v. McAlhaney,* 220 N.C. 389.

(619)

THE STATE v. SAMUEL BURT AND OTHERS.

A nugget of gold separated from the *vein* by *natural causes*, savors of the realty, and, so, is not a subject of larceny.

(*Here*, the nugget was found upon a loose pile of rocks, and was taken and carried away at one continued act.)

LARCENY, tried before *Watts, J.*, at Spring Term 1870, of FRANKLIN Court.

There was a special verdict, finding: that there was a verbal contract between Burt and the owner of a gold mine, that the former might run a rocker in such mine, paying a certain rent; that the other defendants were working with Burt; that one of these employees found a nugget of gold lying upon the land of the owner of the mine, on the top of a rock pile, not a part of the proceeds of the rocker; and that, after consultation with the other defendants, it was appropriated to their own use, and was never accounted for to the owner.

His Honor thereupon gave judgment for the defendants, and the Solicitor for the State appealed.

Attorney-General for the appellant.
Rogers & Batchelor contra.

DICK, J. Nuggets of gold are lumps of native metal, and are often found separated from the original veins. When this separation is produced by natural causes, there is no severance from the realty, but such nuggets will pass under a conveyance, like ores and minerals which are embedded in the earth. When ores and minerals are taken out of mines with expense, skill and labor, to be converted into metals, or used for the purposes of trade and commerce, they become personal property, and are under the protection of the criminal law. (620)

In England, ores, even before they are taken from the mines, are protected by highly penal statutes: St. 7 and 8 Geo. IV, amended by 24 and 25, Vict. Loose nuggets which are occasionally found in gullies and branches, and in woods and fields, are hardly considered by the law as the subjects of determinate property, until they are discovered and appropriated, and then they become personal goods, and are the subjects of larceny. In this respect they somewhat resemble treasure trove, waifs, etc., in the criminal law of England.

It is an ancient rule of the common law, that things which savor

of, or adhere to realty, are not the subject of larceny. In this respect the common law was very defective, and did not afford sufficient protection to many valuable articles of personal property which were constructively annexed to the realty. These defects have, in some degree, been remedied by a number of statutes in this country and in England.

These beneficial changes were induced by the necessities of progressive civilization, which required many valuable species of personal property to be annexed to realty, to be used for the purposes of trade and manufacture, and in the arts; and which needed the constant protection of the criminal law.

In a case like ours, there is no necessity for the Court to depart from the ancient technical strictness of the common law, and there is no need of any additional legislation upon such a subject. In public estimation it has never been regarded as larceny for the fortunate finder of a nugget of gold, or a precious stone, to appropriate it to his own use, although found upon the land of another person. Hundreds of instances of this kind have doubtless occurred, and yet no case can be found of a prosecution for larceny on this account, either in the Courts of this country or of England. This fact sustains us in the opinion, that for cases like the one be-
(621) fore us, there is no necessity to depart from the ancient landmarks established by the fathers of our criminal jurisprudence. The nugget was found upon a loose pile of rocks by one of the defendants, and the taking and carrying away was one continued act, and did not amount to larceny, but was only a civil trespass: 1 Hale P. C. 510; 2 East. P. C. 587; Roscoe Crim. Ev. 459; 2 Russell on Cr. 136; 2 Bish. Cr. Law, § 779.

There was no error in the ruling of his Honor, and the judgment must be affirmed.

Per curiam.

Judgment affirmed.

Cited: S. v. Graves, 74 N.C. 397; *S. v. Beck,* 141 N.C. 831.

JOSEPH H. CARDWELL, ADM'R., ETC. v. JAMES L. CARDWELL.

Upon an appeal from an order vacating a judgment, *for want of service* of the process by which the action was constituted, it is necessary that the record show *how* the Judge *found* upon the question of such service; it must present *the fact* as found, and not (as here) only *the evidence* bearing on such fact.

The decision of the Judge upon such fact is conclusive; except a question be made whether there were *any evidence* tending to establish it, or whether a given state of facts constituted service.

MOTION to set aside a judgment, for want of service of the *mesne* process in the action, made before *Tourgee, J.*, at Spring Term 1870, of ROCKINGHAM Court.

The writ had been returned to the Clerk's office, "executed on 18th Nov. 1868," and upon the 9th December thereafter judgment was rendered for want of an answer, etc. In January 1869 the defendants became bankrupt, and upon the 11th March 1870, notice of this motion was given by the assignee. Both parties (622) filed affidavits upon the question, and at Spring Term 1870 the following order was made:

"On reading and filing the accompanying affidavits, and proof of the service of the notice of this motion, and on motion of, etc., etc., ordered that the judgment obtained in the above entitled actions (being *three,* appeals in all of which were afterwards taken) as above set forth, be vacated, etc."

The plaintiff appealed.

Dillard, J. I. Scales and Phillips & Merrimon for the appellant. Scott & Scott and Ball contra.

READE, J. If there was service of summons upon the defendant, the judgment was regular and valid; if there was no service, the judgment was irregular, and ought to be vacated. Upon the motion to vacate, whether there had been service was a question of fact for his Honor, and from his finding of the fact there could be no appeal. We can no more review the finding of a Judge when it is his province to find facts, than we can review the finding of a jury.

In this case, the testimony of the witnesses on both sides is sent up: the testimony on one side tending to show that there was service, and the testimony on the other side tending to show that there was not. There is no question of law made as to what constitutes service, but only the simple question of fact, as to whether there was service of the summons. His Honor ought to have found the

fact one way or the other, and that would have been conclusive, unless the question had been made, that there was no evidence tending to show, etc.; or the question, that a given state of facts did not in law constitute service. But here his Honor states the testimony in detail on both sides, and then without stating how he (623) found the *facts,* vacated the judgment. The proper course for his Honor to have pursued, was, to state, "Upon hearing the evidence, it appears that there was no service of the summons upon the defendant; it is therefore declared that the judgment was irregular, and it is considered that the same be vacated;" or *vice versa.*

An appeal from that judgment would have presented only the question of law, whether a judgment without service of process is irregular, and can be set aside at a subsequent term.

But as the case is sent up, we cannot tell whether there was, or was not service of process, because we cannot pass upon issues of fact.

We suppose that the reason why cases are so often encumbered with the details of the *testimony,* instead of stating the *facts,* is, that we may see the reasonableness of the finding of the judge or jury; but with that we have ordinarily nothing to do.

It appearing to us that his Honor vacated the judgment without finding any fact to justify it, the order is erroneous. This will be certified, to the end that his Honor may find the facts, and make such order as the law authorizes.

Per curiam.

Error.

NOTE—The same decision was rendered at this term in two other cases, between other plaintiffs and the same defendant.

Cited: Howell v. Barnes, 64 N.C. 629; *Collins v. Gilbert,* 65 N.C. 136; *Perry v. Whitaker,* 77 N.C. 104; *Branton v. O'Briant,* 93 N.C. 104; *King v. R. R.,* 112 N.C. 322; *S. v. Biggs,* 224 N.C. 29.

(624)

SARAH G. WADDELL v. D. B. WOOD, ADM'R., ETC.

Failure to attend a term of Court because the party knew nothing personally about the cause of action and expected that a witness who had been duly summoned would attend, — is not "excusable neglect" (C.C.P. § 133) so as to justify a Judge at a subsequent term in setting aside a judgment rendered against him in the absence of such witness.

Semble, that the defendant had no right to appeal from the order of the Judge refusing to set aside the judgment.

MOTION to set aside a judgment given at Fall Term 1869, heard by *Mitchell, J.*, at Spring Term 1870, of IREDELL Court.

The facts appear in the Opinion.

His Honor refused to make the desired order, and the defendant appealed.

Boyden & Bailey for the appellant.
Furches contra.

1. The power given in C.C.P. § 133, to set aside a judgment, is discretionary, and so cannot be reviewed by appeal: *Simonton v. Chipley, ante* 152.

2. The defendant ought to have been present, to see what became of his case: *Staples v. Moring,* 26 N.C. 218.

READE, J. The defendant seeks to vacate a judgment rendered against him at a former term of the Court, on the ground of excusable neglect, in this: he expected his witness, who had been summoned and had attended a former term, would attend at the trial, and he did not think it necessary to attend in person, because his counsel knew of his defence. Every suitor ought to be present at the trial of his case, either in person or by an attorney in fact, and wilful absence is not "excusable neglect." The fact that he has counsel present does not alter the case, for it is no part of the (625) duty of counsel to get up the evidence, or to make affidavit for a continuance. If the defendant had been present he could have made affidavit, and his Honor, in his discretion, might have continued the case: but it is not to be tolerated, even in the most liberal practice, that a party is to lie by until a judgment passes, and then at a subsequent term move to vacate it.

What we have said is upon the supposition that we have the power to review his Honor upon the motion to vacate. Suppose the defendant had been present at the time of trial, and had filed an affidavit for a continuance of the case, and his Honor had refused to

continue, could the defendant have appealed? It is settled that he could not. Or, suppose that after judgment had passed, the defendant had, at the same term, moved to set it aside and continue the case, on account of the absence of the witness, and his Honor had refused to vacate or continue, could the defendant appeal? It would seem that he would have no more right to appeal from that than from a refusal to continue. How does it alter the case, except to make it worse for the defendant, to wait and make the motion at a subsequent term?

But a decision upon this point is not indispensable, as we agree with his Honor that the defendant's absence was not "excusable neglect:" *Dick v. Dixon,* 63 N.C. 488; *Davis v. Shaver,* 61 N.C. 18.

No error.

Per curiam.

Affirmed.

Cited: Howell v. Barnes, 64 N.C. 629; *Griel v. Vernon,* 65 N.C. 78; *Clegg v. Soapstone Co.,* 67 N.C. 304; *Sluder v. Rollins,* 76 N.C. 272; *Cobb v. O'Hagan,* 81 N.C. 294; *University v. Lassiter,* 83 N.C. 44; *Henry v. Clayton,* 85 N.C. 375; *DePriest v. Patterson,* 85 N.C. 378; *Churchill v. Ins. Co.,* 88 N.C. 208; *Pepper v. Clegg,* 132 N.C. 315; *Osborn v. Leach,* 133 N.C. 431; *White v. Rees,* 150 N.C. 680; *Shepherd v. Shepherd,* 180 N.C. 495; *Sutherland v. McLean,* 199 N.C. 352; *Meece v. Commercial Credit Co.,* 201 N.C. 142.

ROBERT P. HOWELL v. JAMES D. BARNES.

Where a judgment was rendered, upon an attachment, in August 1866, — the defendant had notice thereof in November 1866, and application was made by him, in March 1869 to vacate it, on the grounds: that he had had at the time it was rendered, no notice of the action in the cause in which it was rendered, *that he was an infant* when the note was given, and had had no opportunity of pleading it: *Held,* that, in any view, *his laches* after November 1866, would defeat the application.

(626)

RULE, heard before *Thomas, J.,* at Spring Term 1870 of WAYNE Court.

The facts were, that Barnes had obtained a judgment against Howell and others, at August term 1866 of Wayne County Court, upon a bond executed by them in 1861, when Howell was under age

by eighteen days. The judgment was under an attachment levied in May 1866, Howell being then a resident of Mississippi. Howell visited Wayne County in November 1866, and was notified of the existence of the judgment by his attorney, but was not notified of its being in his power to vacate it. Nothing passed between them upon this last point. Some negotiations took place then and afterwards between Howell and Barnes, for the settlement of the debt, but without result. The affidavit for this rule was filed in March 1869.

The above statement is extracted from the affidavits filed by the parties and their witnesses, which were transmitted to this Court.

His Honor discharged the rule, and the plaintiff appealed.

Moore and Faircloth for the appellant.

It is a moral duty of every citizen not to contract with those who are incapable of binding themselves, and thus cause them to be hedged with difficulties: *Alexander v. Hutchinson,* 9 (627) N.C. 537. Ratification must be deliberate, distinct and explicit: *McCormic v. Leggett,* 53 N.C. 425; *Hoyle v. Stowe,* 19 N.C. 370; *Armfield v. Tate,* 29 N.C. 258; *Alexander v. Hutchinson,* 9 N.C. 535; *Dunlop v. Hales,* 47 N.C. 381, 1 Pars. Cont. 569 and nn., Smith, Con. 214.

In considering this case, the Court cannot forget that, from 1865 to the Fall of 1868, the State was under military rule, and that all business, especially in the Courts, was in the utmost confusion.

Strong contra.

Judgments upon attachment stand upon same footing with other judgments, if taken according to the course of the Courts therein: *Skinner v. Moore,* 19 N.C. 138; *Harison v. Pender,* 44 N.C. pp. 78 and 80. Therefore, they cannot be set aside at a subsequent term: *Murphy v. Merritt,* 63 N.C. 502; *Davis v. Shaver,* 61 N.C. 18; *Sharpe v. Rintels, Ib.* 34.

If it could have been set aside, the delay here is unreasonable: *Webb v. Durham,* 29 N.C. 133; *March v. Thomas,* 63 N.C. 251. See also, *Erwin v. Erwin,* 14 N.C. 528; *Davis v. Marshal,* 9 N.C. 59; *Collins v. Nall,* 14 N.C. 224; *Elliott v. Jordan,* 44 N.C. 298; *Baker v. Halstead, Ib.* 41. Ignorance of law will not help: *Elliott v. Holliday,* 14 N.C. 377.

READE, J. Judgment was rendered against the present plaintiff after he attained his majority, upon a bond which he executed

during his minority, and this is a motion to vacate the judgment, upon the ground that the suit in which the judgment was rendered, was by attachment, and he had no actual notice thereof, and, therefore, did not plead his infancy, and he asks that he may be permitted to plead it now.

Treating the motion as a petition for a *certiorari*, we have this case: Judgment rendered August 1866; application for *cert-*
(628) *iorari* March 1869. The delay unexplained is gross laches.

The explanation must come from the plaintiff. The explanation offered, is, not that he did not know of the existence of the judgment, for it seems that he knew of it in November 1866, but that he did not know of its "voidable character" until about the time of this motion. His counsel construes that to mean, that he did not know the fact of his minority. But that is not the meaning: He means that he did not know that his non-age would have enabled him to avoid the bond by plea, or that the judgment might be vacated, and his plea let in. This ignorance of the law is no excuse.

The point made by plaintiff's counsel, that no *facts* were found by his Honor on which the motion was disallowed, makes it the worse for the plaintiff; for, as before said, the facts in excuse must come from him, and if no facts are found, then, of course, no facts are found for him. It does not appear that the plaintiff offered any evidence which his Honor would not hear. We have then the case of a motion for a *certiorari*, without any evidence to support it. If we look to the complaint and answer for the facts, we find that what is alleged by one is expressly denied by the other. So we still have the motion without any support, and of course, it cannot be allowed.

But probably it would be more satisfactory for us to say that we have looked into the testimony accompanying the case, which we suppose was intended as a substitute for the facts, and it appears plainly enough that his Honor would have been warranted in declaring the facts to be, that the judgment passed in August 1866 without actual, but with constructive and sufficient, notice to the present plaintiff; that he knew of it in November 1866, as appears by his own affidavit, asked indulgence and promised to pay, and never moved to vacate until March 1869. Upon such a state of facts
(629) his Honor ought to have refused the motion. See *Cardwell v. Cardwell, ante* 621, and *Waddell v. Wood, ante* 624.

No error.

Per curiam.

Judgment affirmed.

Cited: Lerch v. McKinne, 187 N.C. 420.

JAMES HARPER, ADM'R., ETC. v. NOAH SPAINHOUR.

Where the parties to a covenant for the conveyance of land in consideration of work and labor to be done by the covenantee, agreed *by parol*, that the title should *also* be held as an indemnity against loss to the covenantor in consequence of his surety-ship for the covenantee: *Held*, that the agreement was void, under the Statute of Frauds.

BILL in equity, coming before *Mitchell, J.*, upon an exception to a report, at Spring Term 1870 of CALDWELL Court.

No other statement is required than what appears in the Opinion.

The exception of the plaintiffs to the report having been overruled, they appealed.

Folk and F. H. Busbee for the appellants.
Malone and Battle & Sons contra.

Treating the parties to the covenants as vendor and vendee, the Court will not divest the vendor's title before he is indemnified according to the contract: 1 Story Eq. Jur. § 742; *Lloyd v. Wheatley*, 55 N.C. 267. Treating Spainhour as a surety, there is a peculiar relation between Cloyd and himself, which warrants the report: 1 Story, § 323. See *Williams v. Helme*, 16 N.C. 151; *Williams v. Washington, Id.* 137; *Battle v. Hurt*, 17 N.C. 31. (630)

PEARSON, C.J. Cloyd, the intestate of the plaintiff, executed a covenant, by which the defendant was to convey to Cloyd the house and lot mentioned in the pleadings, when certain work was done by Cloyd for the defendant. The covenant was deposited with a third person for safe keeping. Afterwards, the parties agreed by parol, that the covenant should be held, in order to indemnify the defendant for becoming, with one Jones, co-surety for Cloyd on a note of $100, to one Sudderth.

The exception makes this point: Does a parol agreement, by one having an equitable estate subject to the payment of the purchase money, that such equitable estate shall *also* be subject to a charge as an indemnity to the vendor, come within the operation of the Statute of Frauds?

Had this been entered on the covenant for title, and been signed by Cloyd, the party to be charged therewith, it would have been binding; but as no such entry was made, the parol agreement is void. It is "a contract to convey an interest in land." The doctrine of an equitable mortgage by the deposit of title deeds, has never been adopted by our Courts. The registration act makes the possession of the original title deeds of little importance; the party may

give notice, and read in evidence a certified copy. But this case does not fall under that doctrine, as the covenant, before the parol agreement, had been deposited with a third person for the benefit of both parties, — so there could be no such delivery as to constitute a pledge. In short, it is simply a parol promise to charge an interest in land, and there is nothing to take it out of the operation of the Statute.

Interlocutory order overruling the plaintiff's exception, re-
(631) versed; The exception allowed. This will be certified.

Per curiam.

Reversed.

WILLIAM A. GRAHAM v. THE CHARLOTTE & S. C. RAIL ROAD COMPANY.

The *venue* in an action against a Railroad Company, can be laid only in some county wherein the track of its road, or some part thereof, is situated; actions brought otherwise are to be dismissed.

CIVIL action upon Railroad Bonds, tried before *Tourgee, J.*, at Spring Term 1870, of ORANGE Court.

The defendant set forth, that no part of the track of said road is situated in the county of Orange, and that the only county in the State, in which such road is situated, is Mecklenburg, — and demanded that trial should be removed to the latter county, according to C.C.P., § 69.

The Court, after finding the facts to be as stated by the defendant, was of opinion that in cases where Railroad Companies *are defendants*, upon comparing the act of 1868-'9, c. 257, with that of 1868-'9, c. 277, actions may be brought in the Court of the county of either party; and thereupon, refused to make the order.

The defendant appealed.

Phillips & Merrimon for the appellant.
Battle & Sons contra.

PEARSON, C.J. The Code of Civil Procedure, by Title VI, fixes "the place of trial." Title VII, relates to the summons: It
(632) shall be issued by the Clerk of any Superior Court; run in the name of the State; be directed to the Sheriff of the county where the defendant resides or may be found; shall summon the de-

fendant to appear at the office of the Clerk of the Superior Court for some certain county; the officer, to whom it is addressed, shall note on it the day of its delivery to him, and return it by mail, or otherwise, to the Clerk of the proper county — and many other details. But, strange to say, the provision as to the county to which the summons shall be returnable, is not set out, except at the end of paragraph 2, sec. 74, by way of inference from the provision: "The Clerk, before whom the defendant shall be summoned to appear, shall be the Clerk of the county in which it is provided in Title VI, that the action shall be tried." So "the county in which the action shall be tried," is the prominent idea. If the county designated in the summons as "the place of trial" be not the proper county, the action may be tried there, unless the defendant shall demand in writing, that the trial be had in the proper county, and the plan of trial be changed: Sec. 69. The relevancy of this remark will appear below.

"The summons shall be returnable to the regular terms of the Superior Court of the county where the plaintiffs, or one of them, or the defendants, reside:" Acts 1868-'9, ch. 81, altering the Code of Civil Procedure, in regard to the return of the summons, and making it returnable to the county where the plaintiff or the defendant resides, at the election of the plaintiff. This is done in language, such as our Statutes had been accustomed to use.

"The 'venire in actions' against Railroad corporations, shall be laid in some county wherein the track of said company is situated:" Acts 1868-'69, ch. 257. We take it, that "venire" is a mis-print for "venue," or "the place of trial," going back to the prominent idea of the Code of Civil Procedure. Originally in England writs were returnable to the Courts at Westminster, and every (633) fact alleged in pleading, was laid with a venue, to fix the vicinage, or county, to which the "venire" should issue, and from which the jury should come. Afterwards the *nisi prius* clause was resorted to, so as to have the trial in the county where the "venue" was laid. That became a very important matter, for it fixed "the place of trial," and it was provided by Statute that all subsequent pleadings should conform to the declaration in respect to the venue, except in matter in its nature local, unless the venue was changed by leave of the Court.

In this State, by the procedure before the Code, writs, except in local actions, were returnable to the Court of the county where the plaintiff or the defendant resided, and that was the county in which the venue was laid, and was the place for trial, unless the case was removed to some other county for trial, on affidavit. This *resume* is made in order to show that the word "venire," in the acts 1868-'69,

ch. 257, is used in the sense of "place of trial," adopting the idea of the Code of Civil Procedure. The word is inartificially used, and the draftsman was not an expert in technical terms, but it is the only construction by which to make any sense of it, and the Court must adopt it.

Taking the Code of Civil Procedure, and the acts 1868-'69 chs. 26 and 257 together, the effect is: in all civil actions, other than local, the summons shall be returnable, and the trial be had in the county where the plaintiff or the defendant resides, at the election of the plaintiff, provided, however, that in actions against *Railroad corporations,* the summons shall be returnable, and the trial be had in some county wherein the track of said company, or some part of it, is situated. In our case, the track of the road is situate in the county of Mecklenburg. It follows that the summons ought to have been returnable to a Term of the Superior Court held in that (634) county, and that it should be the place of trial, or of the venue.

It is unnecessary to notice the other objection, to-wit: that "the Judge had no power to enter judgment out of term time," further than to say, that the effect of the act of 1868-'69, "suspending the Code of Civil Procedure in certain cases," and requiring all writs of summons in civil actions to be returnable to the regular Terms of the Superior Courts, and not to the Clerk, may have the effect to relieve the Judge of the duty of keeping a docket of civil actions, and to so modify the Code of Civil Procedure as to make it irregular to enter judgment in such cases in vacation.

The judgment below is reversed, and the action dismissed.

Per curiam.

Reversed.

Cited: Leach v. R. R., 65 N.C. 487; *Kingsbury v. R. R.,* 66 N.C. 284; *Hayes v. Coward,* 116 N.C. 840; *Russell v. Ayer,* 120 N.C. 212; *Jones v. Brinson,* 238 N.C. 509.

ALEXANDER & McLAUGHLIN, ADM'RS., ETC. v. RINTELS & WITTKOWSKI.

A judgment rendered in 1864 upon a note for Confederate money lent in 1862, is subject to the same *scale* that the note was; and, *therefore,* where a surety to the debt paid off the judgment in 1867 at its face value: *Held,* that he could not recover such full amount from the principal, not having been *compelled* to pay it.

ALEXANDER *v.* RINTELS.

CIVIL action, tried before *Mitchell, J.*, at Spring Term 1870 of IREDELL Court.

On the 20th of August 1862, the defendants Rintels & Wittkowski, upon a loan of Confederate money, made their note to Lowrance (whose administrators the plaintiffs are,) who afterwards endorsed it to Sharpe, and he, at Fall term 1864 of the Superior Court of Law for Iredell County, recovered judgment on it by default against both the makers and the administrators of the (635) endorser. The makers procured the judgment to be vacated as to them, but the administrators failed in their attempt to do so: *Sharpe v. Rintels,* Phil. 34; and they thereupon, in 1867 and 1869 paid the full amount of the judgment to the plaintiff, Sharpe, in United States currency. The administrators then brought this suit and at Spring term 1870 of Iredell Superior Court, the attorney for the defendants consented that the plaintiff might take judgment but there appears to have been a misunderstanding between the attorneys, the attorneys for the plaintiffs understanding that the judgment was to be for the full sum paid by the plaintiffs, and the attorney for the defendants understanding that the debt recovered by Sharpe was to be scaled under the Act of Assembly. The judgment was, in fact, entered according to the understanding of the agreement by the plaintiff's attorney; and the defendants moved to vacate or modify it.

His Honor, Judge Mitchell, without deciding upon the question as to what was the real agreement between the attorneys, refused to vacate or modify the judgment, upon the ground that upon the facts admitted, the plaintiffs were, in law, entitled to the judgment which was actually entered; and the defendants appealed.

Boyden & Bailey, and Bragg for the appellant.
W. P. Caldwell contra.

RODMAN, J. (After stating the case as above.) We can not undertake to decide any differences between the counsel, as to what was their agreement. The Judge, before whom a judgment is alleged to have been confessed, alone (in the first instance, at least,) can say whether the judgment appearing of record in his Court, was entered in the terms of the confession. We understand the question presented to us, to be, whether, upon the facts ad- (636) mitted in the pleadings, and independent of any agreement of the attorneys, the plaintiffs were entitled, in law, to recover as damages the full amount paid by them to Sharpe, or only so much as they would have been liable to pay if the scale for Confederate

money had been applied to the judgment recovered in 1864. This involves the question, whether the plaintiffs were *compelled* to pay the full amount of the judgment. We think they were not, but, by a proper application to the Court, they were entitled to, and could, have obtained an entry of satisfaction on the judgment, upon a payment of so much as it would have amounted to after the application of the legislative scale to the note at its date. The case of a judgment recovered during the war, upon a note given during the war, and remaining unpaid at the enactment of the Ordinance of the Convention in 1865, is clearly within the mischief intended to be remedied, and it is the duty of the Court to apply it to all cases coming within its principle. This being so, the payment by the plaintiffs of any excess over that sum was officious, and no request by the defendants to make such payment for their use, can be implied. Consequently the plaintiffs have entered judgment for more than they were entitled to, and in the absence of any binding agreement by the defendants to confess judgment for a larger amount, the present judgment should be modified in accordance with these views. The judgment below is reversed, and this opinion will be certified to the Superior Court of Iredell, in order that further proceedings may be had herein according to law.

Per curiam.

Judgment reversed.

Cited: Stocks v. Smith, 69 N.C. 356.

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(637)

JOHN A. PARKS v. OBADIAH SPRINKLE.

The *receiver* under *supplementary proceedings*, provided in C.C.P. § 270, must be appointed by the Judge, and not by the Clerk.

In a race of diligence between creditors under such proceedings and appointment, if the personal property sought to be subjected be such as may be levied on and seized, *priority* is to be tested by precedence in the appointment of the receiver; in case a receiver were *applied for* earlier by one, but another obtained an earlier *appointment*, it seems that priority will be determined by the date of *application; Therefore,*

Where judgment had been obtained and docketed by the plaintiff in Wilkes Court, against one Martin, and the latter upon examination said that one Shuford, a non-resident of the State, but at that time in Catawba County, was indebted to him, and a receiver was appointed by the Judge

on the 27th of April 1870, and an order served upon Shuford to answer upon the 5th of May; *where also* the defendant at same Court and term, likewise obtained and docketed a judgment against Martin: the 28th of April, docketed it in Catawba County; on the 29th, obtained an order from the Clerk of Catawba Court for Shuford to answer, who answered on the same day and immediately paid a part of his debt into the Clerk's office; the Clerk on the same day being notified of the appointment of plaintiff's receiver, and on the next day paying the money received by him to the defendant: *Held*, that this payment by the Clerk was in *contempt* of the Judge's order, and that the Judge should have compelled him to pay the amount again to the plaintiff's receiver, to be held subject to the Judge's future orders.

RULE upon a Clerk in the cause above, heard by *Mitchell, J.*, at Spring Term 1870, of WILKES Court.

The plaintiff recovered and docketed a judgment in the Superior Court of Wilkes against Benjamin P. Martin, and issued an execution to that County, which was returned *nulla bona*. He thereupon obtained an order for the examination of Martin, who, on April 27th, 1870, gave information that one Shuford, a non-resident of the State, but then in Catawba County, was indebted to him. A receiver was thereupon, on the same day, appointed, and the provisions of the Code of Civil Procedure sec. 270, were complied with. An order to appear on the 5th of May, was served (638) on Shuford at ten o'clock on the 29th of April.

The defendant, also at the same term of Wilkes Superior Court, recovered and docketed a judgment against Martin. On the 28th of April, 1870, he caused his judgment to be docketed in Catawba: On the 29th he issued execution, and on the same day the Clerk of the Superior Court of Catawba issued an order for Shuford to appear and answer, etc. Shuford appeared, admitted his indebtedness, and at eight and a half o'clock on the same day paid into the Clerk's office, in the cause, $500. At ten o'clock on the same day the receiver and the plaintiff Parks gave the Clerk of Catawba Court notice of the order made by the Judge on the 26th of April. (The day is inconsistently stated in the Judge's case, in one place as being the 27th, and in another, the 26th, but the difference does not seem to be material.) On the 30th of April the Clerk of Catawba paid the money to the defendant Sprinkle.

On the 5th of May, the Judge made an order that the Clerk of Catawba show cause why he should not pay the money to the receiver in the case of *Parks v. Martin*. The Clerk showed cause, and the Judge thereupon affirmed his disposition of the money.

The plaintiff appealed.

W. P. Caldwell and F. H. Busbee for the appellant.
Furches contra.

RODMAN, J. (After stating the case as above.) The appointment of a receiver was made by the Judge under sec. 270, C.C.P., and it would seem that this was intended for the benefit of all the judgment creditors of the defendant Martin, or at least of all who had instituted supplemental proceedings. The counsel who (639) argued the case seemed to have supposed that sec. 270 used the words "the Judge *or Court,* etc." but we cannot find that the words "or Court" have ever been inserted in this section by any act of Assembly. Upon a consideration of sec. 215 and of the first line in sec. 270, and, especially, of the requirement in that section, that "The receiver of the judgment debtor shall be subject to the direction and control of the Court in which the judgment was obtained upon which the proceedings are founded;" it seems plain that the appointment of a receiver under sec. 270 (and it must also be so under sec. 215) is within the power of the Judge alone.

As an execution may issue both from the Court in which judgment is recovered, and from any in which it is docketed, it would seem to follow that either Court (meaning here the Clerk) may require a discovery from the defendant, or from any person having property of, or being indebted to him, under sections 264-5-6-7-8. If the property thus or otherwise discovered, be personal and by its nature capable of being actually taken possession of, the priority between several claims will be determined by priority of levy and seizure. In other cases, that is, where the property discovered is not capable of being actually seized, it would seem that the maxims *"qui prior est in tempore portior est in jure,"* and *"vigilantibus non dormientibus jura subveniunt,"* would apply, and give priority to the party first initiating proceedings. It would seem also, that the same principle would apply when judgments are recovered in different districts, and receivers appointed by different Judges; the one first appointed would be entitled to take possession of all the property of the debtor, not previously levied on, or bound; and the fund would be distributed under the order of the Judge appointing him. How it would be in case an application for a receiver were first made to one Judge, and the actual appointment first made (640) by another, we are not called on to say, but we are inclined to think that the first application would confer priority of jurisdiction, if a receiver were afterwards actually appointed under it.

It follows that the payment by the Clerk to the defendant

Sprinkle, without the order of the Judge, was a contempt of his jurisdiction, and without authority of law. We think the Judge should have ordered and compelled the Clerk to pay to the receiver the money in question, to be disposed of according to law. This Opinion will be certified to the Superior Court of Wilkes, and the case be remanded, in order that such other proceedings may be had as are proper.

Per curiam.

Error.

Cited: York v. McCall, 160 N.C. 280.

GEORGE M. ISENHOUR, ADM'R., ETC. v. DANIEL AND HENRY M. ISENHOUR.

The exception to the rule allowing parties to testify, *i.e.* as to *transactions* between such party and a person deceased: does not extend to cases where a defendant is offered as a witness to testify that a bond which was given to a person deceased, and which is the subject matter of the suit, was *in blank* as to the *amount* payable when executed by him; having been filled up afterwards in his absence, and without due authority.

CIVIL action upon a bond payable to the intestate, tried before *Logan, J.,* at Spring Term 1870, of CABARRUS Court.

The defendant Henry having answered that the instrument sued upon was not his act and deed, offered upon the trial his co-defendant Daniel as a witness, to prove that when he, Henry, executed it, it was in blank as to the amount payable, and that it was filled up afterwards, in his absence, and without authority (641) under seal.

His Honor excluded the testimony, and the defendant excepted.

Verdict for the plaintiff. Judgment accordingly. Appeal by the defendants.

Boyden & Bailey for the appellants.

Dowd contra.

RODMAN, J. The only question in the case is, was the defendant Daniel Isenhour, a competent witness on behalf of himself and his co-defendant, to prove that the bond declared on was blank in respect to the amount payable, when it was signed and sealed by the

defendants, and that the words and figures showing the amount were inserted by the witness after the signature and sealing by his co-defendant, and without authority from him. We think the evidence was competent. Section 342, C.C.P., removes the disqualification of interest; and section 343 allows a party to be examined in his own behalf. The *proviso* limits the generality of the allowance, by forbidding a party, etc., from testifying as to a transaction or communication between him and a person deceased, etc. Here, the matter which the witness has offered to prove, was not *a transaction, or communication* with the deceased intestate of the plaintiff; it was as to a matter which took place in his absence. The exclusion of the evidence is not required by the words of the act.

We think also, that it is not by its spirit or purpose. It is said that the intestate of the plaintiff, if alive, might testify that when the bond declared on was delivered to him, it was acknowledged by Henry, as well as by Daniel Isenhour, as his deed. It is possible he might have done so. But if the act were construed to have
(642) the extensive effect contended for, it would exclude the testimony of an opposite party in every case where the representative of a deceased person was a party, as to any fact whatever; because, possibly, the deceased, if alive, might contradict the witness, or prove some fact inconsistent with his evidence. Such was not its intention. That may be a desirable rule, but it is not the one adopted by the Legislature.

There was error by the Judge below, and there must be a *venire de novo.*

Per curiam.

Venire de novo.

Cited: Brower v. Hughes, 64 N.C. 643; *Gray v. Cooper,* 65 N.C. 184; *S. v. Osborne,* 67 N.C. 260; *Bryant v. Morris,* 69 N.C. 448; *Lockhart v. Bell,* 90 N.C. 506; *Marsh v. Richardson,* 106 N.C. 548; *Wester v. Bailey,* 118 N.C. 195; *Johnson v. Rich,* 118 N.C. 270; *Johnson v. Cameron,* 136 N.C. 245; *Tharpe v. Newman,* 257 N.C. 77.

J. M. BROWER v. SAMUEL M. HUGHES AND OTHERS.

Under the plea of the General issue, in an action of debt upon bond, evidence of the *illegality* of the consideration is inadmissible.

Evidence *by a party*, that when a bond was executed and placed in the hands of an agent, for negotiation, it was in blank as to the name of the obligee, and that the agent had no proper authority for filling such blank, is not, — such obligee being dead at the time of the examination, evidence of *a transaction*, etc., with a deceased person, etc., within the terms of the C.C.P. § 343, excluding evidence *by parties*, in regard to such transactions, etc.

DEBT upon bond, tried before *Cloud, J.*, at Spring Term 1870 of SURRY Court.

The plaintiff declared upon a plain bond for money, payable "in silver or its equivalent" at one day after date, and dated July 2, 1864. The defendants pleaded: General issue, and Payment and set-off.

The name of the obligee was *J. W. Brower*, who had died before the time of the examination of the witnesses, having (643) previously endorsed the bond to the plaintiff.

Upon the trial, the defendant Samuel was offered as a witness to prove that, when the instrument sued upon was delivered to one W. A. Moore as agent, for negotiation, it was *in blank* as to the name of obligee, and that W. A. Moore subsequently, in the absence and without the knowledge of, or any authority from, a portion of the defendants, filled the blank with the name of said J. W. Brower; also, that the object of the bond was to borrow money with which to buy a horse for one of the defendants as a soldier in the Confederate army.

The Court excluded the testimony, and the defendants excepted.

Verdict for the plaintiff; Judgment accordingly; Appeal by the defendants.

Bragg, and Phillips & Merrimon for the appellants.
Clements contra.

RODMAN, J. In this case there is no plea that the consideration of the contract was illegal, neither is there any proof that the plaintiff knew of the illegal purpose to which the money loaned by him, was to be applied. That defence, therefore, fails.

The question of evidence is the same decided in *Isenhour v. Isenhour, ante* 640. The excluded witness was competent.

There was error in the proceedings below.

Per curiam.

Venire de novo.

Cited: Lockhart v. Bell, 90 N.C. 506; *Marsh v. Richardson,* 106 N.C. 548.

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(644)

L. A. TATE v. W. E. POWE AND OTHER.

The summons in Special Proceedings is returnable before the Clerk.

Any proceeding that under the old mode was commenced by *capias ad respondendum,* (including Ejectment,) — or by a bill in equity for relief, is a *"Civil Action;"* any proceeding, that under the old mode, might be commenced by petition, or motion upon notice, is a *"Special Proceeding."*

Proceedings for Dower, Partition, and Year's Allowance, are *Special Proceedings.*

DOWER, before *Mitchell, J.,* at Spring Term 1870, of BURKE Court.

The summons had been made returnable to the Term of the Court. The defendants moved to dismiss for want of jurisdiction.

His Honor refused to make this order, and the defendants appealed.

Furches for the appellants.

Bragg and Boyden & Bailey contra.

PEARSON, C.J. The enactment "writs of summons shall be returnable to the regular Terms of the Superior Courts," in the act suspending the Code of Civil Procedure in certain cases, applies only to civil actions. The act concerning special proceedings, Acts 1868-'69, ch. 93, enacts, that when there are adverse parties, "the proceeding shall be commenced as is prescribed in civil actions," — that is by summons; and the question is, should the summons be returnable before the Clerk, or before the Judge in term time. The latter is the literal construction, and it must be admitted that there is a want of clearness in the several provisions of this Statute,

caused, it would seem, in a great degree by the fact, that, by reference to the Code, where "Superior Court," or "Court" (645) is used, it means the Clerk of the Superior Court, except when the Court in term time, is referred to.

This novelty, as it may be termed, in our legislation, tends to produce a confusion of ideas, and I dare say many voted for the bill, thinking "Superior Court" meant "Superior Court," although by this novelty, it means "Clerk." But however this may be, the other sections of the "act concerning special proceedings," show that, although, as in civil actions, the leading process is a summons, yet the summons must be returnable before the Clerk. So, it may be taken as agreed, that the summons in all civil actions is returnable before the Judge in term time, and the summons in special proceedings is returnable before the Clerk, in his office, *at any time*. The significance of the distinction between civil actions and special proceedings, grows out of the act of 16th of March, 1869, which requires the summons to be returnable before the Judge in term time, in "all civil actions." Thereupon, an effort is made to swell the list of "special proceedings," so as, indirectly, to continue the jurisdiction of the Clerk, in evasion of that Statute.

There is an obvious propriety for *"festina remedia,"* in reference to a widow's Year's provision, or Dower. Under the County Court system, a petition could be filed every three months, and the question was, shall matters of this kind be delayed six months, or be heard before the Clerk, at his office. The Statute under consideration, settles the question in regard to Year's provision and Dower; these two subjects and that of Partition, are expressly declared to be special proceedings. Ejectment is obviously a civil action; as much so as an action for a horse. This reference is necessary, because the Code Commissioners, in their second report, August 1868, set out Ejectment as a *special proceeding!* — probably for the reason, that the Commissioners did not advert to the fact, (646) that *ejectio firmæ* is an original writ, set out in Fitzherbert's *Natura Brevium;* and this writ, by the skill of Chief Justice Rolle, was converted into the action of ejectment. "Lease, entry and ouster;" "John Doe and Richard Roe," are bug-bears only to superficial readers.

Judicial legislation in regard to practice and procedure, is a necessity. The many little "odds and ends" that the diversity in our way of living and talking presents, cannot be picked up and fastened by Statutes; such things must be confided to the Courts.

We might have expected that this Statute, emanating from the Code Commissioners, would have marked the dividing line between civil actions and special proceedings. But it is not so, for the rea-

son, as may be presumed, it was a perplexing subject, fit to be left to *judicial legislation.* The questions occur every day: the mode of procedure is one of instant pressing necessity, and this Court must assume the task of making the dividing line.

It was suggested, as the dividing line, that "All actions which by the old English system were commenced by original writ, and by the North Carolina system, by a *capias ad respondendum,* are civil actions under the Code of Civil Procedure, including ejectment, for reasons above stated: All suits in equity, and proceedings by petition under statutes of this State, are special proceedings." This division is liable to the objection of being simply arbitrary. The definition of the Code is: "An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong." This definition embraces suits in equity for relief, as well as actions at law. "To enforce a right or redress a wrong," is the purpose of a suit in equity as well as at law, and there is as much reason for including the one as the other under the term
(647) "civil action." By reference to other sections of the Code, it is manifest that the proceeding substituted for bills in equity for relief, as well as the proceeding substituted for writs at law, is "a civil action." Among others, see Title XIII. "Appeal in Civil Actions," sec. 306; "If the judgment appealed from directs the conveyance of land" — evidently having reference to a bill for a specific performance, or a bill to convert the defendant into a trustee: Section 307: "If the judgment appealed from direct the sale or delivery of possession of real property" — evidently having reference to a bill in equity to foreclose a mortgage, or an action of ejectment. In short, the Code assumes that bills in equity for relief, are included in the term "civil actions;" the Constitution having abolished the distinction between actions at law and suits in equity, and it being ordained: "The distinction between actions at law and suits in equity, and the forms of all such actions and suits, shall be abolished, and there shall be in this State but one form of action for the enforcement or protection of private rights, or the redress of private wrongs, which shall be denominated a civil action:" Art. IV, sec. 1.

Judge Battle being asked, as *amicus curiæ,* for his opinion, suggested that the dividing line might be. Whenever the proceeding *may be ex parte,* it is a special proceeding, although under particular circumstances there may be adversary parties. After some observations from the Bench, he concluded with his accustomed frankness, that this was not the true line.

Upon consideration, we establish this as the dividing line: Any cause of action for which there is an original writ in England, (see

Fitz. *Nat. Brev.)* or *capias ad respondendum* in this State, or which was relievable by ordinary bill in equity, as distinguished from bills to perpetuate testimony, for discovery, etc., is a "civil action;" except in cases where the remedy by petition is pro- (648) vided by statute.

The Court is obliged to suppose that the framers of the new Constitution had in view the old Constitution and the laws then in force, and that the intention was to allow old modes to prevail unless a change be expressly ordained.

The writ of dower and writ of partition are set out in Fitz. *Nat. Brev.* as *original writs.* True, under our statutes these rights are enforced by petition; but in the words of the Constitution either "is a proceeding for the enforcement of a private right, which shall be denominated a civil action."

On this account I have had much consideration as to whether the statute concerning special proceedings does not violate the Constitution, in regard to Dower and Partition. But in deference to the opinion of my Associate Justices, and the legislative construction put on this clause of the Constitution; and in order to have the matter fixed, I do not dissent, and the line is now marked: Any proceeding that, under the old mode, was commenced by *capias ad respondendum,* including ejectment, or by a bill in equity for relief, is a "civil action;" any proceeding that, under the old mode, may be commenced by petition, or motion upon notice, is a "special proceeding."

This will be certified.

Per curiam.

Reversed.

NOTE.—The same decision was rendered at this term, in the case, *L. A. Tate v. W. E. Powe, Ex'r., Etc.,* for *Year's Allowance.*

Cited: Woodley v. Gilliam, 64 N.C. 649; *Sumner v. Miller,* 64 N.C. 689; *Jones v. Gupton,* 65 N.C. 49; *Foreman v. Bibb,* 65 N.C. 129; *Murphy v. Harrison,* 65 N.C. 247; *Lutterloh v. Comrs.,* 65 N.C. 405; *Badger v. Jones,* 66 N.C. 308; *Rand v. Rand,* 78 N.C. 14; *Efland v. Efland,* 96 N.C. 493; *Parton v. Allison,* 109 N.C. 675; *Sumner v. Early,* 134 N.C. 235; *Settle v. Settle,* 141 N.C. 564; *Drewry v. Bank,* 173 N.C. 667; *Clark v. Holmes,* 189 N.C. 712.

(649)

SAMUEL S. WOODLEY v. H. A. GILLIAM.

A suit to recover the possession of land is *a civil action*, and not *a special proceeding; therefore*, the summons (by the act of 1868-'69, c. 76,) is returnable to term time, and not before the Clerk.

CIVIL action to recover possession of land, tried before *Jones, J.*, at Spring Term 1870, of WASHINGTON Court.

The summons was returned before the Clerk, and the defendant having demurred to the complaint for want of jurisdiction, the action was dismissed; upon an appeal to the Judge, this ruling was reversed; and the defendant appealed to this Court.

Smith for the appellant.
Collins & Armistead contra.

RODMAN, J. The question whether an action to recover the possession of land, is a civil action, within the meaning of the Code of Civil Procedure, and the Act of 1868-'69, ch. 76, p. 189, so as to require the summons to be returned in term time, — or, is a special proceeding, as distinguished from what is termed in the Code a civil action, so that the summons may be returnable before the Clerk at any time, is decided in *Tate v. Powe, ante* 644. Personally, I do not quite approve of the manner in which the line of distinction is drawn in that case. I think those actions are special proceedings, in which *existing* statutes direct a procedure different from the ordinary. In practice, the two lines will almost always co-incide, but this seems to me the most convenient.

On any principle of distinction such an action as this must be deemed a civil action. The mention by the Code Commis-
(650) sioners, in their Report, of the action of ejectment as one of those in which some legislative provision of special proceeding would probably be found necessary, no doubt indicated the opinion of the Commissioners, and their intention to present some such provision to the General Assembly for its consideration. It may be that for the same reasons which caused the introduction of the modern action of ejectment in lieu of the old action of *ejectione firmæ*, the Legislature may yet find it expedient to provide some special proceeding for such a case. But hitherto they have not done so. There was error in the opinion of the Judge: the demurrer must be overruled. The defendant will recover costs in this Court. Let this opinion be certified.

Per curiam.

Reversed.

Cited: Holmes v. Marshall, 72 N.C. 40; *Hallyburton v. Greenlee,* 72 N.C. 319; *Sharpe v. Williams,* 76 N.C. 90.

JOHN P. HEDGECOCK v. HENRY DAVIS AND OTHERS.

The jurisdiction conferred upon Justices of the Peace by the Constitution, Art. IV, sec. 33, extends to all sums of two hundred dollars and under, *exclusive of interest.*

Where questions of constitutional construction are doubtful, Courts will defer to a previous decision thereupon made by the Legislature.

CIVIL action, tried before *Cloud, J.,* at Spring Term 1870 of FORSYTHE Court.

The complaint was founded upon a note, executed by the defendants, for two hundred dollars, dated May 17, 1859, the interest upon which, after deducting certain payments, amounted to some thirty-nine dollars. The defendants demurred, for want of jurisdiction.

Judgment for the defendants, and Appeal by the plaintiff.

T. J. Wilson for the appellant. (651)
No counsel contra.

PEARSON, C.J. The Constitution confers on Justices of the Peace exclusive original jurisdiction "of all civil actions founded on contracts wherein the sum demanded shall not exceed two hundred dollars"; Art. IV, sec. 33. The question is, If the principal sum due on a note does not exceed two hundred dollars, but the *value of the note* exceeds that amount by reason of accumulated interest, has a Justice of the Peace jurisdiction? That depends upon the meaning of the words, "the sum demanded."

On one side it is said that "the sum demanded" is the value of the note, and the interest makes a part of the value: *Birch v. Howell,* 30 N.C. 468. On the other it is said that "the sum demanded" is the principal of the note: interest follows as a mere legal incident, involving only a simple calculation, and is no part of the note. If the principal be paid, the party can have no action for the interest: *Moore v. Fuller,* 47 N.C. 205.

We are inclined to adopt the latter view as the true one, on several considerations:

1. The meaning of *the value of a note,* was fixed by the decisions of the Supreme Court, and if it was intended to express the

same idea, the same words would have been used. The use of other words tends to an inference that the idea was not the same.

2. Under the old system the jurisdiction of a Justice of the Peace in regard to bonds, notes and signed accounts, was limited to one hundred dollars, "exclusive of interest." In adopting the new system, an increase of jurisdiction was made necessary by the abolition of the County Courts, and it is raised to two hundred dollars — as much as to say, let it be doubled; and of course, "exclusive of interest," which is a thing that is always growing; and it is
(652) not proper that the jurisdiction of a tribunal now become important, should be fluctuating, so that it may exist to-day, and be gone to-morrow.

3. Interest depends upon a simple calculation. If a Justice of the Peace be competent to count interest on a note of one hundred and seventy-five dollars, he is as fully competent to count it on a note of two hundred dollars: so the amount of the sum on which it is counted, is not an element that could at all influence the conclusion in respect to jurisdiction.

But suppose the matter to be doubtful: the General Assembly has put a construction upon this section which the Court does not feel at liberty to depart from, unless it be clearly wrong. Statutes are presumed to be constitutional until the contrary is made to appear. By section 498, C.C.P., amended by Acts 1868-'69, ch. 109, sec. 2, a Justice of the Peace has "exclusive original jurisdiction of all civil actions founded on contract, except when the sum demanded 'exclusive of *interest*' exceeds two hundred dollars." This settles the question, and we would be relieved from any further observation, but for the fact that section 499, C.C.P., amended by Acts 1868-'69, ch. 109, sec. 3, provides: "When it appears in any action brought before a Justice of the Peace, that the sum demanded exceeds two hundred dollars, the Justice shall dismiss, etc., unless the plaintiff remits all of the interest, and so much of the *principal* as is in excess of two hundred dollars." This has no bearing on our case, for here the principal does not exceed two hundred dollars, and the only way to avoid confusion, is to confine the one section to actions where the principal does not exceed that amount, and the other to actions for unliquidated damages, and actions on bonds, notes and signed accounts where the principal is in excess of two hundred dollars, and the party is allowed to bring his case within the jur-
(653) isdiction of the Justice by remitting all of the interest and the excess of the principal.

Per curiam.

Judgment affirmed.

Cited: Dalton v. Webster, 82 N.C. 282; *Brickell v. Bell,* 84 N.C. 85; *Sternberger v. Hawley,* 85 N.C. 140; *Riddle v. Milling Co.,* 150 N.C. 690; *Reade v. Durham,* 173 N.C. 681; *Purser v. Ledbetter,* 227 N.C. 4.

B. F. MARTIN v. THE DEEP RIVER COPPER MINING COMPANY.

A motion to amend, or to vacate, a judgment, cannot be entertained by the Court of the county to which such judgment has been transferred, and where it has been docketed. It should have been made in the county where the judgment was rendered.

MOTION to vacate a judgment, made before *Tourgee, J.,* at Spring Term 1870, of GUILFORD Court.

No statement beyond what appears in the Opinion, is necessary.

His Honor granted an order to vacate the judgment, and the plaintiff appealed.

Gorrell for the appellant.
Dillard and Phillips & Merrimon contra.

READE, J. The plaintiff sued out an attachment, and obtained judgment, in Rowan Superior Court, against the defendant, by the name of the Deep River Copper Mining Company; and, under the provisions of the Code, had the judgment transferred from Rowan to Guilford County, and docketed there, and sued out a *fi. fa.* and levied it on the lands of the "Deep River Copper Company of the City of Baltimore;" who, upon motion and affidavit in Guilford Superior Court, obtained an order to vacate the judgment docketed in Guilford, and to enjoin proceedings under the (654) *fi. fa.*

Admitting for the sake of the argument, that the Deep River Copper Company of the City of Baltimore, could be heard at all in a suit to which they were no party, we are of the opinion that the motion to vacate ought to have been made in Rowan Superior Court, where the judgment was rendered, and not in Guilford, to which it had been transferred. If the Deep River Copper Company of the City of Baltimore, who made the motion in this cause, had no opportunity to defend the suit, and really desired to do so, the judgment in Rowan could be vacated, and they could be allowed to de-

fend by setting up the misnomer. And on the other hand, if there is any irregularity in the proceedings affecting the plaintiff, he could there move for leave to amend; as, for instance, to aver that the defendants were known as well by one name as the other.

There was error in vacating the judgment docketed in Guilford, and in the perpetual injunction: *Williams v. Rockwell, ante* 325. Let this be certified, etc.

There will be judgment here against the Deep River Copper Company of the city of Baltimore, for the costs of the appeal.

Per curiam.

Reversed.

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(655)

MARY G. BADHAM, ADM'X., ETC. v. JOHN M. JONES, AND OTHERS.

Section 10 of the Ordinance of June 23d 1866, ("To change the jurisdiction, etc.") modified the provisions of the Rev. Code, c. 45, § 29, directing Clerks to issue executions within six weeks; so that a Clerk who after Spring Term 1867, failed to comply with the above statute, was not responsible therefor.

A minute upon the docket, "Issue execution," is not to be taken as a mandate of the Court, although it may be such a *memorandum* as the Clerk may extend into an order, or, as may enable the Court afterwards to have such order entered *nunc pro tunc.*

CIVIL action upon a Clerk's bond, tried before *Pool, J.*, at Spring Term 1870 of CHOWAN Court.

The facts on which it was sought to recover upon the bond of the defendant Jones, as Clerk of Chowan Superior Court, were, that at Spring Term 1867 of that Court, the plaintiff had obtained *a* judgment for money against one Leary; that the Clerk had *failed to issue an execution therefor* for two terms afterwards; and, that in the meantime Leary had become insolvent. It appeared that after the entry of judgment upon the docket were the words "Issue execution;" also, that the plaintiff had never demanded that execution should issue.

Under the instructions of his Honor there was a verdict and judgment for the plaintiff.

The defendants appealed.

Phillips & Merrimon for the appellants.
Bragg contra.

READE, J. By the provisions of the Revised Code, chap. 45, sec. 29, it was the duty of Clerks of Courts to issue executions, unless otherwise directed by the plaintiff, within six weeks from the rendition of the judgment. Under that statute the Clerk would have been liable for not issuing executions in this (656) case. But the ordinance of June 23d 1866, entitled "An ordinance to change the jurisdiction of the Courts," etc., forbids any *fi. fa.* or *ven. ex.* to issue from Spring Term 1867, without permission from the Court. This clearly repeals the statute, which made it the duty of the Clerk to issue it within six weeks of his own motion; and further, section 23 of the ordinance expressly repeals all laws in conflict therewith, and section 21 imposes a penalty of $500 on the Clerk for a violation.

The case then stands thus: Is a Clerk liable to an action on his bond for not issuing a *fi. fa.* of his own motion, without application by the plaintiff, or a statute enjoining it? We do not think that he is.

It is the business of the Clerk to make and keep the records, and to issue such process as the Court directs, or the law enjoins. The statute requiring him to issue execution of his own motion being repealed, and he not having been applied to by the plaintiff, the remaining enquiry is: Was he ordered by the Court to issue it. It is insisted that the entry on the docket, "Issue execution," was a mandate from the Court to the Clerk. We do not think so. There may have been an order by the Court, and this entry may have been the note or memorandum of it. If there was such order, this note was sufficient for the Clerk to draw out the order in form, and it was his duty to do so; and if it had been made to appear to the Court at any subsequent term, that the order was made and not recorded, the Court might have ordered the Clerk to make the record speak the truth. But the note itself is of no force. It was a mere reminder to the Clerk of something, but of what we cannot know. The plaintiff insists that it was a mandate to the Clerk; the defendant insists that it was a permission to the plaintiff, and no proof was offered to explain it, or whether there was any action of the Court at all; and there was no motion, as there might have (657) been, to the Court below to make the record speak the truth.

It would seem probable that it was a permission to the plaintiff, as the ordinance, *supra,* forbids execution to issue from that term — Spring Term 1867, without permission of the Court; or it may have been a memorandum by the attorney, without the action of the Court. Probably it ought to be assumed that it was not the action

of the Court, as, if it was, it was the duty of the Clerk to put it in form. At any rate, we cannot see that it was a mandate to the Clerk for disobedience of which he is liable upon his bond.

The defendant was entitled to the instruction for which he asked, that the plaintiff was not entitled to recover.

Per curiam.

Venire de novo.

Cited: McIntyre v. Merritt, 65 N.C. 560; *Richardson v. Wicker,* 80 N.C. 176; *Etheridge v. Woodley,* 83 N.C. 15; *Williamson v. Kerr,* 88 N.C. 12; *Bank v. Bobbitt,* 111 N.C. 197.

DELANIA THOMAS v. W. W. WOMACK.

Where a summons was made returnable, — and the complaint, and answer, in chief, were filed, *before the Clerk,* (July 1869,) and he returned the case to the next term, the docket of which showed the names of the respective counsel marked to such case: *Held,* that at Spring Term 1870 it was competent for the Judge to amend the summons by making it *returnable to the term,* in accordance with the Act of 1868-'69, c. 76.

MOTION to amend a summons, made before *Tourgee, J.,* at Spring Term 1870 of CHATHAM Court.

The summons had been issued in July 1869, returnable *before the Clerk,* and the complaint, and answer, in chief, had been filed before him. The cause was then transferred by him to the
(658) next term, with the names of the attorneys for the parties marked on the docket.

At Spring Term 1870, upon motion by the plaintiff, his Honor allowed the summons to be amended, by making it (in accordance with the Act of 1868-'69, c. 76,) *returnable to the term.*

The defendant appealed.

Phillips & Merrimon, for the appellant.
Howze and Manning contra.

RODMAN, J. Section 132, C.C.P., by its language taken generally, confers on the Court the power to make the amendment allowed in this case. But it is contended by the defendant, that however general may be the words of a statute, they will never be construed to have an effect in violation of manifest principles of justice.

This we admit. The defendant further contends that such would be the effect of this amendment, as it would bring a party into Court without notice: This we do not admit. The defendant had notice to appear before the Clerk, and did appear and plead in bar of the action. It is true that in consequence of the Act of 1868-'69, ch. 76, the Clerk at the date of the summons, did not have jurisdiction either to hear the case, or to have the pleadings conducted, and the issues made up before him. The defendant contends that, therefore, the Clerk must be regarded for the purposes of this action, as no Court at all, and that the summons and appearance are nullities.

We concede that the summons was irregular, and that the defendant might have set it aside on motion, or by demurrer, and that no consent on his part could waive the want of jurisdiction. But the Clerk is, for certain purposes, a part of the Superior Court which had jurisdiction of the action, and as such, he has a certain jurisdiction and certain powers. The defect in the summons is, that it was not returnable before the Court in term time. A mis- (659) take in the return day may be amended if the defendant has notice of the true day, or may be waived by his appearance and pleading on the true day. In this case, as the defendant had actual notice to appear, and did appear, and had also notice that the case was transferred to the Superior Court at its regular term, and of the motion to amend; and, as he cannot be prejudiced in any defence which he may have, we do not see how any principle of natural justice forbids the amendment. If the defendant had gone to trial upon the issues joined in the Clerk's office, could he contend that a verdict found against him was a nullity? We think the Superior Court had power to allow the amendment. The terms on which it should have been allowed, were within the discretion of that Court, and do not come within our review.

There is no error. Let this Opinion be certified.

Per curiam.

Affirmed.

Cited: Walston v. Bryan, 64 N.C. 765; *Cheatham v. Crews,* 81 N.C. 345; *Bank v. McArthur,* 82 N.C. 110; *Kivett v. Wynne,* 89 N.C. 42; *Redmond v. Mullenax,* 113 N.C. 510; *Ewbank v. Turner,* 134 N.C. 81.

ASHLEY CHURCH v. H. K. FURNISS.

A summons (with *warrant* of attachment) was issued *returnable* Nov. 1st, but was not *returned* until Nov. 26th, the day before the *warrant* was returnable, and then it was returned "Not to be found, etc."; on Nov. 27th, the plaintiff was allowed to continue the case, because, by accident, due advertisement had not been made: *Held*, that, under the circumstances, the *advertisement* was *the substantial process*, and that a failure duly to return the summons, was no *discontinuance*.

A motion, and not a demurrer, is the proper method of taking advantage of a discontinuance.

CIVIL action, tried before *Jones, J.*, at Spring Term 1870 of WASHINGTON Court.

The action had been commenced by a summons returnable (660) (Nov. 1, 1869,) before a Magistrate. Incident to this, was a warrant of attachment, upon an allegation that the defendant had left the State, etc. The warrant was returnable Nov. 27th. The summons was returned, ("Not to be found," etc.,) upon the 26th of November. Upon the next day, the plaintiff, upon a suggestion that the advertisement which had been ordered, had, by accident, not been duly made, obtained a continuance of the case for four weeks. On the 25th day of December, the Magistrate dismissed the action, because the summons had not been *duly* returned.

After appeal to the Superior Court, upon motion made for the defendant, his Honor adjudged that a failure to return as above was no discontinuance, and the defendant appealed.

Smith for the appellant.
Collins & Armistead contra.

1. Discontinuance is cured by *appearance:* Tidd. 924, Comyn, Dig. Courts, (P. 11 Continuance,) etc.

2. The notice is by the *publication,* and the summons need not be *returned.* The law cannot mean that the return of the *summons* shall render void that of the *warrant.*

RODMAN, J. It is said, that, as the summons in this case was not returned on its return day, (1st Nov.,) nor until some twenty-five days thereafter, the action was discontinued. The doctrine of discontinuance is founded on this principle: If a defendant be summoned to appear on a certain day, and the plaintiff fails to appear on that day, to prosecute his suit, and no future day is fixed by the Court for the appearance of the defendant, he is left without knowledge on that point, and as he cannot be expected to appear every

day for an indefinite time, he is held to be discharged from appearing again, without a fresh summons. The action is dis- (661) continued. But this supposes that the defendant has once had a day for his attendance. In this case, the summons was never served personally on the defendant. It was necessary that it should issue, to lay a foundation for the attachment, and to ascertain with certainty, whether the defendant could be found in the county, and if he could be, to give the benefit of a personal service. But the substantial process was the advertisement, and, as this could not have been made by the 1st of November, and, by accident, failed to be made by the 26th November, we think the Justice had the power, and might not inequitably extend the time. This he did. The case does not state with the proper distinctness, that the advertisement was duly made, or on what day the defendant was required by it to attend, but we may assume for the present purpose, that the plaintiff moved for judgment on the day named in the advertisement for the appearance of the defendant, and we think, on default of the defendant to appear and plead, he would have been entitled to it.

The above views are independent of the question, whether a demurrer is the proper way to take advantage of a discontinuance. We think it is not. The effect of a demurrer is so familiar that it need not be stated; none of its effects reach such a case as this. The proper way would be, to move for a declaration by the Court, that the action was discontinued, the result of which would be that the plaintiff would pay his own costs.

We think there is no error in the judgment below. The case will be remanded, in order that the Superior Court may proceed therein according to its course.

Per curiam.

Judgment affirmed.

Cited: Penniman v. Daniel, 93 N.C. 335.

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(662)

CONOLEY AND McQUIGG v. W. M. HARRISS.

Where an Act of the General Assembly authorized the election, in Townships containing cities and towns, of a larger number of Justices than *two*, (Const., Art. VII, § 5,) all such justices are members of the Township Board of Trustees.

CONOLEY *v.* HARRISS.

CONTESTED election, tried before *Russell, J.*, at Spring Term 1870 of NEW HANOVER Court.

An Act of Assembly authorized *six* Justices to be elected in the township including Wilmington; and upon a contest occurring as to which of these composed the Board of Trustees for such township, the County Commissioners decided that the two elected for the township at large (the plaintiffs) were such Board. Thereupon the defendant appealed to the Superior Court.

His Honor thereupon gave judgment for the defendants without prejudice to the rights of the plaintiffs; and the plaintiffs appealed to this Court.

Attorney-General for the appellants.
No counsel contra.

RODMAN, J. The County Commissioners of New Hanover, under the power given them, by ch. 185, Acts 1868-'69, p. 478, § 8, to decide in all cases of contested elections of township trustees, subject to an appeal to the Superior Court of the County, decided that McQuigg and Conoley were duly elected Justices of the Peace for the township of Wilmington, and that they, with the Clerk elected, should constitute the Board of Trustees for said township, to the exclusion of the other Justices elected with them. From this decision, Harriss, who had also been elected a Justice, appealed to the Superior Court. The Judge there decided that Harriss was a Justice for the township, and as such was a member of the Township
(663) Board of Trustees, without prejudice to the right of McQuigg and Conoley also to act as Trustees. From this decision McQuigg and Conoley appealed to this Court.

The decision of the Judge can only be founded on the opinion that all of the six Justices of the Peace elected in Wilmington township, together with the Clerk, constituted the Township Board of Trustees. We think his opinion was correct. Art. VII, Sec. 5 of the Constitution provides that two Justices of the Peace and a Clerk shall be biennially elected in each township, and shall constitute a Board of Trustees. But it further authorizes the General Assembly to provide for the election of a larger number of Justices of the Peace in cities and towns, and in those townships in which cities and towns are situated. The clear inference from this is, that where a city is part of a township, and when by virtue of any act of the Legislature a greater number of Justices shall be elected for the township, all of them shall constitute the Township Board of Trustees. By the act above referred to (Acts 1868-'69, ch. 185, § 4,) the Legislature enact that, in every township in which any city or

town is situated, the number of Justices elected shall be two more than the number of wards in such city or town, etc. All the Justices duly elected in and for the township of Wilmington by virtue of that act, constituted, with the Clerk, the Board of Trustees. The case omits to state into how many wards the city of Wilmington is divided, or whether it is divided into wards at all. We assume, however, that the number of Justices was the number to which the township was entitled under the act.

The decision of the Judge is affirmed. Harriss will recover his costs in this Court.

Per curiam.

Affirmed.

(664)

JAMES BOYLE v. THE CITY OF NEWBERN.

Cities, etc., are responsible to their officials for services rendered to them by the latter during the existence of the Provisional Government.

ASSUMPSIT, tried before *Thomas, J.,* at Spring Term 1870, of CRAVEN Court.

The plaintiff had served as policeman in Newbern from July 1865 to March 1866, under an appointment by persons, who, during that time, acted as Mayor and Commissioners of the City under an appointment by Governor Holden, whilst Provisional Governor.

Under the instructions of his Honor there was a verdict and judgment for the plaintiff; and the defendant appealed.

Manly & Haughton for the appellant.
Green contra.

DICK, J. Upon the subjugation of North Carolina in 1865, the functions of the State government and of all municipal corporations which constituted a part of the State government, was suspended. In this condition of anarchy the President of the United States rightfully established a Provisional Government, invested with power to regulate the police of the State, to administer justice, etc.: *Cooke v. Cooke,* 61 N.C. 583, and the authorities therein cited. By virtue of such power the Provisional Governor appointed and commissioned certain municipal officers in the City of Newbern,

who employed the plaintiff as a policeman. The plaintiff performed the duties assigned him, and the City of Newbern received the benefit of his services, and is liable for his claim for compensation.

In order that no difficulties might arise about questions like the present, the acts of municipal officers of towns and other
(665) officers and agents of the late Provisional Government were declared valid by the Convention of 1865 and the Legislature of 1866; See Ordinance of Oct. 18th 1865; Acts 1866, ch. 36, § 1; Const. Art. 4, § 24.

There is no error.

Per curiam.

Judgment affirmed.

Cited: Paul v. Carpenter, 70 N.C. 507.

MARY FIKE v. J. M. GREEN, AND R. N. & J. M. GREEN, EX'RS., ETC.

Where the testator (dying in 1863) was debtor, as surety for a principal solvent until the emancipation, and his personal property consisted of seventeen slaves bequeathed to the persons named as executors, which he had before placed in their possession, and which remained there until they were emancipated: *Held*, that a creditor, who did not present her claim, but who was unwilling to receive Confederate currency for it, could not charge the executors with laches in not selling such slaves for payment of debts, — even in a case where they had not advertised for creditors to present their claims, as required by statute.

Executors are not chargeable with land as assets.

EXCEPTIONS to a report, made in an action of Debt against executors upon a bond given by their testator, tried before *Tourgee, J.*, at Spring Term 1870, of CHATHAM Court.

The Commissioner, to whom a reference had been made as to the state of the assets, reported that the testator, at the time of his death, in April 1863, owned no personal estate of any consequence, excepting seventeen slaves bequeathed to his executors, and which had previously been placed in their hands; that he also owned land which he devised to his executors, the defendants R.

N. and J. M. Green; that, besides the debt in suit, which he
(666) had contracted as surety of J. M. Green, he owed only some small debts, which had been paid by the executors; that J. M. Green was solvent until after the emancipation of his slaves,

and that subsequently to the death of the testator, he had sold the land devised to him as above.

It appeared that the will had been proved by the executors, but that neither of them had qualified as executor; that no advertisement had been made for creditors, — that the slaves had been allowed to remain in the hands of the legatees until they were emancipated, and that the land had not been sold by the executors, to pay debts. It also appeared that the executors did not know of the existence of the debt in question, and that the plaintiff said she would not take Confederate currency in payment of it.

The Commissioner refused to charge the defendants with either the slaves or the land; and thereupon the plaintiff excepted as to each.

His Honor overruled the exceptions, and the plaintiff appealed.

Headen, and Phillips & Merrimon for the appellant.
Manning contra.

DICK, J. The first exception to the report of the Referee is, that he did not charge the executors with the value in 1863 of seventeen negroes belonging to the estate of the testator. It appears in evidence that the testator died in April 1863, leaving no personal property except the seventeen negroes mentioned in the exception, and they had been put into the possession of his children sometime before his death. There were a few small debts against the estate, and these were paid on by the executors. The testator was surety to the debt of the plaintiff, and the principal, John M. Green was amply solvent until his slaves were emancipated. The plaintiff would not present her debt, as she would not receive Con- (667) federate money. Under such circumstances, the defendant acted prudently in not selling the negroes for Confederate money, which could not be used to advantage, and was rapidly depreciating in value. The subsequent emancipation of the negroes ought not to result in injury to the defendants. This exception was properly overruled by his Honor: *Finger v. Finger, ante* 193; *Kerns v. Wallace, Ib.* 189.

The ruling of his Honor as to the second exception, was also correct. The real estate was not assets in the hands of the executors: *Floyd v. Herring, ante* 409. Where a will directs real estate to be sold for the payment of debts, and an executor fails or refuses to execute such trust, he may be compelled to do so by special proceedings properly instituted: *Wadsworth v. Davis,* 63 N.C. 251. The law requires an executor or administrator, where there is a deficiency of personal assets, to obtain a license from Court to sell the

real estate of the deceased, and the proceeds of sale, when received, become assets for the payment of debts. If the personal representative neglects this duty, its performance may be enforced by a creditor.

As the land devised to John M. Green was sold within two years from the death of the testator, the alienation is void as to creditors, (Rev. Code, ch. 46, § 61) and the executors can be compelled to sell it for the payment of the debts of the deceased.

We cannot see from the evidence reported, that the executors have been guilty of any laches which has prejudiced the rights of the plaintiff.

There is no error.

Per curiam.

Judgment affirmed.

Cited: Ramsey v. Hanner, 64 N.C. 671; *Womble v. George,* 64 N.C. 762; *Vaughn v. DeLoach,* 65 N.C. 378; *Green v. Green,* 69 N.C. 27; *Hawkins v. Carpenter,* 88 N.C. 406; *Wilson v. Bynum,* 92 N.C. 723; *Speed v. Perry,* 167 N.C. 129; *Barbee v. Cannady,* 191 N.C. 533; *Linker v. Linker,* 213 N.C. 354.

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(668)

THE STATE EX REL. MARTHA R. RAMSAY V. O. S. HANNER AND C. C. GOLDSTON, EX'RS.

Where the testator had died in November 1863, and his estate was afterwards rendered insolvent by the results of the war: *Held,*

1. That the executors were not chargeable with Confederate money, which, upon its refusal by the creditors of the estate, they had divided amongst the legatees, without taking refunding bonds;

2. *Nor,* with the value of the slaves which they had allowed the legatees to take, or to retain; *but* they were chargeable with the value of the other personal property, so taken or retained;

3. *Nor,* with the Confederate money and bonds, and N. C. Treasury notes, remaining in the hands of the executors;

4. *Nor,* with the value of personal property sold by them in November 1863 for Confederate money.

Where land was sold under execution for a debt due to the testator, and his executors purchased it, paying for it with the debt, and taking title to themselves: *Held,* that it was optional with the creditors of the estate to charge them with the debt, or with the land.

RAMSAY *v.* HANNER.

An executor of a creditor is not required to administer upon the estate of a deceased debtor.

After the institution of a suit against them by a creditor, *(here,* in Feb. 1868,) executors have a right, under the act of 1866-'7, c. 59, to pay other debts, without a judgment against them.

EXCEPTIONS to a report upon assets, in an action (commenced in February 1868,) against executors, tried before *Tourgee, J.,* at Spring Term 1870, of CHATHAM Court.

George W. Goldston, the testator, died in November 1863, leaving a considerable estate, mostly in notes and other personalty, which having been lost by the results of the war, it was found that the estate was insolvent. Previously to the termination of the war his executors had proceeded to wind up the estate, without apprehension on the score of its indebtedness, allowing legatees to receive, or retain their specific legacies of shares and other personal property. After the creditors of the estate refused to receive Confederate money for their claims, they paid a large amount (669) of it then on hand to the legatees. The relator was a ward of the testator, and this suit was brought for the money due to her as such. In the course of the suit a reference was had in regard to assets. The character of the report sufficiently appears from that of the exceptions filed by the relator.

These exceptions were:

1. Because the Commissioner had allowed to the executors certain sums of money paid by them voluntarily since the institution of the present suit;

2. Because he had charged them with $900, as a debt collected from one O. A. Palmer, whereas he ought to have charged them with the value of the land ($3500) which had been sold under an execution for such debt, and which at the sale they had purchased with the same, taking title to themselves;

3. For that, he had not charged them with $8300 in Confederate money, which they had paid to the legatees;

4. For that, he had not charged them with the value of the slaves and other personal property (horses, watches, a piano, etc.,) which they had allowed the respective legatees thereof to take, or to retain;

5. [Abandoned;]

6. Because he had not charged them with $600, due from the estate of R. W. Palmer;

The facts material to this exception were, that said Palmer died insolvent, and that no one had administered upon his estate.

7. Because the Commissioner had not charged them with $2.80

in specie, $1810 in Confederate money, $984 in N. C. Treasury notes, and $4500 in Confederate bonds, now on hand;

8. Because he had not charged them with the value of
(670) personal property sold by them in the latter part of 1863 for Confederate money, to the amount of $5,792.65.

His Honor sustained exceptions 3 and 8, and overruled the others. Both parties appealed.

Headen for the plaintiff.
Manning contra.

READE, J. The plaintiff's first exception is overruled. The act of 1867, ch. 59, authorizes administrators and executors to pay other debts after suit is brought, and without judgment.

II. The second exception is allowed. The land, worth $3500, was purchased by the executor with a debt of $900, due the estate of the testator, and a deed was taken to himself. "If an estate or fund has been changed by breach of trust, the *cestui que trust* may at his option waive its restoration, and may attach and follow it in its altered form: *e.g.* if a trustee or executor purchase an estate with his trust money or assets, and the fact of his having done so be admitted or distinctly proved, the parties interested in the money may claim the estate:" Adams Eq. 143.

III. The third exception is overruled. The estate was a very large one, much more than sufficient to pay all the debts. Eight thousand three hundred dollars in Confederate treasury notes were in the executor's hands, and the creditors would not receive them in payment of their claims. What was the executor to do? If he had kept the money it would have been worthless. He could not invest it with safety; he supposed that it would eventually belong to the legatees, and therefore, as the best thing he could do under the circumstances, he paid it over to them. The only seeming error in this is, that, he did not take refunding bonds. A sufficient excuse
(671) for this neglect was, that in 1864 no one would have given a refunding bond, for Confederate money, and no one could have supposed that he had not retained an abundance to pay debts, and that it turned out otherwise by the accident of the result of the war.

IV. The fourth exception is overruled so far as the value of the slaves is concerned, and allowed as to the value of the other personal property. The executor could not have sold slaves in 1864, except for Confederate money, and that would have been worthless. He did well to keep the slaves, and their emancipation was an accident,

for which he is not responsible: *Fike v. Green, ante* 665. But it is otherwise with regard to the other property.

V. The fifth exception is abandoned.

VI. The sixth exception is overruled. The executor was not obliged to administer on the insolvent estate of R. W. Palmer, and no one else would.

VII. The seventh exception is overruled, except as to the small sum of specie. The other effects were worthless, without the fault of the executor.

VIII. The eighth exception is overruled, for the reasons stated in disposing of the other exceptions.

There is error. This will be certified, etc.

Per curiam.

Error.

(672)

WILLIAM R. BROWN v. HENRY M. FOUST AND ANOTHER.

A bond had been given in 1863 for the price of a slave, and partial payments had been made thereupon in Confederate money: *Held*, that in order to ascertain how much is now due thereupon in National currency, the jury should estimate the value of the slave when purchased, in gold, and deduct therefrom an amount which bears to that value the same proportion which the payments do to the sum specified in the bond; adding to the remainder the depreciation of U. S. Treasury notes at the time of the verdict.

DEBT upon bond, tried before *Tourgee, J.*, at Spring Term 1870 of RANDOLPH Court.

The bond had been executed Sept. 1, 1863, payable at six months, for $1400, being the price of a negro girl then purchased by the obligors. Payments were endorsed thereupon: of $800, paid April 30th 1864, and of $400, paid Oct. 29th 1864.

His Honor instructed the jury that they should scale the note according to the value of the property, and that the payments should be scaled according to the money scale, and that they might allow the premium for gold, upon both the value of the property, and the value of the money paid.

Verdict, and Judgment accordingly, for $1,192.53.

The defendants appealed.

Gorrell for the appellants.
Scott & Scott and Mendenhall contra.

DICK, J. The Confederate money was received by the obligee, and such payment discharged the bond *pro tanto.* The bond was given for a negro girl, and the value of the balance of the contract is regulated by the acts of 1866, chs. 38 and 39. The jury upon the proof, should have estimated in gold, the value of the negro (673) girl at the time of the contract, and deducted therefrom an amount which bore the same proportion to such value as the payments did to the sum specified in the bond, and then added to such gold balance, the depreciation of U. S. Treasury notes, at the time of the verdict: *Garrett v. Smith, ante* 93.

As for instance, if the amount of the bond had been fifteen hundred dollars, and the payments had been five hundred dollars, one-third of the bond would have been discharged, and one-third should have been deducted from the gold value of the property.

The instructions of his Honor were erroneous, and there must be a *venire de novo.*

Let this be certified.

Per curiam.

Venire de novo.

Cited: Boyden v. Bank, 65 N.C. 17; *Hall v. Craige,* 65 N.C. 53; *Dunn v. Barnes,* 73 N.C. 275; *Duke v. Williams,* 84 N.C. 77;

JESSE RANKIN, GUARDIAN, ETC. v. R. M. ALLISON, AND OTHERS.

A pleading which is amended in a material part after verification, is to be regarded as unverified; *therefore,* where such pleading was a complaint, an answer thereto need not be verified.

The *parties* spoken of in the acts defining *venue,* are the parties to the record; therefore, no objection can be made on account of *venue,* by pleading and showing that the party on whose behalf a suit is brought, and the defendant therein, are citizens of another county than that in which suit was brought.

An answering setting forth that B is the real owner of the note sued upon but that it was assigned to the plaintiff, is to be taken as meaning that the plaintiff is trustee of an express trust, and so is properly plainiff, (C.C.P. §§ 57 and 58.)

RANKIN *v.* ALLISON.

CIVIL action, tried before *Mitchell, J.*, at Spring Term 1870 of CALDWELL Court.

A summons, issued in the name of Jesse Rankin, plaintiff, against R. M. Allison and others, defendants, returnable to the Superior Court of Caldwell County. The complaint alleged, (674) that the defendants, on February 26th 1863, made a promissory note to Sarah C. McRorie, which she assigned to plaintiff, and that it is due and unpaid, etc. The complaint was verified by affidavit, but was afterwards amended by adding in the title, after the name of Jesse Rankin, the words, "guardian of John S. McRorie."

The answer alleges that, at the time the action was brought, the plaintiff was not the owner of the note, but that John S. McRorie, an infant, who resided in Iredell County, was the owner; also that one of the defendants resides out of the State, and the other in Iredell County. Judgment was given for the plaintiff, and the defendants appealed.

W. P. Caldwell for the appellant.
Folk contra.

RODMAN, J. (After stating the case as above.) It was said for the plaintiff in this Court, that the answer was properly disregarded, because it was not properly verified; but, as the complaint was amended in a material part after it had been sworn to, it was in effect, not sworn to: consequently the answer did not require to be verified by affidavit.

2. Every action must be brought to the Superior Court of the County where the plaintiff or defendant resides: C.C.P. §§ 74, 68; Acts, 1868-'69; and if both reside in the same county, it must, of course, be brought in that county. If an action be brought in the wrong county, it may, on the written application of the defendant, be transferred to the right one: C.C.P. § 69.

We might regard the answer in this case as such an application; but then it does not allege that Rankin, the plaintiff of record, resides in Iredell County, and consequently, as for such a purpose the Court can only look at the parties of record, it could not be allowed. We must, therefore, consider whether regarded as (675) an answer in bar, it sets forth a sufficient defence. It admits the assignment to Rankin, but alleges that John S. McRorie, an infant, is the owner; it does not state how he became owner, or that he is the owner of the legal, or only of an equitable estate: we are obliged, therefore, to construe the allegation of ownership in John

as consistent with the ownership admitted in Rankin, and the result is that Rankin took an assignment to himself as trustee for, or, as guardian of, the infant. Taking that to be so, by sections 57 and 28 C.C.P., Rankin, as the trustee of an express trust, must bring the suit. We do not see that the answer states any sufficient defence. The judgment below must be affirmed.

Per curiam.

Judgment affirmed.

Cited: Mebane v. Mebane, 66 N.C. 336; *Alexander v. Wriston,* 81 N.C. 193; *Shaver v. Huntley,* 107 N.C. 628; *Brown v. Rhinehart,* 112 N.C. 775; *McCullen v. R. R.,* 146 N.C. 569; *McArthur v. Griffith,* 147 N.C. 550; *Whitford v. Ins. Co.,* 156 N.C. 43; *Biggs v. Bowen,* 170 N.C. 35; *Trust Co. v. Finch,* 232 N.C. 486.

HUGH JOHNSON v. DANIEL McARTHUR.

Where a defendant in a case at law, pending at the adoption of the C. C.P., wishes, subsequently to such adoption, to place his defence upon some *equitable* principle, he must resort to an *action,* in the nature of a bill in equity, and the relief to be had thereby, in analogy to former practice, must be against *execution* in the suit so pending, all other opposition to the plaintiff's recovery being waived:

Therefore, where the plaintiff, in a *civil action,* alleged that the defendant therein had previously brought actions of *trespass,* and of *ejectment,* against him, which were still pending, and that the title sought to be enforced by such defendant, was based upon a deed that was fraudulent in equity, and prayed that such deed should be delivered up for cancellation; and also moved for and obtained an injunction against the further prosecution of the previous suits: *Held,* that the order should be vacated, and the action dismissed.

INJUNCTION, ordered by *Russell, J.,* at Spring Term 1870, of ROBESON Court.

The prayer for judgment in the action to which the order (676) was incidental, was, that a certain deed should be surrendered for cancellation; the *order* on motion of the plaintiff, was, that two suits, one of *trespass,* and one of *ejectment,* brought by the present defendant against the present plaintiff, and still

pending, — being suits based upon a title created by such deed, should be *stayed.*

From this order, the defendant appealed.

The facts are stated in the Opinion.

Leitch for the appellant.
N. A. McLean contra.

DICK, J. The plaintiff alleges that he is seized and possessed of the land in question, under a deed from John L. McArthur, founded upon a *bona fide* and valuable consideration. The defendant also claims title from John L. McArthur, under a deed executed to Angus L. McArthur, which is prior in date to the deed of the plaintiff. Before the adoption of the Code of Civil Procedure, the defendant commenced an action of trespass, Q. C. F., and also an action of ejectment, to recover damages, and obtain possession of said land. The action of trespass, has been before this Court, and the title of the defendant has been declared valid at law: *McArthur v. Johnson,* 61 N.C. 317.

These actions are still pending, and as the plaintiff in this case has no legal defence, he now seeks by this civil action, the equitable relief of having the deed of Angus L. McArthur cancelled for fraud in the consideration. If the said actions at law had been commenced after the adoption of the Code of Civil Procedure, the present plaintiff might have set up his equity as a counter-claim: C.C.P., sec. 101. But, as those actions are to be governed by the laws existing at the time they were commenced, a civil action in the nature of a bill in equity, is the only remedy which the plaintiff can have, and it must be governed by the rules and principles formerly (677) established and observed in Courts of Equity. A Court of Equity would not interfere by injunction to stay a trial at law, where a party was attempting to assert his legal title, but would stay the *execution* when an equitable element was involved, until the equities of the parties to the action at law were ascertained and adjusted.

The plaintiff's ground for equitable relief in this case is, that he has the equitable title to the land, and cannot set up a legal defence to the actions of the defendant. He ought, therefore, to have submitted to a judgment in said actions, before he invoked the equitable jurisdiction of the Court to furnish the adequate relief which could not be obtained in the actions at law. He cannot be allowed, according to the course of the Court, to take his chances in two actions, respecting the same matter of controversy. These rules and principles

of Courts of Equity are too well settled to need further discussion: *Williams v. Sadler,* 57 N.C. 378.

The injunction must be vacated, and the action dismissed.

Let this be certified, etc.

Per curiam.

Ordered accordingly.

Cited: Dempsey v. Rhodes, 93 N.C. 127.

(678)

NEAL & JOHNSTON v. WILLIAM LEA AND OTHERS.

The defence of *set-off* as heretofore administered in the State has, by the C.C.P., been merged in that of *counterclaim*, the effect of which, in one respect, is, that a defendant is not allowed to off-set the claim of a plaintiff as assignee of a note past due when assigned, by showing that the assignor was indebted to such defendant at the time of the assignment; unless such counterclaim had *attached itself to the note* before the assignment, *ex. gr.* by an agreement that it should be applied thereto, or otherwise.

CIVIL action, tried before *Tourgee, J.,* at Spring Term 1870 of CASWELL Court.

The cause of action was the non-payment of a note due September 13, 1868 by the defendants to one Williamson, and by the latter endorsed for value, February 24, 1869, to the plaintiffs. The defendants set up as a counterclaim, certain notes given by Williamson to third persons in 1866 and 1868, and endorsed for value by the payees to the defendant Lea, February 9th and 22nd 1869, and by Lea assigned to the defendants after they had received notice of the assignment of the note sued upon, by Williamson to the plaintiffs.

His Honor was of opinion that these notes constituted a valid counterclaim.

Verdict and Judgment accordingly. The plaintiffs appealed.

Hill for the appellants.

Graham contra.

PEARSON, C.J. By C.C.P., sec. 101, the plea of set-off is merged in the defence of counterclaim. By paragraph 2, the counterclaim,

in an action on contract, embraces not only matter that under the old practice was pleaded as a set-off, but every other (679) cause of action arising out of contract, whether legal or equitable, between the plaintiff and defendant; where there are more than one plaintiff or defendant, it is further extended so that not only mutual debts between the plaintiffs and defendants, but every claim by the defendants, or any one of them, against the plaintiffs, or any one of them, between whom a several judgment might be had in the action, is embraced.

Our question is, does this section of the Code further extend the doctrine, so that in an action on a note assigned after maturity, besides a counterclaim against the plaintiffs or any one of them, the defendants or any one of them is entitled to set up a claim either legal or equitable, held at the commencement of the action against the assignor or assignors, where there have been two or more assignments? It seems clear that he is so entitled, where the claim of the defendant had *attached itself* to the note in the hands of the assignor, for instance a payment made to him not entered on the note, or a claim which the assignor had agreed should be taken in satisfaction: for the note being past due is notice of all equities, and the assignee is not allowed to enable the assignor to commit a fraud, and, on that ground, is construed into a trustee for the defendant. But, if the claim had not attached itself to the note, and there was no understanding that the one debt should be applied to the other, it was no fraud on the part of the assignor to dispose of the note, and it is difficult to see any principle on which the assignee can be treated as a trustee.

As is said in *McConnaughey v. Chambers, ante* 284: "In the absence of an agreement between the parties that the one debt should be applied to the discharge of the other, we can see no principle of law upon which the Court can make the application *to the prejudice of third persons,*" etc., "each party had the control of his own debt, and neither had a lien, either in law or (680) equity, which prevented the other from making an assignment for an honest purpose in the exercise of the right to prefer creditors."

In our case, Lea, one of the defendants, a few days before the assignment bought a note upon the assignor. The assignment is made without notice of this fact on the part of the assignor, much less any understanding in regard to it. The assignment to the plaintiff was made in satisfaction of a debt, in the exercise of the right to prefer creditors, so there is nothing to affect the conscience of the assignor or of the assignee. Under the statute of set-off, the rule adopted by the Courts in England allowed only mutual claims that

had attached to the note while in the hands of the assignor, to be set-off against the assignee: *Borough v. Moss,* 10 B. & C. 558, (21 E. C. L. 128.) In this State the doctrine was carried further, and included any demand, although collateral and unattached to the note, as a set-off. So the defendant had a right to set-off a mutual demand against the plaintiff at the commencement of the action, and also a collateral demand against the assignor at the date of the assignment: *Haywood v. McNair,* 19 N.C. 283. The Court admit this to be a departure from principle and also from the words of the statute, and the rule is adopted on the ground that such was considered by the profession to be the rule, and it had been acted upon in the Circuit Courts. Such is assumed to be the rule in *Wharton v. Hopkins,* 33 N.C. 505. An exception is made where the assignor had also an account against the defendant of equal amount, and it was not against conscience for him to dispose of the note.

So, before the change made by the Code of Civil Procedure that was the rule.

It remains to consider whether, after this change, the rule is not restricted to claims *against the plaintiff,* including equities (681) that had attached to the note at the time of the assignment.

This is the result of a proper construction of the Code: "The counterclaim must be one existing in favor of a defendant against a plaintiff." Here are positive words restricting the rule to claims between plaintiff and defendant, and there is no ground upon which to explain them away, and let in a collateral claim against the assignor, without adding important words to this section.

Again, by paragraph 2, all claims are let in "existing at the commencement of the action." So, this will not fit. It reaches over: for by the rule as before held, the set-off must be a claim against the assignor *existing at the time of the assignment.* If such collateral claims are let in, the rule must extend by the words of this section, to the time of commencing the action, and take in all notes on the assignor that the debtor may be able to buy up, as well as all notes against the assignee, provided they are bought before the commencement of the action: thus putting it in the power of the debtor to select such of the creditors of the assignor as he (the debtor) may choose to prefer, and taking from the creditor the right of preference. This must be so unless we add to the statute: "and any claim against the assignor of a note past due, existing at the date of the assignment."

The New York Code is worded as ours in this particular; the Court decided to exclude collateral demands against the assignor: but as it was *divided,* a statute was passed allowing all such collateral demands, as a counterclaim. Whether our General Assembly

will deem it wise to enact a like statute is not a matter for the Courts. We must be governed by the Code of Civil Procedure until such a statute be passed. The necessity for a statute in New York tends to confirm our conclusion.

We have considered the case as if Lea was the holder of the note. The assignment by him to his co-defendants after the note sued on had been assigned to plaintiffs, does not affect (682) the question. There is error.

Per curiam.

Venire de novo.

Cited: Harris v. Burwell, 65 N.C. 585; *Sloan v. McDowell,* 71 N.C. 358; *Owens v. Wright,* 161 N.C. 137.

JOSEPH A. NORWOOD v. LEWIS THORPE.

By the effect of the statute which suspends the Code of Civil Procedure, the proceedings of the latter as to docketing *such judgments as are taken in the Court where docketed,* are suspended; and the 18th Rule of practice laid down by the Supreme Court (63 N.C. 669) operates to make all judgments during any term relate to the first day of such term.

Such relation takes effect even where the Judge fails to open Court upon the first day.

The provision (C.C.P. § 396,) that where the Judge fails to appear at any term until the fourth day thereof inclusive, the sheriff shall adjourn the Court until the next term, does not avoid the acts of any term where, upon the non-appearance of the Judge, the sheriff *did not* in fact adjourn the Court, and the judge afterwards, *(here,* in the second week) actually appeared and held Court.

CASE submitting a question in difference, decided by *Tourgee, J.,* at Spring Term 1870, of PERSON Court.

The question was, whether there were any priority between judgments taken as follows: The Fall Term of Person Court 1869, began by law upon the 6th Monday after the first Monday of September, being the 18th day of October, but the Judge did not attend until the 7th Monday, being the second week of the term, he having previously directed the sheriff to adjourn the Court until that day. The plaintiff's judgments were taken at that term, and were certified as docketed on the 26th day of October. The defendant's judgment had been rendered at Fall Term 1869 (683)

of Granville Court, and was docketed in Person on the 18th day of October 1869.

Execution issued upon all such judgments, and an amount of money was raised thereupon that was insufficient to satisfy all.

The plaintiff claimed that his judgments were to be taken as docketed upon the 18th day of October, and moved that the record be amended so as to show this fact; and that thereupon, the money which had been raised by the sheriff upon the above judgments, should be applied to all, *pro rata.*

The defendant claimed that the judgment recovered by him, was to be satisfied in full, before any part of the money should be applied to those in favor of the plaintiff.

His Honor gave judgment in favor of the defendant, and the plaintiff appealed.

Graham for the appellant.
Venable contra.

PEARSON, C.J. His Honor fell into error, because, as it would seem, he did not fully comprehend the extent and the importance of the change made in the Code of Civil Procedure by the statute of March 16th 1869, entitled "An act suspending the Code of Civil Procedure in certain cases;" and particularly, by the enactment "writs of summons shall be returnable to the regular terms of the Superior Courts." The effect of this enactment, according to the construction given to it by this Court, after much consideration, in *McAdoo v. Benbow,* 63 N.C. 461, is to repeal so much of the Code as confers jurisdiction on the Clerk "to give judgments," and to re-
(684) store the old mode of procedure, by which all judgments are rendered in term time, — the Clerk acting simply as the instrument of the Judge in making entries, according to the course of the Court. The Clerk is no longer a subordinate Judge, but is divested of all judicial functions in civil actions, and is simply a clerk; except in regard to matters pertaining to the functions of "a Judge of Courts of Probate," which before had been exercised by the County Courts. So that all judgments are now entered in term time, as was heretofore the course of the Court, and are subject to the principles and rules which had been adopted and acted upon in furtherance of justice.

According to the Code, by the operation of sections 144, 252, 253 and 254, the Clerk is directed to keep a judgment docket, which is to set out among other things, all final judgments "with the *dates* and *numbers* thereof." If the Code had been allowed to go into op-

eration in this respect, so as to treat judgments as rendered in vacation by "the Court," meaning the Clerk, it would have followed that every judgment would take priority according to its date and number on this judgment docket, and would have introduced entirely a new order of things. But the Code has been modified in this particular, and the effect of the statute referred to, is, to restore the old mode of procedure in respect to judgments rendered in term time; leaving these sections to apply only to judgments rendered in some other County, and sent to the Clerk to be entered upon his judgment docket. Such docketed judgments take priority according to dates and numbers, in order to give effect to this new feature introduced by the Code of Civil Procedure, which is not affected by the statute referred to, and leaving likewise the new mode of bringing up appeals to be governed by the Code.

As all judgments are rendered in term time according to this mode of procedure, it follows that this Court had power to make rule 18, "Rules of Practice," 63 N.C. 669: "All judgments shall be docketed during the term, and shall be held and deemed (685) to be docketed on the *first day of the term.*" This was nothing new, but simply an affirmance of an ancient principle of the common law, adopted in furtherance of justice, to give fair play, — to prevent an indecent rush to get a judgment docketed first, and to cut off all chance for favoritism on the part of the Clerk. The same principle applies to legislative proceedings, and has been applied very beneficially to deeds, by holding every deed to be registered as soon as it is delivered to the register of deeds.

2. It was insisted, on the argument, that, as his Honor did not in fact open Court until Monday of the second week of the term, allowing the doctrine of relation, judgments rendered during the second week can only be considered as docketed on the first day of that week.

We do not accede to this proposition. The Constitution fixes a term two weeks, and ordains what shall be the first day of the term; and according to the doctrine of relation, every judgment is deemed to be entered on that day, with the limitation established by *Whitaker v. Wesley*, 74 E. C. L. 48. This conforms to the precedents: "Be it remembered that at a Superior Court *begun* and *held* at the Court House, etc., on the sixth Monday after the first Monday in September," etc.; as if every thing, in contemplation of law, was done on the *first* day of the term. The idea of dividing terms so as to have some records to set out the sixth Monday, and others the seventh Monday, is a novel one, and would tend to infinite confusion. This is so clear that we hold it to have been the duty of the

Judge in the Court below, *ex mero motu,* to have directed the Clerk to correct his entries, so as to make the record of that term conform to the precedents, without regard to the fact that he did not in person open Court until the second week of the term.

3. It was also insisted on the argument, that the judg-
(686) ments of the plaintiffs are void, on the ground that his Honor not being in attendance until after the fourth day of the first week, the term expired; and it was not in the power of the Judge to hold Court on the second week, any more than he could have held Court on the third or fourth week thereafter.

This position, if true, leads to very important results; for it would follow that every thing done on the second week is a nullity — all the judgments in civil actions, void, false imprisonment for what was done on the State docket, and judicial murder if any one was hung. This is a new question. Fortunately, the Judges heretofore have felt it to be a sacred duty to be prompt in their attendance. It would seem that his Honor is still under the influence of certain pre-conceived notions as to the true construction of the Code of Civil Procedure, and has not fully given his adhesion to the opinion of this Court in *McAdoo v. Benbow;* but still thinks that as the Court is to be always open (for certain purposes,) he is in the proper discharge of his duty if he attends at any day during the term, provided always, that he gets to Court in time to dispose of the business on the docket. It is our duty to correct this idea, and to call his attention to C.C.P. § 396.

The important question which we are discussing, for it involves the validity of every judgment rendered at Fall Term 1869, depends upon the construction of this section of the Code: "If the Judge of a Superior Court shall not be present to hold any term of a Court at the time fixed therefor, it shall be the duty of the sheriff to adjourn the Court from day to day until the fourth day of the term inclusive, unless he shall be sooner informed that the Judge, from any cause, cannot hold the term. If by sunset on the fourth day the Judge shall not appear to hold the term, or if the sheriff shall be
(687) sooner advised that the Judge cannot hold the term, it shall then be the duty of the sheriff to adjourn the Court until the next term." Taking this section literally, it would seem that the term expired at sun-set of the fourth day; and that the Judge was then *functus officio* in regard to that term, and was not authorized to open Court on the following Monday.

In the construction of statutes, particularly such as are remedial and intended for the furtherance of justice, it is the duty of the Courts to adopt a liberal view, in order to effect that object, and

not to stick to the letter, if by so doing the main purpose will be defeated.

One great object of government, is, to afford to the citizens a speedy administration of justice. The particular object of the section under consideration, is, not to compel the citizens, as suitors, jurors and witnesses to be from home longer than is necessary, or after it has been ascertained with reasonable certainty that to require them to remain longer will be of no use. This is a secondary object, and is not to be carried into effect at the expense of the primary one. If this was not the view of the makers of the law, why did not the act provide that the term should absolutely expire at sun-set of the fourth day, *by act of law?* Such, however, is not the provision; but it is made the *duty of the sheriff* to adjourn the Court until the next term: so, it is to be done by the act of the sheriff, and not by act of law. If the sheriff had adjourned the Court until the next term, Fall Term 1869 would have been at an end, and all of the "actings and doings" of his Honor on the second week, were nullities. But the sheriff did not choose to adjourn the Court until the next term, and in excuse for this omission, relies upon the information received from the Judge, that he would appear on the next Monday.

So the term was not put an end to either by the act of law, or by the act of the sheriff. This may be an instance of letting the matter depend on the act of the sheriff, for, as it turned (688) out, the primary object was effected, although no doubt the secondary object was in some measure disappointed; and many of the good citizens had to complain of being put to much inconvenience, and perhaps loss, by having to stay at Court during the first week, and then being required to come back, in order to wait upon the motions of the Judge.

There is error. This will be certified, and the fund will be divided *pro rata.*

Per curiam.

Error.

Cited: Johnson v. Sedberry, 65 N.C. 4; *Bates v. Bank,* 65 N.C. 82; *Harrell v. Peebles,* 79 N.C. 33; *McNeill v. McDuffie,* 119 N.C. 337; *Davidson v. Land Co.,* 120 N.C. 259; *McKinney v. Street,* 165 N.C. 516; *S. v. Wood,* 175 N.C. 814; *S. v. Harden,* 177 N.C. 583.

SARAH D. SUMNER v. CHARLES R. MILLER.

Proceedings to obtain damages for injuries to land caused by the erection of mills, are *Special Proceedings*, and the summons therein should be returned before the Clerk.

Statutes which change modes of procedure, govern suits pending at the time of their enactment.

The jury required to try issues joined in proceedings for damages caused by mills, have no right to assess such damages; these are assessed by Commissioners, to be appointed by the Judge, in case the jury find the issues in favor of the plaintiff.

SPECIAL proceedings to obtain damages caused by the erection of a mill, tried before *Cloud, J.*, at Spring Term 1870 of ROWAN Court.

The summons was issued April 3d, 1869, and was made returnable *to term*. The defendant having taken issue upon the allegations of the complaint, they were submitted to a jury, who found (689) a verdict for the plaintiff, assessing his damages, etc.

The defendant appealed.

K. Craige for the appellant.
Boyden & Bailey and Blackmer & McCorkle contra.

DICK, J. The remedy of a person injured by the erection of a mill, is regulated by Statute: Acts 1868-'69, chs. 93 and 158. These special proceedings were commenced improperly, as the summons was returned to a regular Term of the Superior Court, and they might have been dismissed upon demurrer; *Tate v. Powe, ante* 644. This irregularity was waived by the plaintiff's putting in an answer, and going to trial upon the merits. In a case like the present, the summons ought to be returned to the Clerk of the Superior Court, and when the issues are joined, the case ought to be sent to the Judge. If there are no issues of fact requiring the intervention of a jury, the Judge may determine that the plaintiff is entitled to relief, and order Commissioners to enquire, and ascertain the damages, etc.

Where a jury is needed, the case must be transferred to the trial docket, when they pass upon the issues of fact raised by the pleadings, and if they find that the plaintiff is entitled to relief, three Commissioners are ordered by the Judge to inquire, and assess the damages sustained. This order is in the nature of a writ of enquiry, and the mode of procedure is regulated by the Statute referred to.

Although these proceedings were commenced before the act of 1868-'69, ch. 158, they are governed by its provisions, as chapter 71

of the Revised Code was repealed: Acts 1868-'69, ch. 33. The Statute changed the mode of procedure, but did not deprive the parties of any vested right.

The verdict of the jury was irregular, and must be set aside as to the damages assessed, for that is a question to be determined by Commissioners. (690)

The complaint alleges that the plaintiff is the owner of the damaged freehold, that the defendant erected the dam, etc.; and the jury have found the allegation to be true. The defendant positively denied the truth of such allegations, in an answer upon oath. The answer was probably filed in the hurry of business, but such inconsistent swearing does not look well in the proceedings of a Court.

As the judgment appealed from is partly confirmed, the appellant is not entitled to costs in this Court. Let this be certified, that proceedings may be had as above indicated.

Per curiam.

Ordered accordingly.

Cited: Clodfelter v. Bost, 70 N.C. 735; *R. R. v. R. R.,* 148 N.C. 70; *High Point v. Brown,* 206 N.C. 668.

JOHN D. SHAW v. JAMES AND JOHN B. VINCENT.

In a case where the defendants had agreed with the plaintiff, in consideration of $1200 to be paid in three annual installments ending with June 1, 1869, to convey to him certain islands in a river; and the plaintiff, after paying $200, (Feb. 1867,) notified the defendants that in consequence of their inability to make title, he abandoned the contract and demanded the $200; and thereupon (Nov. 16, 1867,) brought *assumpsit* against them, declaring, 1, *for money had and received,* and, 2, on a *special contract* to convey land; it being admitted that up to the time of bringing the suit the defendants had no title to five of the islands, and only *one-ninth* undivided interest in several others: *Held, that,*

1. As the plaintiff had not complied with his part of the agreement, he could not maintain the *second* count;

2. The defendants were to be allowed to complete their title at any time before Jan. 1, 1869, or, (if compellable to do so earlier) at all events, before the *tender* of all the purchase money by the plaintiff;

3. Evidence offered by the defendants, that the plaintiff at the time of making the agreement knew of the want of title by them, was competent;

4. In such a case, in order to enable a plaintiff *in a court of law,* to *abandon* the contract, and recover back his payments thereupon, the failure

of title must be *complete;* the doctrine of *compliance merely insignificant* or *immaterial,* being one confined to courts of equity, which, as this case was pending at the adoption of the Constitution of 1868, cannot be enforced here.

ASSUMPSIT, commenced Nov. 16th 1867, tried before *Watts,*
(691) *J.,* at Spring Term 1870, of NORTHAMPTON Court.

The plaintiff declared: 1. For money had and received; 2. On a special contract to convey certain land to plaintiff, and a refusal to do so.

The case stating that on the 4th of October 1866, the defendant agreed in writing, in consideration of $1200, to sell to plaintiff all the islands in Roanoke River between certain points; "Title to be retained until the purchase money is paid; Payments, one-third Jan. 1st 1867, one-third Jan. 1st 1868, one-third Jan. 1st, 1869." On February 1st 1867, plaintiff paid defendants $200. Afterwards he notified defendants, that in consequence of their inability to make title, he (the plaintiff) abandoned the contract, and demanded repayment of the $200. This the defendants refused. There are five islands, viz: Jones, Ivey, Hickory, Holly and Collard, lying between the points named in the contract, to which it was admitted that defendants at the date of the contract had no title, and that they had not acquired any up to suit brought; but this want of title, it was alledged by the defendants, was known to the plaintiff. There are several other islands between the points named, of which the defendants claimed to have owned at the date of the contract an undivided ninth, as tenants in common with other persons. The

plaintiff objected to the evidence tending to prove his knowl-
(692) edge of the defect of title in the defendants, but it was admitted.

The Judge told the jury that if the plaintiff knew at the time of making the contract that defendants had no title to the islands, he was not entitled to recover anything, but if he did not, he was entitled to recover $200. The jury found for the plaintiff, and assessed his damages at $100. There was an allegation of misconduct by the jury, which it is unnecessary to consider.

The plaintiff appealed.

R. B. Peebles for the appellant.

1. Where purchaser has paid any part of the price, and vendor is unable to make title, from any cause, the former may *abandon,* and sue for money had and received: Chitty, Cont. 316, Sugden, Vend. 279.

2. The rule of damages is: What he has paid and interest, and expenses in investigating the title: *Fuller v. Hubbard,* 6 Con. 13; *Clark v. Smith,* 14 Jon. 329.

3. That vendee, at time of contract, knew of defect of title is immaterial: Chitty Cont. 320; *Barrett v. Wheeler,* 7 M. &. W. (Exch.) 364.

Ransom contra.

RODMAN, J. (After stating the case as above.) This is an action of assumpsit brought on the 16th of Nov., 1867.

As this action was brought before the Code, it must be dealt with under the former practice.

The plaintiff cannot recover on his second count, because, by the terms of the contract the title was not to be made until payment of the purchase money, which is not averred. Moreover, the plaintiff has credit for a part of the price until January 1st 1869, and the defendants might contend that they were en- (693) titled to that time to complete their title in, and that it was not in the power of the plaintiff by a premature tender to deprive them of the benefit of the time. As this point does not arise under the actual facts, it is unnecessary to decide it.

The plaintiff rests his case principally on the first count, which is founded on the idea that as soon as he discovered that the defendants were unable to make him a title, he had a right to rescind the contract, and recover the money he had paid under a mistake.

If a vendor at the expiration of the time given by the contract within which to make title, is unable to make title to any part of the land, so that there is a total failure of consideration, the vendee may rescind the contract, and recover the whole or any part of the purchase money which he may have paid under a mistake as to the vendor's ability, in an action for money had and received: 2 Pars. Cont. 678; Hilliard Vend. p. 319, § 20.

So, if a vendor contracts to sell an estate which he then has, and incapacitates himself, or is disabled from doing so, the vendee may treat the contract as rescinded: Hilliard, p. 259, sec. 4.

But, where by the contract a certain time is given to the vendor within which to make a title, it is a matter of no importance whether he has his title at the date of the contract, or at any time prior to that agreed on for its performance. More especially is this true where the vendee knows of the vendor's want of title at the date of contract: *Ib.* p. 252, § 6. In that point of view evidence of the plaintiff's knowledge of defendant's want of title at the date of the contract, was admissible.

Where time is expressly stipulated for, it is of the essence of the contract. It is true that in this case there was no express stip-
(694) ulation that the money should not be paid, at the choice of the vendee, before the expiration of the credit; and *possibly* he might, by a tender before that time, have enabled himself to require of the vendor to make him a title prematurely, or else to rescind the contract; but, as was said before, we are not called on to consider that state of facts; for the vendee has made no title, and certainly, in the absence of one, the vendor will be allowed the full time stipulated for. This is a fatal objection to the claim of the plaintiff to rescind the contract, and recover what he has paid.

There is also another objection. In *Franklin v. Miller*, 4 A. & E. 599, (31 E. C. L. R.) Littledale, J., said: "It is a clearly recognized principle that if there is only a partial failure of performance by one party to a contract for which there may be a compensation in damages, the contract is not put an end to." In this case the defendants did own an undivided part of the lands contracted to be sold; and the inability to perform is only partial. The doctrine of a Court of Equity is, that where the vendor can convey only an insignificant and immaterial part of what is bargained for, it will not compel a vendee to take that, even at a corresponding reduction of the price; but if he can substantially perform his contract, and the part as to which he cannot perform is of such a character as to admit of compensation being made to the vendee for the failure, there the Court will enforce the specific performance of the contract so modified. But this is an equity, which cannot be applied in a court of law. A jury is incompetent to deal with the perplexed and difficult questions which such cases present, and so is a court of law, to give such judgments as would preserve the rights of all the parties.

We think there was error in the instructions of the Judge.
(695) There must be a *venire de novo*. The defendants will recover costs in this court.

Per curiam.

Venire de novo.

CORINNE S. ROBERTS v. FREDERIC L. ROBERTS, EX'R, ETC.

In a case where a Masonic Insurance Company provided, by a by-law, that the proceeds of policies therein, should be paid "to the widow, * * * for the benefit of herself and the dependent children of the deceased," with a permission to the party insured, to appoint an executor to disburse such proceeds; and a prohibition against any disposal, "by will or otherwise, so as to deprive his widow or his dependent children of its benefits;" — and the widow owned $2,000 worth of other property: *Held*, that a bequest by one insured, of a policy of $4,012: giving to his widow, $1,000, and the remainder to an only child, (there being no other property owned by him,) was not an unreasonable exercise of the discretion vested in him as above.

CIVIL action, tried before *Pool, J.*, at Spring Term 1870 of CHOWAN Court.

The plaintiff demanded one-half of a Policy of $4,012 upon the life of her husband, W. C. Roberts deceased, which was the only estate left by the deceased, and had been received by the defendant as his executor, and was held by him subject to the disposal made thereof in the will. The Policy had been issued by the Georgia Masonic Mutual Life Insurance Company. By the will, the proceeds thereof were distributed: *One thousand dollars*, to the plaintiff, "who is otherwise provided for;" and *the remainder*, to the only child of the deceased.

The question between the parties, was as to the testator's right to prevent the plaintiff from receiving *one-half* of such proceeds, under the provisions of the By-Laws of the Company. (696) Those provisions were:

"SEC. 3. The sum due upon the Policy of a deceased member of this Company, shall be paid to his widow (if living with deceased, and recognized by him as his wife, at the time of his death,) for the use of herself, and the dependent children of the deceased, free from the claim of his administrator or creditors; if no widow, — then to the children, — and if no children, to other next of kin, *share and share alike*. As the benefits of Insurance in this Company is intended mainly for the families of its members, to keep them from want, and to prevent them from becoming a burden to the Brotherhood in their immediate vicinity, in no case shall a member dispose of his Policy, by will or otherwise, so as to deprive his widow, (if living with him, etc.,) or his dependent children, of its benefits: *Provided*, that any member may, by will duly executed, authorize and appoint some friend in whom he has confidence, to act as his executor of the fund due upon his Policy at his death, and disburse the same, as the trustee of the widow and children of deceased, and for their benefit. If there be no widow," etc., etc.

It was admitted, that the only estate of the petitioner, besides

her interest in the proceeds of the Policy, was some $2,000 worth of land.

His Honor gave judgment as demanded by the plaintiff, and the defendant appealed.

No counsel for the appellants.
Phillips & Merrimon contra.

READE, J. Art. VII, sec. 3, of the By-Laws of the Georgia Masonic Mutual Life Insurance Company, provides that "the sum due upon the policy of a deceased member of the Company, shall
(697) be paid to the widow, * * * for the use of herself and the dependent children of the deceased." It declares the intention to be, to keep from want the families of its members, and to keep them from becoming a burden to the Brotherhood; and it provides that, "in no case shall a member dispose of his policy by will or otherwise, so as to deprive his widow or his dependent children of its benefits."

The testator, after providing for his funeral expenses, gives $1,000 to his wife, and the remainder, about $3,000, to his infant son, for his education, etc. The widow dissents from the will, and claims, as the proper construction of the policy, that the sum due upon it must be equally divided between herself and the child, share and share alike; and that the testator had no power otherwise to dispose of it.

We do not think that is the proper construction of the policy. Where the member leaves a wife and dependent children, the money must go to their support, according to their necessities, so as to keep them from being a burden to the Brotherhood; and as one may be more dependent than another, there must be a reasonable discretion in the member to make such discriminations as will effect the main purpose of the policy; and the division need not be made share and share alike. This construction is strengthened by the fact, that when the member leaves no widow, and his family is broken up, then the money is directed to be divided out among his children or other relations, "share and share alike;" but there is no such direction, if there is a widow.

We do not see any unreasonable exercise of this discretion on the part of the testator. The widow was otherwise provided for, to an amount which, if added to the $1,000 given in the will, would make her more than equal with the child; and the child has to be educated. The widow having already received the $1,000 left in the will, she is not entitled to any more.

There was error in giving her a judgment. The judgment must be reversed, and judgment entered here for the defend- (698) ant, for costs.

Per curiam.

Judgment reversed.

THE STATE EX REL. ANNA M. WHITE v. THOMAS H. ROBINSON, ADM'R., ETC.

A guardian of an infant (some fifteen years of age) obtained judgment in her favor in July 1861, against parties who were, and remained until the Surrender, amply solvent — by his direction no execution was issued upon such judgment during the war, and until his death, in March 1866; the administrator of the guardian commenced an action upon the judgment in October 1866; and before he obtained judgment therein, the defendants sold out their property, removed from the State, and were found to be insolvent: *Held*, that neither the guardian nor his administrator were chargeable with negligence in managing the debt due to the ward.

Guardians are not responsible for losses to their wards attributable to their not having resorted to new and extraordinary remedies the force and effect of which are doubtful.

EXCEPTIONS to a report, tried before *Logan, J.*, at Spring Term 1870 of CABARRUS Court.

The facts are stated in the opinion.

The Commissioners had reported, charging the defendant with the loss; and the Judge overruled his exception to the report.

The defendant appealed.

Wilson for the appellant. (699)
Dowd contra.

DICK, J. The rules of law laid down in the cases of *Cummings v. Mebane*, 63 N.C. 315, and *Shipp v. Hettrick, Ib.* 329, govern this case. In the administration of justice, this Court feels constrained to take judicial notice of the anomalous condition of things which existed during the late war and the transition period which preceded the adoption of our present State government.

In 1861 the rightful government of this State was subverted by a government of paramount force. In the constant changes of revolution, the well established laws of trade, commerce and finance were so much deranged that prudence, experience and wisdom furnished

no certain guide in business transactions, and afforded no safe guards against unfortunate investments. An intolerant public opinion, and the fear of military authority, often controlled the action of the most cautious and prudent men. Stay laws prevented the enforcement of contracts in the Courts, and a wild spirit of speculation, and the rapid depreciation of the currency unsettled the value of property. No one could tell what a day or an hour might bring forth.

For some time after the termination of hostilities, there were no regular system of Courts with certain and well defined jurisdictions. The failure of the banks, the repudiation of State securities, and the emancipation of the slave property of the country, produced wide-spread individual insolvency. The various policies of reconstruction which were proposed for the settlement of existing disorders, were undergoing constant change, and the civil functions of the State were subordinated to military power. It would be unjust and even oppressive to apply to the business transactions of such a period the same strict accountability for prudence and diligence,

(700) which are proper in times of peace and prosperity, and well established civil government. The suspension of the statute of limitations, and the enactment of various remedial statutes, clearly indicate the opinion of the Legislature upon this important and difficult subject.

In the case before us, there was no intimation of a want of good faith on the part of the intestate of the defendant, and so far as he is concerned, the only question for us to determine is, whether he managed the trust funds in his hands with due care and reasonable diligence. In July 1861 he obtained a judgment for the funds of his wards against several parties who were amply solvent and remained so during the war. He directed the Clerk not to issue an execution to collect the money, but received in part payment several amounts, as he had an opportunity of handing over the money to the parties entitled. He did not collect the amount due the present plaintiff, as she was a minor, (coming of age in 1867,) and he would have to reinvest the money, and might not have been able to have the fund as well secured again. If an execution had been issued in July 1861, the Stay-law of the 11th of September 1861, would have retarded its progress, and it would have been satisfied in a depreciated currency, which could not have been safely invested. The defendants in the judgment remained amply solvent, even after the emancipation of their slaves, and as there were no Courts in 1865, the intestate had not the opportunity of reviving the judgment, and collecting the debts before his death, which occurred in March 1866. We think

the intestate acted wisely in not collecting the guardian bonds in Confederate money, and we can see no laches on his part which ought to subject his estate to the payment of the claim of the plaintiff.

The defendant qualified as administrator in the Spring of 1866, and the fund which his intestate held as trustee devolved upon him. He was by law, clothed with the same character of trustee of the fund, and he succeeded to the same obligations. He (701) was bound to perform the trust in good faith, and with reasonable diligence, until he was relieved from the fund, by delivering it to some person who was entitled in law to receive it: *Trevithick v. Austin,* 4 Mason 16. If the defendant, as administrator, had failed to do his duty, the estate of the intestate would, in the first place, have been liable for the loss of the trust fund, but the next of kin could have recovered the amount from the administrator, for his neglect of duty.

It appears that the defendant sued out a writ to renew said judgment, returnable to the first Term of the Superior Court after his qualification as administrator. The jurisdiction of the County Courts in such cases, had been taken away by the act of 1866, ch. 16. The defendant adopted the only remedy he had at law, for reviving and enforcing the said judgment, as the Ordinance of June 1866 suspended the remedy by *scire facias: Parker v. Shannonhouse,* 61 N.C. 109. The failure of the defendant to demand bail upon the service of his writ, did not prejudice the rights of the plaintiff, as the act of 1866-'67, ch. 63, sec. 1, abolishing imprisonment for debt, would have released the bail: *Bunting v. Wright,* 61 N.C. 295. The same result might have followed if an original attachment had been sued out, as the parties could have given bail upon this process.

It was further insisted that the defendant might have secured the fund belonging to the plaintiff, by filing a bill in equity against two of the parties to the judgment who are insolvent, and who left the State in November or December, 1866 after disposing of a considerable amount of real and other estate, under the provisions of the Ordinance of June 23d, 1866, sec. 18. This was a new and unusual remedy, and the Ordinance, in all probability, was not published for several months after the adjournment of the Convention, and the force and effect of such proceedings in (702) equity, as a lien upon land, was not determined until the decision of the case of *Carr v. Fearington,* 63 N.C. 560.

The defendant promptly and diligently pursued his remedy according to the ordinary course of the Courts, and considering the

circumstances of the times, we think it would be a harsh administration of the law to subject him to loss for not resorting to a new and extraordinary remedy, which, at the time, could not have been generally known and adopted.

There was error in the ruling of his Honor. The defendant's exceptions are sustained, and this must be certified, to the end that the report may be reformed.

Per curiam.

Error.

Cited: Sudderth v. McCombs, 65 N.C. 188; *Whitford v. Foy,* 65 N.C. 267; *Jennings v. Copeland,* 90 N.C. 579.

THE STATE EX REL. J. B. CHARLETON v. ROBERT SLOAN, ADM'R.

An administrator is not responsible for the sufficiency of a bail bond taken by a sheriff in a case wherein he is plaintiff, — even although he expressly accepted such bond.

Where the bail taken was a non-resident, and after judgment against the principal, had been rendered, and writs of *ca. sa.* issued and returned *not to be found*, writs of *scire facias* were issued against the bail, and, after two *nihils*, judgment was rendered against the latter: *Held*, that the administrator was not bound to attempt to collect such judgment in another State.

Inasmuch as there was no personal service of the writs of *scire facias* in the action against the bail, the judgment therein could not have been *enforced* in another State.

DEBT upon an administration bond, commenced in 1858, and tried upon exceptions to a report, before *Bailey, J.*, at Fall (703) Term 1863 of MECKLENBURG Superior Court.

It appeared from the report that the defendant administered on the estate of Drury Clanton in 1834, and thereupon took into his possession two notes on Robert Hamilton, for about $984. Robert Hamilton had no permanent home, but resided sometimes in this State, and sometimes in the State of Georgia, and never owned any property which could be reached by execution.

In 1838 he came to this State in company with his brother William Hamilton, also a non-resident, who had a drove of horses for sale. The defendant sued out a writ on the notes, and Robert Hamilton was arrested; and the sheriff, with the assent of the defendant

in this case, accepted William Hamilton as bail. A judgment was obtained on the notes, and a *ca. sa.* was issued against Robert Hamilton, which could not be executed, as he had left the State. Writs of *scire facias* were issued against the bail, and after the return of two *nihils,* judgment was rendered on the bail bond. Successive executions were issued upon this judgment for a year, and were also returned unsatisfied.

The referees, upon these facts, reported that the defendant was chargeable with the debt due from Robert Hamilton.

The defendant excepted thereto, and after argument, the exception was sustained by his Honor.

The plaintiff appealed.

Boyden & Bailey for the appellant.
Wilson contra.

DICK, J. (After stating the case as above.) The plaintiff in this case insists that the defendant as administrator was guilty of negligence in two respects:

1. In accepting William Hamilton as bail;
2. In not attempting to enforce the judgment against the bail at the place of his residence in another State. (704)

Robert Hamilton was always insolvent, and the administrator was not bound to make an effort to collect the debt. He, however, brought suit, and diligently used all legal means to enforce payment. It was the duty of the sheriff to judge of the security to the bail bond, and the acceptance of the bond by the defendant did not make him accountable for its sufficiency. Robert Hamilton probably could not have given any other bail, and if the bond tendered had not been accepted he might have been imprisoned at the personal expense of the administrator, as there were no assets; and even if there had been assets, the administrator would not have been justified in holding an insolvent debtor at the expense of the estate of the intestate.

The administrator could not have enforced the judgment against William Hamilton in another State, as it was obtained without any personal service of process. The Courts do not regard as *judgments* such proceedings abroad as are not based upon a personal service of process. Such proceedings, when founded upon process *in rem,* have their full effect in warranting a satisfaction of the claim involved out of the property attached: *Irby v. Wilson,* 21 N.C. 568, Cooley, Const. Lim. 404.

It is further insisted that the defendant ought to have brought suit on said bail bond in the State where the bail resided. It does

not appear in evidence that the defendant knew the place of residence of William Hamilton, and even if he had such knowledge, he had no assets with which he could pay the necessary expenses of a suit. The administration granted in this State gave him no authority to administer goods in another State, and he is not responsible for failing to collect such assets: *Governor v. Williams,* 25 N.C. (705) 152. In this State proceedings against bail are regulated by a statute similar to the statute of 4 Ann. In England it is well settled that an action on a bail bond must be brought in the same Court where the bail is given, as this is the only Court authorized by the statute to give in a summary manner "such relief to the plaintiff and the defendant, and also to the bail, as is agreeable to justice: *Walton v. Bent,* 3 Burr. 1923, 2 Cowp. 295.

A bail bond is a part of the proceedings in a suit, and the remedy given by *sci. fa.* must be sought in the court where the suit was instituted. It is doubtful whether in this State the plaintiff in a suit had any other remedy on a bail bond until an action was given by the Code of Civil Procedure, sec. 160. The defendant in this case certainly could not have carried the bail bond to another State, and brought suit upon it, as the Courts of such State could not have accepted a surrender of the principal by the bail, and given any other proper relief to the parties. We think his Honor was right in allowing the exception of the defendant to the report of the referees, and the judgment must be affirmed.

Per curiam.

Judgment affirmed.

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(706)

ROBERT LOVE v. THE COMMISSIONERS OF CHATHAM COUNTY.

A demurrer under the C.C.P. differs from the former demurrer *at law* in this: every demurrer, whether for substance or form, is now *special,* and must distinctly specify the ground of objection to the complaint, or be disregarded; it differs from the former demurrer in equity, in that the judgment overruling it is final, and decides the case, unless the pleadings are amended, by leave to withdraw the demurrer and put in an answer.

The provisions of the C.C.P., sec. 99, as regards *complaints which do not contain facts sufficient to constitute a cause of action,* are satisfied by *arresting the judgment* in cases where they apply.

Claims against counties must be presented for payment and refused, before an action can be maintained because of their non-payment; *therefore,*

Where the complaint contained no averment of such demand and refusal, judgment was arrested.

CIVIL action, tried before *Tourgee, J.*, at Spring Term 1870 of CHATHAM Court.

The plaintiff alleged that the former County Court of Chatham had incurred the two debts for which he now demanded judgment, in building, and repairing bridges; and that they had been *allowed,* after being scaled. No *demand* for such debts was alleged.

The defendant demurred because the complaint did not "state facts sufficient to constitute a cause of action."

His Honor overruled the demurrer, and the defendants appealed.

Headen for the appellants.
Manning contra.

PEARSON, C.J. We concur with his Honor. The demurrer ought to be overruled, or rather "disregarded." It is in these words: "The complaint does not contain facts sufficient to constitute (707) a cause of action." This, under the old procedure, was a general demurrer, and embraced only matter of substance, as distinguished from a special demurrer, for matter of form, which, by statute of Ann, must set forth the cause of demurrer specially. Defects in form were to be set out specially, in order to give the opposite party an opportunity to amend.

Under the C.C.P., sec. 96, "The demurrer shall distinctly specify the ground of objection to the complaint; unless it does so, it may be disregarded." These are broad words and include demurrers for defects in substance, as well as defects of form. So, the demurrer in our case ought to have been disregarded, because it does not distinctly specify the ground of objection. But it is said, section 99 provides, if no objection be taken by demurrer or answer, it shall be deemed to be waived, except objections to the jurisdiction, and the objection that the complaint does not contain facts sufficient to constitute a cause of action; and that the effect of this is, that this section excepts those two objections out of the rule, and allows the demurrer to be general in form. We are not able to see how this consequence follows. The rule is positive. It applies to all demurrers, and cannot be modified by implication. Indeed, if we resort to implication, section 97, in regard to amendments, furnishes a much stronger reason for adhering strictly to the rule, as it shows the reason for requiring the ground of objection to be distinctly specified; *i.e.*, in order to have the objection removed by amendment, and so, put the case on its merits.

For instance, in our case, had the demurrer specified that the ground of objection was the omission to aver a demand before action brought, the plaintiff would have amended the complaint in this particular; or, if in fact, a demand had not been made, (708) would have taken a non-suit, and begun again. Whereas, the defendant, by saying nothing about the objection in the Court below, gets the plaintiff up to this Court, and here springs the objection, and demands judgment, that *he* "go without day," and recover his cost! This judgment would be final, and bar any other action; for the plaintiff cannot amend in this Court, as he could have done in the Court below. So, by a departure from the rule, the case is not put on its merits, and a cause of action is lost by a "slip in pleading;" the very thing which the C.C.P. professes to remedy! By this construction the plaintiff even loses the benefit of the doctrine, that omissions of this kind, although matter of substance, are cured by verdict.

This form of demurrer is said to have been taken from a "form book." Several instances like the one before us, are in the papers at this term. The objection in most of them was waived, and in the others it did not become necessary to notice it. It is well that the matter has come up for adjudication so soon. Doubtless the members of the bar, with their usual liberality, will consent to have the form changed, or else the Judges will permit amendments.

The effect of overruling a demurrer is disposed of in *Ransom v. McCleese, ante* 17. The present case disposes of the *form,* and it is now settled that a demurrer under the C.C.P. differs from a demurrer in equity in this; the judgment overruling it is final, and decides the case, unless the pleading be amended, by leave to withdraw the demurrer and put in an answer; and that it differs from a demurrer at law under the old mode in this, that every demurrer is special, and must distinctly specify the ground of objection to the complaint. It is so easy to specify the ground of objection, that the Court is not disposed to relax the rule. "There is no use in having a scribe, unless you cut up to it!" Although the demurrer in our case is disregarded, it does not follow that the plaintiff can have judg- (709) ment if the complaint does not contain facts sufficient to constitute a cause of action. The objection is still open to a motion in the nature of a motion in arrest of judgment, and this gives effect to sec. 99. The difference being, had the demurrer been in proper form, and been sustained, the defendants would have been entitled to final judgment, and *to costs,* whereas, under this motion if the judgment be arrested, neither party recovers costs. As no judgment is rendered, each party pays his own costs.

No demand being averred in the complaint, it remains to in-

quire: was a demand necessary before action? The defendants had allowed the plaintiff's claims, on their being reduced according to the scale. By law, the Commissioners of a county do not keep the county funds, but give orders upon the proper office. The complaint does not set forth, whether such orders were given or refused, it does not aver that the plaintiff called upon the proper officer, and that he declined to accept the orders, and to make payment, *"of which the defendants had notice:"* This was clearly necessary to constitute a cause of action against the Commissioners; as much so as a demand upon the drawee, and notice to the drawer, or endorser, of an inland bill of exchange.

The judgment must be arrested.

Per curiam.

Judgment arrested.

Cited: Heilig v. Foard, 64 N.C. 711; *Garrett v. Trotter,* 65 N.C. 433; *Jarman v. Ward,* 67 N.C. 34; *Alexander v. Comrs.,* 67 N.C. 331; *Jones v. Comrs.,* 73 N.C. 183; *Wade v. New Bern,* 73 N.C. 320; *George v. High,* 85 N.C. 100; *Bank v. Bogle,* 85 N.C. 204; *Goss v. Waller,* 90 N.C. 150; *Hunter v. Yarborough,* 92 N.C. 70; *Burbank v. Comrs.,* 92 N.C. 258; *Johnson v. Finch,* 93 N.C. 208; *Baker v. Garris,* 108 N.C. 225; *R. R. v. Reidsville,* 109 N.C. 500; *Elam v. Barnes,* 110 N.C. 74; *School Board v. Greenville,* 130 N.C. 88; *Williams v. Smith,* 134 N.C. 252; *Blackmore v. Winders,* 144 N.C. 219; *Shaffer v. Bank,* 201 N.C. 417; *Duke v. Campbell,* 233 N.C. 264; *McKinley v. Hinnant,* 242 N.C. 253; *Trust Co. v. Processing Co.,* 242 N.C. 381; *Johnson v. Graye,* 251 N.C. 451.

(710)

L. G. HEILIG AND OTHERS *v.* J. C. FOARD, ADM'R., ETC.

Civil actions by a creditor against an executor or administrator, must be brought *to the Court at Term:*

In such case, if the defendant denies the debt, admitting assets, the action is tried in the ordinary way;

If he deny the debt, *and also,* that he has assets, the issue as to the debt is tried in the ordinary way, and then, if the debt be established, a reference is to be had, to ascertain the amount of the debts, (and their several *classes,* in respect to administrations since July 11th 1869,) and the amount of assets from all sources; upon the coming in of the report, after the exceptions, if any, are disposed of, a final judgment will be en-

tered in favor of all the creditors respectively who have proved their debts, for such part of the fund as they may be entitled to, and executions will issue accordingly *de bonis propriis*, as formerly upon a claim in equity.

The Probate Court has exclusive original jurisdiction of special proceedings for legacies and distributive shares; in such cases, if the construction of a will come in question, or, should exceptions be filed to the account as stated by the Probate Judge, such questions and exceptions, and all other questions of law will be sent up to the Judge; from whose decision, an appeal may be taken.

The jurisdiction for auditing accounts of executors, administrators and guardians, conferred upon the Judge of Probate, by C.C.P., §§ 418 and 478, is an *ex parte jurisdiction* of examining the accounts and vouchers of such persons, allowing them commissions, etc., as formerly practised; and does not conclude legatees, etc., or affect suits *inter partes* upon the same matters; which suits, *in case of legatees and distributees*, (unless brought upon bonds given by administrators,) are by *special proceedings* before the Probate Court; and *in case of wards*, or if *upon administration bonds*, are by *civil actions* brought to term.

A demurrer to a complaint, "because it does not state facts sufficient to constitute a cause of action," must be disregarded, for not *distinctly specifying* the grounds of objection.

CIVIL action, tried before *Cloud, J.*, at Spring Term 1870 of ROWAN Court.

The plaintiff brought suit as a creditor of the deceased, (711) on behalf of himself and all others of the same *class*, alleging that he held a bond against the intestate, upon which he had heretofore brought suit which was still pending, and that the administrator (who had been appointed before July 1st 1869,) was about to exercise the power of preference amongst creditors of the same class, so as to defeat his claim.

The prayer was for an injunction, etc.

The defendant demurred to the complaint:

"1. Because it does not state facts sufficient to constitute a cause of action;"

2. For want of jurisdiction of the subject matter.

His Honor overruled the demurrer; and the defendant appealed.

Blackmer & McCorkle for the appellant.

1. The injunction was improvidently granted: *Simmons v. Whitaker*, 37 N.C. 129; *Wadsworth v. Davis*, 63 N.C. 251.

2. The Court had no jurisdiction of the subject matter; *Hunt v. Sneed, ante* 176.

Boyden & Bailey and Barringer contra.

PEARSON, C.J. The first branch of the demurrer ought to have been disregarded, because "it does not distinctly specify" the ground of objection to the complaint: *Love v. Commissioners of Chatham County, ante* 706.

This is a civil action by a creditor against an administrator. The question is, has the Superior Court jurisdiction, or should the proceeding be had before the Probate Court? It is singular that the act of 1868-'9, ch. 113, entitled "An act concerning the settlement of the estates of deceased persons," although it enters very fully into matters of detail, does not settle this question, but leaves (712) it to be decided by the Courts, as matter of construction. After full consideration of the Constitution in regard to the jurisdiction of the Probate Court, of the provisions of the C.C.P., and of the act referred to, we have come to the conclusion that the true construction, taking all together, is as follows: Debts against deceased persons must be sued for by civil action against the personal representative, and the summons must be returnable to a regular term of the Superior Court; If the defendant denies the debt but admits assets, the question, debt or no debt, must be tried in the ordinary way; If the defendant by his answer denies the debt, and also denies that he has assets applicable to the debt, then the debt being first established an interlocutory order should be made declaring that fact, and directing a reference, C.C.P. sec. 245, to ascertain the amount of the debts (and their several *classes,* in respect to administrations since July 1st 1869, acts 1869-'70, ch. 58,) and the amount of the assets from all sources. Upon the coming in of the report, after disposing of exceptions, a final judgment will be entered in favor of all creditors respectively who have proved their debts, to the part of the fund to which they may be severally entitled, for which executions may issue *"de bonis propriis"* as upon a claim in equity. This is the only construction that will give effect to chapter 113, (above) secs. 24, 25, 102, 103, 104. For instance, sec. 103 provides "The defendants in such actions (that is executors and administrators) may show that there are unsatisfied debts of a prior class, or of the same class with that in suit; if it appears (on the coming in of the report) that the value of the property acquired by them, (that is, the amount of assets) does not exceed the debts of a prior class, judgment must be in their favor; if it appears (on coming in of the report) that the value of the property acquired by them (the amount of assets) exceeds the amount (713) of debts which are entitled to preference over the debt in

suit, the whole amount which the plaintiff shall recover is only such a portion of the excess as is a just proportion to the other debts of the same class of that in suit." This disposes of the subject of the manner of collecting debts of deceased persons.

The Probate Court has original exclusive jurisdiction of legacies and distributive shares, by "special proceedings." Should the construction of a will become necessary, the question will be sent up to the Judge, and from his decision an appeal may be taken; should exceptions be filed to the account stated by the probate judge, the exceptions and all questions of law will be sent up to the judge, and an appeal may be taken. This disposes of the collection of legacies and distributive shares.

The only difficulty is presented by *Hunt v. Sneed, ante* 176. When that case was before us it was treated as a special proceeding for *a legacy*, and it was held that the probate Court had original exclusive jurisdiction. Our attention was not called to the fact that the plaintiff also demanded *a debt*. If it had been, we should either have dismissed the action, on the ground of multifariousness, (one claim being a debt, of which the Superior Court had jurisdiction, the other a legacy, which belonged to the jurisdiction of the Probate Court,) or else have required the plaintiff to elect to proceed for the debt, and withdraw his claim for the legacy, to be determined by the Probate Court.

It is proper to remark, that Art. IV, sec. 17 of the Constitution, and the C.C.P. §§ 418 and 478, in using the words, "audit the account of executors, administrators and guardians," have reference to the duty of examining accounts filed by executors, etc., to see that the account of *charges* corresponds with the *inventories*, passing upon the *vouchers* and striking a balance, after allowing
(714) *commissions*, as under the existing laws. This is *ex parte*, and does not conclude legatees, distributees and wards, and is subject to a final account and settlement by a *special proceeding "inter partes"* before the Probate Court, (Act of 1868-'9, c. 113, § 96,) and by *civil action* in respect to the amount claimed of guardians. "The ordinary" never had jurisdiction in the matter of settlements between guardian and ward. The remedy is by action on the guardian bond. So in suits *on the bonds* of administrators, the remedy is by civil action; the accounts to be taken by a referee: C.C.P. § 245.

Judgment below affirmed. This will be certified, to the end that an account may be taken, etc., according to the law in force when

letters on administration were granted; which, in this case, was prior to the first day of July 1869. Act of 1869-'70, c. 58.

Per curiam.

Affirmed.

Cited: Miller v. Barnes, 65 N.C. 68; *Hendrick v. Mayfield,* 74 N.C. 632; *Batton v. Davidson,* 79 N.C. 426; *Shields v. Payne,* 80 N.C. 293; *Hoover v. Berryhill,* 84 N.C. 134; *Houston v. Howie,* 84 N.C. 354; *Ray v. Patton,* 86 N.C. 389; *Little v. Duncan,* 89 N.C. 418; *Stancill v. Gay,* 92 N.C. 462; *Grant v. Hughes,* 94 N.C. 236; *Braddy v. Pfaff,* 210 N.C. 251; *Duke v. Campbell,* 233 N.C. 264.

ALFRED ROWLAND AND WIFE v. JOSEPH THOMPSON, GUARDIAN, ETC.

Where an appellant *elects* (under C.C.P., § 490,) to carry a case from the Probate Court, to the judge *in vacation,* it is still within the discretion of the latter to hear it *in term time;* and *vice versa.*

In case of such an appeal, if there be a further appeal from the judge to the Supreme Court, the latter tribunal can review no point before the Probate Court that was not passed upon by the judge.

(*Practice,* in the Probate Courts, in taking the accounts of executors, guardians, etc., stated in detail, the distinction between *issues of fact* and *questions of fact,* applied.)

CIVIL action, before *Russell, J.,* at Spring Term 1870 of ROBESON Court.

The plaintiffs demanded a settlement by the defendant of his trust as former guardian of Mrs. Rowland. The defendant (715) answered, submitting to an account. During the taking of the account the defendant excepted to various points of evidence, etc. The probate Judge gave judgment for the plaintiffs, for a large amount. And the defendants appealed to the Judge of the District.

Upon the case being brought before his Honor at Chambers in Wilmington, he ordered it to be transferred, for trial as to matters both of law and fact, to the next term of the Court to be held for Robeson County.

The plaintiffs thereupon appealed.

Leitch for the appellants.

N. A. McLean and W. McKay contra.

RODMAN, J. The simple question brought up for review in this case, is the right of the Judge to make the order appealed from, transferring the hearing of the appeal, from the Probate Judge to him at Chambers, to the Superior Court at its next term. If this Court should be of opinion that the Judge had no right to make the order in question, the only judgment which it could give, would be to remand the case to the Judge, in order that he might decide upon the questions presented by the appeal from the Probate Judge. No appeal lies directly from the Probate Judge to this Court: before any question can come before it, it must have been decided by the Judge of the Superior Court. Hence this Court cannot now inquire into the propriety of the findings of the Probate Judge; nor could it give judgment for the plaintiff according to his finding, even though all the Justices were individually satisfied that it was correct. Of course, we intimate no opinion of any sort on that point. In order to arrive at the question properly before us, it is proper to consider what is or ought to be the practice of the Probate Courts
(716) in taking the accounts of executors, guardians, etc.

An action in a Probate Court to enforce an account *in invitum*, is begun and prosecuted in analogy with a special proceeding in a Superior Court. The defendant is brought in by a summons, the plaintiff files his complaint, and the defendant his answer or demurrer, as is prescribed by the Civil Code of Procedure in civil actions. Section 490, C.C.P., enacts "All *issues of fact joined* before the Judge of Probate shall be transferred to the Superior Court of the County for trial." An issue of fact is one made by the pleadings, and no other; it does not include every question of fact which may collaterally come before the Probate Judge in the course of taking an account: *Heilig v. Stokes*, 63 N.C. 612. For example, if in answer to a complaint against a guardian, the defendant should deny that he had ever been guardian, or should set up a release from his ward after his coming of full age; and the plaintiff should take issue on the denial, or should reply generally to the allegation of a release, issues of fact would be joined such as are intended in the act, and which, as they can only be tried by a jury, must be transferred to the Superior Court for trial. Probably that Court, having once obtained jurisdiction of the action, would retain it, after the decision of those issues, and would proceed to a complete decision of all the matters in controversy, by taking an account if necessary, or otherwise, according to its course. If, however, the defendant in the Probate Court, instead of putting in an answer offering an issue of fact, admits expressly, or by legal intendment, his liability to account, the Probate Judge proceeds to

take and state the account in the ordinary way, hearing and recording all the evidence which may be presented to him.

In the course of this examination, he must necessarily decide upon all exceptions which may be taken to the admissibility of evidence, and upon any other collateral question which may arise. He should record the evidence offered, even though in (717) his opinion incompetent, with his decision rejecting it. No appeal having the effect of stopping his proceeding is permitted from any such decisions but upon an appeal from his final judgment, all his decisions upon these collateral questions may be reviewed, and all inadmissable or irrelevant testimony stricken out by the Superior Court. When the account is stated, the parties should be informed thereof, and notified to attend on a certain day, and show cause why it should not be made final, and then judgment rendered accordingly. Either party may thereupon file exceptions to the whole account, or to any particular part of it. These exceptions should be numbered, and should set forth with precision what item or items are excepted to, and concisely the ground of the exception. An exception may be, that some one or several facts are not sufficiently proved; or that the facts proved respecting a particular item of charge or discharge, are not sufficient in law to sustain it. The exceptions may thus raise questions of fact and of law, but they are not technically "issues joined," and are not required to be tried as such issues are. The Probate Judge should proceed to decide on the merits of every exception separately, allowing or overruling it; if any material exception is allowed, he must amend his account accordingly. He will then enter his final judgment, and notify the parties thereof, and either party may appeal, and the appeal entitles the parties to a review of every decision of law, and every finding of fact which was excepted to, and which is material to sustain the final judgment. The above is a brief outline of the practice which must prevail in the Probate Court. It is true that the Code does not prescribe this course in detail. But when it directs (sec. 481) that the Probate Judge shall "audit" the account, it implies that he shall pursue the usual course which has been found to be just and convenient in such cases. To hold that (718) an appeal would lie from the decision of the Probate Judge upon every question collaterally arising in the course of his investigation, with the effect of suspending his proceedings until the question could be decided in the Superior Court, and if one of fact, by a jury, would introduce into our practice all the inconveniences of the obsolete common law action of *Account,* which caused it to be superseded in practice by the more expeditious and convenient proceeding in equity. As has been already said, no question arises here now

upon the course of practice pursued in the Probate Court in this case, but this view of the practice seemed an appropriate introduction to the question before us, and may help Probate Judges in the discharge of their duties.

The question in this case, depends upon the construction of the remaining part of § 490; "And appeals shall lie to the Judge of the Superior Court of the district, *either in term time or vacation*, from the judgments of the Probate Court, in all matters of law." That is to say: the appellant may elect whether he will have his appeal determined by the Judge in term time, or vacation. But if the appellant can thus elect, cannot the Judge use a discretion as to whether he will hear it in term time, or vacation? There is no requirement here, that the Judge shall decide the appeal in ten days, as there is in section 111. The final decision of the Probate Judge will generally embrace the determination both of matters of fact, and of matters of law, and upon an appeal, both must be reviewed. The Judge may decide on the questions of fact, as well as of law, without the aid of a jury; but it may be that some of the questions of fact are so important and difficult, that he may be unwilling to do so. In such a case, we think it would be within his power, as it formerly was in that of a Judge in equity, to make up issues of fact, and sub-
(719) mit them to a jury. If that be so, it follows that he must have the power to postpone his decision on the appeal until a term of the Court, as then only a trial by jury can be had. We do not see any error committed by the Judge below. The case will be remanded to the Superior Court of Robeson County, in order that it may be proceeded in, according to the course of the Court. The appellee will recover the costs of this Court.

Per curiam.

No error, remanded.

Cited: Sc., 65 N.C. 110; *Maxwell v. Maxwell,* 67 N.C. 386; *Daniel v. Bellamy,* 91 N.C. 81; *Edwards v. Cobb,* 95 N.C. 10; *Spencer, Ex parte,* 95 N.C. 275; *Collins v. Smith,* 109 N.C. 471; *Donnelly v. Wilcox,* 113 N.C. 409; *Bean v. Bean,* 135 N.C. 94; *Moseley v. Johnson,* 144 N.C. 269; *In re Sams,* 236 N.C. 230.

THE FIRST NATIONAL BANK OF CHARLOTTE v. DAVID A. JENKINS, TREASURER, AND THE WILMINGTON, CHARLOTTE & RUTHERFORD RAILROAD COMPANY.

A plaintiff can appeal from a decision of a Judge at Chambers refusing an injunction.

Where property is conveyed to the State by one for whom it has become surety, in order to indemnify it against the risk incurred, the State becomes a trustee of such property for the benefit of the creditor, also, and so, cannot do any act calculated to impair the security.

Where a State becomes surety, *(here,* by an endorsement of the bonds of a Railroad Company,) the equities arising to the creditor out of any contract for indemnity of the State by the principal debtor, are as much entitled to protection, as would be any rights directly created by a contract between the creditor and the State.

Whether equitable obligations assumed by a State as a trustee can be enforced indirectly through the process of an injunction against the Treasurer of the State: *Quære?*

Where the State authorized a Railroad Company to issue bonds to the amount of $2,500,000, secured by a first mortgage of its property, and further engaged to *endorse* $1,000,000 of such bonds, provided that the Company would deposit with the Treasurer of the State $500,000 other of such bonds, as an indemnity against its paying principal or interest upon those which it had endorsed: *Held,* that a creditor who owned some of the endorsed bonds could not be said to be either injured or damaged by subsequent legislation providing that the $500,000 should be surrendered to the

1. The facts stated above in regard to the State, the Company and the otherwise.

By PEARSON, C.J., *(concurring.)*

1. The facts stated above in regard to the State, the Company and the creditor, create no *contract* between the State and the creditor.

2. The equities between a creditor and a surety in cases like the above, *(Wiswall v. Potts,* 58 N.C. 184) require that the surety, as well as the creditor, shall be insolvent; so that the attempted change of disposition involves the idea of a *fraud;* and *that* no Court can attribute to its sovereign.

3. Where the facts *(as here)* put aside the question of the *constitutionality* of the Act, a Court cannot enjoin an officer of the State from doing something directed to be done by the Legislature, upon the ground that such transaction will injure the plaintiff.

MOTION for an injunction, before *Pearson, C.J.,* at Chambers in Yadkin County, April 27th 1870. (720)

The complaint, filed in WAKE Court, set forth that:

1. By an act ratified Dec. 20th 1866, the Company defendant was authorized to issue bonds not to exceed $4,000,000, for the se-

curity of whose holders it might execute a mortgage, conveying its franchise, etc., which should be a *first* mortgage, — a previous loan in favor of the State to be postponed, and made a second mortgage;

2. By an ordinance of the Convention of 1868, passed Feb. 5th 1868, upon a surrender of $1,500,000 of the above bonds, the State would endorse $1,000,000 of the remainder thereof: *provided* that $500,000 in other bonds of such remainder should be deposited with the Treasurer of the State, as collateral security for it on account of such endorsement; and if the Company should fail to pay either the principal or interest of said endorsed bonds, so that the State should become liable for, and should pay the same, then the State should become the owner of said $500,000, but if the Company should
(721) pay both principal and interest, they should be the property of the Company;

3. Under the above provisions the Company issued $2,000,000 in bonds (besides the $500,000) and executed the mortgage as aforesaid, and obtained the endorsement of the State for $1,000,000 of the $2,000,000 issued and secured as above:

4. The $500,000 were also deposited as required, for an indemnity, etc.;

5. Of the bonds endorsed by the State, $50,000 has come to the hands of the plaintiff as purchaser, for value, etc.;

6. By an act ratified March 12th 1870, the Treasurer is directed to re-deliver to the said Company the above $500,000, (in exchange for a like amount of certain State bonds) to be by it applied to the construction and completion of the road; and the Company is about to demand, and the Treasurer to deliver, them accordingly;

7. The plaintiff is advised that as holder of the said $50,000, it is interested in the security held by the State by having the $500,000 in hand as an indemnity; and is also interested that the fund secured by the mortgage shall not be increased by placing the $500,000 in market; and, therefore, that the act of March 12th 1870, is, as regards it, unconstitutional and void;

8. That the estate conveyed in the mortgage is insufficient to secure the debt provided for; that the Company is insolvent; and that the *power* which the plaintiff has over the fund held by the State in trust, as above, is superior to that of *enforcing* payment from the State itself, and that this advantage is one of which he cannot be deprived by adverse legislation;

9. The judgment demanded, was that the Treasurer should be enjoined from delivering the $500,000, or any part thereof;
(722) and that the Company and its agents, etc., should be injoined from receiving the same.

Upon application to his Honor, Judge Henry, at Chambers, in Raleigh, on the 17th of March 1870, he granted a restraining order until the motion should be decided, and a further order, that the defendants should show cause before Chief Justice Pearson, at Chambers, in Yadkin County, upon the 7th day of April, why the injunction should not be continued until judgment, etc.

There was a miscarriage in regard to the appearance upon the 7th of April, and thereupon, his Honor the Chief Justice postponed the hearing until the 27th day of April, at which time the motion was argued before him at length, by counsel upon both sides.

His Honor made the following order:

It is thereupon considered by me, that the motion be refused, and that the defendants recover the costs of the motion.

The plaintiff having asked to be allowed to appeal, his Honor added:

The plaintiff is entitled to an appeal. The injunction in this case is not ancillary to some primary equity, as a provisional remedy, but is itself the primary right demanded, viz: an injunction, in the first instance, until the hearing, and then, to have it made perpetual; and it rests on the right to be protected from irreparable injury. Consequently, an order refusing the injunction puts an end to the case. The effect of the appeal is, to vacate the order refusing the injunction; and the order of restraint made by his Honor, Judge Henry, remains in force until the motion for an injunction is disposed of by the Supreme Court;

This being an appeal from a ruling at Chambers, does not fall under the regular course of the docket, but will be called on the second day of the next term. (723)

The plaintiff appealed.

Phillips & Merrimon for the appellant.

1. Any fund given by a principal debtor, *(here,* the Company,) to his surety, *(here,* the State,) in order to indemnify the latter against the risk incurred by the relation between them, enures to the benefit of the creditor, *(here,* the Bank); and no consent by the two former parties to abolish the indemnity, can prevail if the third party disagree. An act of Assembly allowing such new arrangement, against the will of the creditor, impairs the obligation of the contract. The State took the $500,000, charged with a trust to the Bank, and a trust is a *contract,* within the meaning of the Constitution of the United States: *Wiswall v. Potts,* 58 N.C. 184; *Blalock v. Peck,* 56 N.C. 323, Burge, Surety, 324; *Wright v. Baseley,* 11 Ves. 12, 21; *Keys v. Brugh,* 2 Paige 311; *Mouse v. Harrison,* 1 Abr. Eq.

Cas. 93; *Moses v. Murgatroyd,* 1 Jon. C. 119; *Nelson v. Bright,* 1 John. 205, 2 John. C. 418.

2. This is especially true *here,* where the plaintiff can, by suit, *enforce* his rights against the fund, although he cannot against the surety: *Curran v. Arkansas,* 15 How. 305; *Briscoe v. Bank of Kentucky,* 11 Pet. 311; See *Hunter v. U. S.,* 5 Pet. 173; *Bank of U. S., v. U. S.,* 2 How. 711, 2 Story, Const., secs. 1391, 1392; *Woodruff v. Trapnall,* 10 How. 190; *Hawthorne v. Calef,* 2 Wall. 10, Cooley, Const. Lim. 277; *Town of Pawlett v. Clark,* 9 Cranch 292; *Terrett v. Taylor, Id.* 43; *Montpelier v. East Montpelier,* 29 Vt. 12, 1 Kent. Comm. 463; *Hoffman v. The City of Quincy,* 4 Wall. 535; *Dodge v. Woodsey,* 18 How. 331.

3. Even if the State cannot be enjoined, its agents may, as, *here,* the Treasurer: *Osborne v. U. S. Bank,* 9 Wheat. 738;
(724) *Curran v. Arkansas,* and *Dodge v. Woolsey, supra.*

4. A State may become a trustee. The English authorities, where they are to the contrary, go upon the view, that the sovereign can act in his sovereign capacity only. In the United States, it is accepted that the sovereign may put off his sovereignty, *i.e.* as member of a corporation, or as a trader. The rule seems to be, that if a State choose to appear in the guise of a trader, it must submit to be bound by the beneficent rules, *(uberrima fides,)* of the mercantile law. It cannot, in its sovereign capacity, by the mouths of its Judges, lay down a rule for its citizens, which, in its *quasi* private capacity, when trading itself, it will not be bound by to the full. If it be a surety, as here, it takes upon itself all the qualities and incidents of the relation. Its example is to tally with its precepts. See 1 Green. Cruise, 385, 431, and n.; *Kildare v. Eustace,* 1 Vern. 412; *Penn v. Lord, Baltimore,* 1 Ves. Sr. 444, Saund. U. and T. 349; *Pinson v. Ivey,* 1 Yerg. 296.

Guion contra.

1. The plaintiff states that the trust set up by it is only "indirect," and not express: As the State is not bound by *Statutes* which do not act upon it *expressly,* so also, it is not by transactions: Bac. Abr., Prerog. 5; *Charles River Bridge v. Warren Budge,* 11 Pet. 552; *U. S. v. Arredondo,* 6 Pet. 738; *State v. Garland,* 29 N.C. 48; *McRee v. Wil. & Ral. R. R.,* 47 N.C. 186; *State v. Manuel,* 20 N.C. 33, 2 Sto. Eq. sec. 1195.

2. The doctrines which affect ordinary persons who fill certain relations of business, etc., have no place in regard to the State, or sovereign, when holding such relations: Bac. Prerog. 1; *Taylor v.*

Shuford, 11 N.C. 133; *Candler v. Lunsford,* 20 N.C. 408; *Wallace v. Maxwell,* 32 N.C. 112.

3. The State cannot be a trustee: *Cook v. Fountain,* 3 Swanst. 585. (725)

4. If the State be decreed a trustee, it has, of course, the *privileges* of a trustee; one of which is that of making prudent investments of the trust funds, at his discretion; as, *here,* by an investment for the completion of the road, and the consequent enhancement of all its property. Lewin, Trusts, 413; *Massey v. Bonner,* 1 Jac. and Walk. 241.

RODMAN, J. A question is made in this case as to the right of a plaintiff to appeal from a decision of a Judge, or of a Justice of this Court, sitting at Chambers, refusing an injunction. We think the right is clearly given by section 299, C.C.P., and we can see no inconvenience in its exercise.

2. As to the principal question:

The plaintiff contends that by virtue of the contract between the State and the Company, contained in the ordinance of 1868, the State became a trustee of the property conveyed to it under that ordinance, to wit: of the road and of the half million of the bonds of the company, not only for the indemnity of the State as the endorser for the company of a million of its bonds, but also for the benefit of all the holders of such bonds; and that consequently it cannot, in good faith, do any act calculated to impair the security. The general principle is admitted. And although there was no direct contract between the State and the plaintiff, (except, of course, the endorsement,) it is conceded that any equities arising to the plaintiff as a creditor, out of the contract between the State and the company, are as much entitled to protection as would be any rights directly created by a contract between the plaintiff and the State. In the view which we take of this case, it is not necessary to consider whether equitable obligations assumed by a State as a trustee, can be enforced indirectly through the process of an in- (726) junction against the State Treasurer; we avoid the expression of any opinion on that point, but for the sake of the argument we assume that they may. The only remaining question is, whether the act sought to be enjoined is in violation of any contract implied between the State and the plaintiff, or of any equity arising on behalf of the plaintiff out of the contract between the State and the defendants, contained in the ordinance of 1868. If it is not, although the plaintiff may be damaged by the threatened act, he cannot, in a legal sense, be injured. The act sought to be enjoined is the delivery to the company of the half million of its bonds which

were deposited with the State under the ordinance of 1868, to be negotiated for its benefit.

Two ways are suggested in which the plaintiff will be damaged by this act:

I. It is said that the fund provided for the security of his debt will be diminished, by withdrawing from it this half million of bonds: and, for example, it is said that if the road shall be sold under the mortgage, and bring less than two millions, the plaintiff and other like creditors, through the State as their trustee, would be entitled, in the distribution of the proceeds, to a share, in the proportion of a million and a half to the million of the notes not endorsed by the State.

This view regards the half million of bonds as property, as a real value, which it seems clear to us, as long as they remain unnegotiated and in the hands of the State, they are not. For this half million of bonds the State has given no consideration; they do not represent a debt to the State, actual or contingent; they have not been delivered to the State as bonds; they are simply in the nature of the penalty of a bond, which does not increase the real obligation. The only debt to the State, (we may speak of it as a debt, although it is in fact only a liability,) is, for the million of bonds en-
(727) dorsed by it; and the company by procuring the holders of those bonds to release the State, would be immediately entitled to receive the half million of its bonds. To such a distribution of the assets of the company as that suggested in the event supposed, the holders of the million of bonds not endorsed by the State, but secured in the mortgage equally with those so endorsed, might reasonably object: it would be inequitable for the State to prove for an amount exceeding its liabilities; in a common risk, equality is equity. It may here be asked if this be the true construction of the contract, what purpose was intended to be answered by the deposit of this half million of bonds. The question is pertinent, and an answer will be attempted in the course of this discussion.

II. It is said that the plaintiff will be damaged by the negotiation of the half million of bonds, in that the debt secured by the mortgage will be increased, and hence, in the event supposed, of the insolvency of the company, the *pro rata* share of the plaintiff will be diminished. The suggestion is opposed to the former one, which considers the mortgage debt to be two millions and a half, whereas this properly regards it as being, until the negotiations of these bonds, only two millions. It is admitted that the negotiation of these bonds may be a damage to the plaintiff in the way suggested; and if the whole debt contemplated by the mortgage, both prospective and existing, was only two millions, we are prepared to

concede that the increase would be inequitable and injurious. The equities claimed by the plaintiff can arise only out of this construction of the ordinance. But it seems to us clear, on the face of the ordinance, that the intention in depositing these bonds, was, that they might be negotiated in some contingency. No other reasonable purpose can be suggested, and this is our answer to the inquiry above, which was deferred. Unless they were to be negotiated, their existence could answer no useful purpose whatever; in the (728) hands of the State they were without vitality. The plaintiff therefore, although he might be damaged by such negotiation, could not be injured, as it is consistent with the contract which he knew of and assented to, when he purchased his bonds.

The plaintiff, however, says that although it was agreed that the State might negotiate these bonds, yet it can only do so in the event of a default of the company in the payment of interest, and the proceeds of the sale must be applied *exclusively to pay the interest of the bonds endorsed by the State.* We think this the most serious question in the case. But upon consideration of the whole contract between the State and the company, we are led to the conclusion that it was not the intention to tie up the power of the State over these bonds so narrowly, but that a discretion was left to it to use them in any way not injurious to the creditors secured by the mortgage.

In the first place, it is not said expressly, or, as far as we can see, by a reasonable implication, that the proceeds of the half million of bonds is to be appropriated in the way claimed. They are deposited with the State as a collateral security for its endorsement, "and if the company shall fail to pay either interest or principal of said endorsed bonds, so that the State shall become liable for the same, then the State shall become the owner of the said five hundred thousand dollars of bonds:" but if the company shall pay the bonds endorsed by the State, the half million of bonds shall be the property of the company. It does not appeal that the State has yet paid any thing for the company, nor is it material that it should appear. It is not easy to see what precise rights the Convention supposed would arise from the deposit of these bonds. It could not be that in the event of the insolvency of the company and a failure of its assets, the State was to prove as a creditor for half a (729) million more than was owing to it, or than it was bound for. The injustice of this to other creditors in the event supposed is so obvious, that we cannot attribute such a purpose to the Convention. But, in any event the half million were to be the property either of the State or of the company; they were regarded as a part of the debt secured by the mortgage, and this they could not be so long

as they remained in the hands either of the State or of the company; they had no existence as a debt until they were negotiated, and the expectation plainly was that they should be negotiated, under circumstances not clearly described, and probably not clearly foreseen.

Secondly, the holders of the million of bonds secured by the mortgage, but not endorsed by the State, might truly allege that to sell the half million of bonds and apply the proceeds to pay the interest of the endorsed bonds, would be disadvantageous to them, as enlarging the principal of the mortgage debt for the exclusive benefit of the holders of the endorsed bonds. We are not prepared to say that this application of the half million of bonds would be inequitable, because it probably was one of the modes in which it was contemplated in the ordinance that they might be used: but we think it was not the only one, and that the State and the company might agree to any other application not expressly or impliedly forbidden by the ordinance. The act of 1870 gives the bonds to the company, to be negotiated by them, and the proceeds to be expended in the construction of the road. This application does not impair, but may increase the security of the mortgage creditors; it is neither expressly, nor, so far as we can see, by any probable implication, forbidden by the ordinance of 1868, but we think was contemplated, as possible, by that ordinance. We do not see that the plaintiff is damaged — much less injured — by this appli-
(730) cation. We think, therefore, the injunction was properly refused; the restraining order is also dissolved.

The defendant will recover costs.

PEARSON, C.J. In forming the opinion at Chambers that the motion for an injunction should be refused, I had the aid of a full argument by counsel on both sides. The argument at bar has tended to convince me more clearly of the soundness of that conclusion.

The motion is put on the ground that the act of the General Assembly directing the Public Treasurer to deliver to the Railroad Company the half million of bonds deposited for the indemnity of the State, on receiving a like amount of the State, is unconstitutional:

1. It violates the Constitution of the United States, in this, it impairs the obligation of a contract.

There is no contract, express or implied, between the State and the Bank in respect to this half million of bonds. The contract was between the State and the Railroad Company: That the Company should issue two and a half million of bonds only, secured by a first mortgage of the Road, etc.; the State should guaranty the pay-

ment of one million; and, to indemnify the State, half a million of the remaining bonds should be deposited with the Public Treasurer. The Bank was no party to this contract. The only contract between the State and the Bank grows out of the fact that the Bank holds $50,000 of the bonds guaranteed by the State. There is no allegation of a violation of the contract of guaranty. So the Constitution of the United States is out of the question.

2. It violates the Bill of Rights, in this, it deprives the Bank of a "vested right." In support of this position, it is said that by the purchase of the bonds the relation of *creditor and surety* was established between the Bank and the State, and that by a settled doctrine of equity, the creditor acquires a vested (731) right in the indemnity fund held by the State.

It is an admitted doctrine of equity, that a creditor is entitled to the benefit of a fund put by the principal debtor in the hands of a surety for his indemnity. This doctrine of the Courts of Equity is a very refined one; the principle on which it rests is not clear. It is not put on the ground of contract, for there is no contract between the creditor and surety in respect to the fund. A, in order to induce B to become his surety on a debt to C, puts a horse in the hands of B, for his indemnity; there is no contract between B and C in respect to the horse, and so far as C is concerned, it is difficult to see why B may not sell the horse, or, if he choose to surrender the indemnity, and give the horse back to A; that is, provided B is *solvent* and fully able to pay the debt; for if B is insolvent and is about to make way with the fund, it is a *fraud* on C which the Court will prevent, by converting B into a trustee of the fund for the benefit of C. In the latter case the equity is clear, but in the former I confess my inability to see any ground on which an equity can rest. If the surety be not insolvent, how does it concern the creditor what he does with the indemnity fund?

This point was called to the attention of the learned counsel who argued for the motion at Chambers, and he was requested by me to look into the books, and aid the Court upon the argument at Bar, by tracing out the principle so as to show from the authorities, whether the equity is put on the ground of contract, or of fraud. On the argument at bar, no case was referred to touching this point, and without looking through the books, on reflection and general reasoning I feel satisfied that it rests on the ground of preventing fraud, and is worked out by converting the surety into a trustee of the fund for the benefit of the creditor.

Wiswall v. Potts, 58 N.C. 184, was relied on in the argument at Chambers, but was not cited in the argument at bar, (732) for the reason, I presume, that it was found not to be in

point. In that case, a debtor in failing circumstances, made an assignment to a trustee, for the *indemnity* of certain of his sureties; the trustee sold the property, and the question was, should he pay the proceeds of sale over to the sureties, or pay it to the creditor in satisfaction of the debt, the Court held, that it must be paid to the creditor, for, inasmuch as the debt constituted the consideration which upheld the deed of trust and saved it from being void as against creditors, by its proper construction, the legal effect of the deed was to vest the property in the trustee, to be sold, and the proceeds of sale applied to the *discharge of the debt,* for the indemnity of the sureties; there being by the construction of the Court, an express trust. The creditor had, of course, a right to enforce it, so it was not necessary to resort to the refined doctrine of converting a surety into a trustee of the indemnity fund, to prevent fraud.

In our case, to say nothing of the fact that there is no allegation of the insolvency of the surety, to-wit: the State, and admitting that a sovereign may, by express agreement, become a trustee, (although there might be difficulty in enforcing even an express trust,) I am not able to see any principle upon which a Court can undertake to declare that its sovereign is about to commit a fraud and, to prevent the supposed fraud, prohibit any disposition of the fund which the sovereign sees fit to make. No case was cited to show such an equity against the sovereign. The equity is a creation of the Court, and it never has been recognized where the sovereign is concerned. It follows that there is no such equity against the sovereign. A distinction was taken in the argument at Chambers, between a sovereign who is a natural person, like Queen Victoria, and a mere ideal sovereign, as the State of North Carolina, but no authority was cited to support it. It must be taken then, that
(733) the bank, in purchasing bonds guaranteed by the State, knew that it acquired no vested right in the bonds deposited for the indemnity of the State, and relied solely upon the ability of the Railroad Company and of the State, and the mortgage on the Road, etc. The bank having no vested right in the indemnity fund, the Bill of rights is out of the question.

3. It is said, the bank will be injured by the delivery of these half million of bonds to the Company. That is not clear to my mind: The ability of the surety, the State, to meet the guaranty, will be increased by getting in a half million of its bonds to be cancelled, and thereby lessen the public debt. The ability of the principal debtor, the Rail Road Company, will be increased by having those bonds to dispose of, and the mortgage fund will be enhanced in value, by having the proceeds of these bonds applied to the completion of the Road, which is an express provision of the act. On

the other hand, it is true, that a larger amount of the bonds of the Rail Road Company will be put in market, but the act by which the State agrees to guarantee one million of the bonds and requires the deposit of half million as an indemnity, expressly provides that the mortgage shall include the whole two and half millions of bonds. Surely the bank cannot expect the State to cancel these bonds for its benefit, or keep them locked up in the vaults of the Treasury.

But, suppose the bank may be prejudiced if these bonds are delivered to the Rail Road Company; this Court has no power, on that ground, to direct an officer of the State, not to obey an act of the General Assembly. We have held that the Court has the power, and will exercise it, to forbid any officer of the State, from executing an unconstitutional act of the General Assembly: *University R. R. Co. v. Holden,* 63 N.C. 410. But when the act is not unconstitutional, the Courts have no power to interfere.

So, the whole question turns upon the unconstitutionality of the act, and that has been disposed of. (734)

I concur with the other members of the Court.

Per curiam.

Injunction refused.

Cited: Harrison v. Styres, 74 N.C. 295; *Jones v. Thorne,* 80 N.C. 75; *Matthews v. Joyce,* 85 N.C. 266; *Lutz v. Cline,* 89 N.C. 188; *Holder v. Strickland,* 116 N.C. 192; *Sherrod v. Jenkins,* 120 N.C. 67; *Gill v. Comrs.,* 160 N.C. 192.

J. M. ROBESON v. DAVID LEWIS.

The Supreme Court may allow an appellant to substitute a sufficient, for an insufficient, appeal bond, after a motion by the appellant to dismiss the appeal for such defect.

(Attention called to the provisions in regard to appeal bonds, in the C.C.P. sec. 303, as affected by sec. 309.)

A description in a deed of the lands therein conveyed, as "752 acres of land, including the land I now live on, and adjoining the same," is too vague to convey more than the lands *lived on;* and, in a case where the grantor owned much more than 752 acres of land "adjoining," cannot be aided by *parol evidence* of what was the specific land intended to be conveyed.

Where a grantor (defendant) testified without objection, as to what was *his intention* in using the terms of description applied to the land in

the deed, and upon cross-examination denied that he had ever said the contrary; the plaintiff was allowed, after objection, to prove that he had previously said the contrary: *Held*, that it was error to allow any part of this testimony, even that unobjected to, to go to the jury; *what is a muniment of title, being a matter of law, simply.*

CIVIL action to recover possession of land, etc., tried before *Russell, J.*, at Spring Term 1870 of BLADEN Court.

The complaint demanded possession of land described by metes and bounds as one tract "containing 752 acres, more or less."
(735) The answer set forth, that at the time of making the deed, the defendant understood that he was conveying the 60 acres on which he lived, and also *the Davis* tract, of 300 acres, and 392 acres of *the Norman* tract; and not the land described in the complaint.

The plaintiff made title by a deed from the defendant to one Cromartie, who had afterwards conveyed to him. In that deed the land was described thus: "also 752 acres of land, including the lands I now live on, and adjoining the same." For the purpose of identifying the lands thus described, the plaintiff offered parol evidence showing that the defendant, (the grantor) when the deed was executed, resided on a certain tract, and that the tracts specified in the complaint (including this tract) corresponded in number of acres with the quantity called for by the deed. The defendant objected to this evidence, but it was admitted by the Court.

The defendant then was introduced as a witness for himself, and testified that he had not intended to convey the land claimed by the plaintiff, but other land, which he described. This testimony was not objected to by the plaintiff. Upon cross-examination the plaintiff asked the defendant if he had not made certain declarations inconsistent with his present testimony, amongst others, that he had intended to convey the lands as claimed by the plaintiff. The defendant answered that he had not. Thereupon the plaintiff offered evidence showing that the defendant had made such declarations. To this the defendant objected, but it was admitted by the Court.

Verdict for the plaintiff; Judgment accordingly; the defendant appealed.

Leitch and N. A. McLean for the appellant.
F. H. Busbee contra.

RODMAN, J. In this case, the appellant did not execute
(736) an undertaking for the costs of the appellee to a sum not exceeding five hundred dollars, as required by C.C.P., sec. 303,

but executed a bond in the penalty of one hundred dollars. The plaintiff moved to dismiss the appeal on this ground; and the defendant moved to be allowed to file a proper undertaking, *nunc pro tunc*. Under the general power of the Court to amend any proceeding, we allowed the latter motion, and required undertaking having been given, there remains no ground for that of the plaintiff. It would seem that the attention of the profession has not been directed to the requirement of section 309, C.C.P., which requires, that when an appeal is taken with the effect of vacating the judgment appealed from, a copy of the undertaking, with the names and residence of the sureties, shall be served on the adverse party, with the notice of the appeal. This provision is not made expressly to apply to an undertaking for the costs only, under section 303, but the two cases seem to stand on the same principle. Of course, in both cases, the time for giving the undertaking may be enlarged by order of the Judge.

As to the questions of evidence: The plaintiff claimed through one Cromartie, to whom the defendant had conveyed lands by the following description: "also seven hundred and fifty-two acres of land, including the lands I now live on, and adjoining the same." It was conceded that the piece of land on which the defendant was living at the date of the deed, passed by it; this piece, however, was only part of that claimed by the complaint. In order to show his title to the residue, the plaintiff was allowed "to introduce parol evidence, showing that the defendant resided on one certain tract at the time of the execution of the deed, and that the tracts described in the complaint, added to this tract, corresponded, as to the number of acres, with the quantity called for by the deed." It does not appear that any other evidence was introduced tending (737) to make certain the very uncertain description in the deed.

The principles respecting the use of parol evidence to explain an uncertain description in a deed, are familiar, and are very clearly set forth in 1 *Green, Ev. sec.* 286, *et seq;* and in proposition VII, of V.C. Wigram, cited in the note to section 287; and in *The Deaf and Dumb Institution v. Norwood,* 45 N.C. 65. It is always admissible for the purpose of applying the description to the subject matter: For example, in this case, to show what lands the grantor *lived on;* and if he had said *"all* my lands adjoining the piece I live on," evidence might have been offered to show what lands he owned *adjoining.* It is always competent, by evidence, to enable the Court to occupy the point of view of the grantor with respect to the property which it may be alleged was conveyed; and for this purpose, it may sometimes be important to prove the quantity of a particular tract. The Court say, in *Proctor v. Pool,* 15 N.C. 370, "Quantity is not

generally descriptive, though it may be so, as, if a person own two lots, one of half an acre, and the other of an acre, and grant his acre lot, the larger lot will pass, though a few feet more or less than an acre." If, therefore, the plaintiff in this case had proved that the defendant owned land adjoining his residence, which, with the residence piece, contained less than 752 acres, or just that quantity, or but a trifling excess, such proof might be sufficient to show that the grantor intended to convey all his lands adjoining his residence: *Carson v. Ray,* 52 N.C. 609. But if the quantity is considerably in excess, what is there in the deed to show whereabouts in the larger body the 752 acres is to lie. Is it to join the residence piece on the North, or the South? Is it to be in the shape of a square, or a circle, or a triangle? It is not necessary to say, that there can be no evidence by which the land can be identified under such circumstances, but we cannot readily imagine any. His Honor
(738) erred in permitting mere evidence of quantity to go to the jury, as sufficient by itself to enable them to identify the land. In the case supposed, of the grantor owning considerably more than 752 acres, we think the Court should have told the jury, that the description was too vague, and uncertain to pass any thing: *Edmundson v. Hooks,* 33 N.C. 373. In *Waugh v. Richardson,* 30 N.C. 470, and *McCormick v. Monroe,* 46 N.C. 13, it was held that mere quantity is not a certain description. These cases are cited and distinguished in the late case of *Melton v. Monday, ante* 295.

II. The defendant should not have been allowed to prove what it was his intention to convey by the deed; 1 *Green. Ev. sec.* 277. If a solemn conveyance of land can be interpreted, added to, or diminished, by the secret intentions of the grantor, or by his parol declarations afterwards, it will be anything but a muniment of title. The intention is to be ascertained from the deed, and, with certain exceptions stated in the text books, it is a question of law, for the Court. It is true that the defendant in this case did not object to the evidence, but this could not authorize its admission. It related to a matter which it was not for the jury to decide, and could legally have no weight whatever, in the case. Consequently, the counter evidence of the plaintiff as to the declarations of the defendant, was inadmissible.

The judgment below is reversed, and there must be a *venire de novo.* Let this Opinion be certified.

Per curiam.

Venire de novo.

Cited: Farmer v. Batts, 83 N.C. 389; *Smith v. Proctor,* 139 N.C. 318; *Lumber Co. v. Cedar Co.,* 142 N.C. 422; *Cathey v. Lumber Co.,*

151 N.C. 596; *Pate v. Lumber Co.*, 165 N.C. 187; *Katz v. Daughtrey*, 198 N.C. 394; *Self Help Corp. v. Brinkley*, 215 N.C. 620.

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(739)

WILLIAM HAIGHT v. WILLIE G. GRIST.

The United States statute (1866, c. 184, § 9) providing that no deed, writing, etc., required by law to be stamped, which has been signed or issued without being duly stamped, etc., shall be admitted or used as evidence in any court, etc., etc.; *is a rule of evidence for the court of the United States only.*

Whether the courts of this State will enforce contracts which were not stamped by the parties *by design*, to defraud the United States of revenue: *Quære?*

CIVIL action upon a bond, tried before *Jones, J.*, at Spring Term 1870, of BEAUFORT Court.

The answer relied upon the defence of *set off*. Upon the plaintiff's offering the bond in evidence, the defendant objected to its being read, because it was not *stamped*. Thereupon, the plaintiff moved that he be allowed to stamp it then, alleging that when it was executed neither party had a stamp, that it was not convenient then to procure one, and also, that the defendant, the maker, had authorized him to procure, affix and deface a stamp. The Court allowed the stamp to be affixed and defaced, and then the note was read to the jury. The defendant excepted.

Verdict for the plaintiff; Judgment accordingly; Appeal by the defendant.

Carter for the appellant.
Battle & Sons contra.

1. Supposing this case to come within the provisions of the U. S. Act, although, it does not, we submit that the clause in question is a penal one, which the State cannot undertake to administer: See Story's Conf. of Laws, sec. 621, *et seq;* also *Allen v. Pass*, 20 N.C. at p. 90.

2. Again, the State ought not to take upon itself the enforcement of the U. S. *revenue laws;* See Story Conf., sec. (740) 257; and *Satterthwaite v. Doughty*, Bus. 314.

3. The U. S. government has no constitutional power to regulate the rules of evidence in the State Courts: *Carpenter v. Snelling,* 97 Mass. 452; *Lynch v. Morse, Ib.* 458; 3 Am. Law Rev. 335; *Hunter v. Cobb,* 1 Bus. 239, 3 Am. L. Rev. 484.

4. The omission to affix a revenue stamp to an instrument requiring one, will not invalidate the instrument, unless such omission be *with intent* to defraud the government of the stamp duty: *Holyoke Machine Co. v. Franklin Paper Co.,* 97 Mass. 150; *Vosebeck v. Rose,* 50 Barb. 302; *Blunt v. Bates,* 40 Ala. 470.

5. The maker of a promissory note through whose fault an insufficient stamp was affixed to it, cannot object to its being received in evidence: *Jocquin v. Warren,* 40 Ill. 459, 3 Am. Law Rev. 484.

6. The defendant cannot take advantage of the want of a stamp under the pleadings in the present case: *Hollock v. Jaudin,* 34 Calif. Rep. 167; *Jones v. Davis,* 22 Wis. 421, 4 Am. L. Rev. 421; *Adams v. Dole,* 29 Ind. 273.

READE, J. No objection is made to the validity of the bond sued upon, excepting that it was not duly *stamped* when offered in the evidence; as, it was alleged by the defendant, was required by the United States Revenue Act of 1866, ch. 184, § 9.

That act provides that "no deed, instrument, writing or paper required by law to be stamped, which has been signed or issued without being duly stamped or with a deficient stamp, nor any copy thereof, shall be recorded, or admitted, or used as evidence *in any Court,* until a legal stamp denoting the amount of tax, (741) shall have been affixed thereto, as prescribed by law."

Our attention has not been called to any provision of law which authorized parties interested to affix stamps at the date of trial below, to writings, etc., that had been executed previously. It was said at the bar that a custom of that sort had sprung up in the country, owing to the difficulty of procuring stamps at the proper times and places. However convenient that custom may be, we have no ground for supposing that it has the sanction of law. The periods during which, in some cases, stamps were allowed by statute to be affixed to papers previously executed, have long since expired.

Admitting that it is a vital matter with the government of the United States that its revenue laws shall not be evaded, it is equally clear that the enforcement of these, as well as of all of its other laws, as a general proposition, must be left with the Courts of that government. The United States is equipped with a complete machinery of its own, for effecting all of its vast and manifold purposes. It does not look to the Courts of the several States to remove obstructions from its path, or to carry out its views. Whenever there are excep-

tions to this rule they rest upon definite and clearly expressed statutory provisions. The general doctrine is, that neither the enforcement nor the obstruction of its revenue laws is within the province of the States, or of any department thereof. It is therefore in accordance with long settled and widely extended rules of constitutional construction, that the general expression *"any Court,"* which is found in this statute of the United States, means only *"any Court of the United States,"* and does not include Courts of the respective States; See the well considered case reported in 97 Mass. 451, as well as other cases, cited for the plaintiff at the bar.

We are therefore under no necessity of discussing the *power* of Congress to devolve upon State Courts the duty of protecting the revenue of the United States, or its power to affect the (742) laws of evidence as previously administered in such Courts.

There is no allegation in the case before us, that the stamp was omitted with an intent by the parties to defraud the United States of its revenue. If such had been the case, we would gravely consider whether public policy does not forbid our Courts to give the plaintiff relief. The commonly received principle of public law which forbids the enforcement of the revenue law of other States, has been reprobated by Story in his Conflict of Laws, and he quotes Pothier and other writers to the same effect. It may be that this principle is too firmly established to be overthrown except by legislation. However it is mere matter of speculation in the case before us, where no fraud upon the United States is suggested.

We place this decision upon the ground that the expression "any Court" in the statute cited, does not include State Courts.

Per curiam.

Judgment affirmed.

Cited: Dodson v. Moore, 64 N.C. 515; *Rowland v. Thompson,* 65 N.C. 109; *Ratliff v. Ratliff,* 131 N.C. 427; *Davis v. Evans,* 133 N.C. 321.

(743)

WALTER CROOK v. DAVID S. COWAN.

If one send by mail an absolute and specific order for certain goods to a merchant who sells such goods, the latter need not reply by mail engaging to send them; the contract will be complete upon his at once complying with the order:

This is so even where the thing ordered must be manufactured by the merchant before it is sent, at least where it can be manufactured without much delay, *ex. gr.* in case of the making up of carpets, where the merchant is a carpet seller; *Therefore,*

Where the defendant, who resided near Wilmington, sent, Dec. 10, 1866, by mail, an order to a carpet merchant of Baltimore for two carpets similar to those which the merchant had furnished to a friend of his, ("good three ply carpet, medium color," etc., etc., giving size and proportion of rooms: "I want good durable carpets, and wish you to have them made up; You can forward them to my address at Wilmington, N. C., *per* Express, C. O. D.," etc., etc.,) and the order was received Dec. 14th, and the carpets forwarded by Express, Dec. 21st, and duly received in Wilmington at the Express office: *Held,* that the contract was complete, there being no need that the merchant should have answered by mail, engaging to comply with the order.

By RODMAN, J. *(dissenting.)* Although no reply by mail assenting to the offer to buy be needed where the article is transmitted immediately, it is otherwise in all cases where the *preparation* of such article requires the lapse of time. Such lapse of time as is *reasonable* for the preparation of the article, if it be *unreasonable* for withholding notice of assent to the offer by the customer, leaves the latter unbound by the contract.

ASSUMPSIT, tried before *Russell, J.*, at December Special Term 1867 of NEW HANOVER Court.

The action was brought to recover the price of two carpets, the transaction in regard to which is presented in the following correspondence.

ROBESON, N. C., Dec. 10th, 1866.

WALTER CROOK, JR., ESQ., *Baltimore:*

SIR:—General R. of Wilmington, has kindly furnished me your name, and recommends your house.

I want similar carpets for two rooms, good three ply carpet, medium color, small figures. I would prefer no white in them. Description of rooms: No. 1, 14 feet 6 inches by 16 feet 3 inches square; No. 2, 14 feet 2 inches by 16 feet 3 inches square. For jams of chimney, four (4) pieces, one breadth, each piece (5, 8 in.) five feet eight inches long.

I want good durable carpets, and wish you to have them made up. You can forward them to my address at Wilmington, N. C., *per* Express, C. O. D., or else, advise me of the cost, and I will remit while you are having them made up. Number each as per description.

Yours respectfully,

D. S. COWAN.

This letter was received by the plaintiff upon the 14th of December. (744)

The defendant, receiving no reply, sent the following telegraphic dispatch:

WILMINGTON, N. C., Dec. 26th, 1866.

(Received at Baltimore, December 26th:)

To WALTER CROOK, JR., *Baltimore Street:*

Have you received an order for carpets? If so, do you intend sending them?

D. S. COWAN.

The next communication was the following:

BALTIMORE, Jan. 16th, 1867.

MR. D. S. COWAN, *Wilmington, N. C.:*

DEAR SIR:—I have the pleasure to notify you that we have this day received advice from Adams' Express Company that the carpets ordered by you through letter dated December 10th, 1866, are at their office in Wilmington on hand, their notification having, up to date, received no reply. Be good enough to respond. The goods were shipped you December 21st, 1866.

Yours, etc.,

WALTER CROOK, JR.

ROBESON, N. C., Jan. 18th, 1867.

WALTER CROOK, JR., *Baltimore, Md.:*

DEAR SIR:—I was somewhat surprised on yesterday at receiving a notification of the fact that a roll of carpeting was in the Express office for me. I declined to receive it, and cannot let it go back to you, without a word of explanation in justification of myself.

It was on or about the 10th December, 1866, that I wrote you ordering carpets. I received no acknowledgement of my letter, and was in doubt whether it ever reached you. On the 26th of December, I dispatched you a telegram from Wilmington to the following effect, to wit:

WALTER CROOK, JR., *Baltimore Street, Baltimore:*

Have you received an order for carpets? If so, do you intend sending them?

(Signed) D. S. COWAN.

The above copy I got from the original on file in telegraph office in Wilmington on yesterday. I called at telegraph office frequently from 26th Dec. to 2nd Jan. 1867, seeking a reply, but received none. Concluding that my letter had miscarried, and consequently you did not understand the dispatch, I bought carpets in Wilmington and had them made up. Agreeable to the above facts, I cannot think I am morally bound to take the carpets. Should you think differently, I will be pleased to hear from you.

Yours very respectfully,

D. S. COWAN.

Some other letters passed between the parties, presenting their respective views of the controversy, but they are not (745) material here.

It was further in evidence that by general custom, known to all who had any dealings with the Express Company, the letters C. O. D. marked upon goods, means that such Company is not to deliver the goods without payment of the bill for the purchase money which accompanies them; and that the carpets sent to the defendant were so marked.

The counsel for the defendant requested the Court to instruct the jury:

1. That there was no *contract;*

3. That, if there was a contract, the failure of the plaintiff to reply to the original order of the defendant, and to his dispatch of Dec. 26, 1866, authorized the latter to believe that the order (746) would not be complied with, and that, so, the defendant was discharged.

The Court declined to give either instruction.

Verdict for the plaintiff, etc. Appeal by the defendant.

No counsel for the appellant.
Strange contra.

READE, J. If one writes to another, who has not offered his property for sale, proposing to buy, the letter is of course nothing but an offer, and is of no force until the other answers and accepts the offer; then the contract is made. But if one holds his property out for sale, naming the terms, and another accepts the terms, the contract is complete; or, if one bids at an auction, and the hammer falls, the contract is complete; or, if one advertises, offering a reward for something to be done, as soon as the thing is done the contract is complete, and the reward is due. So, in our case, the plaintiff held himself out as a carpet manufacturer and vender, and offered his carpets for sale, and invited purchases; and when the defendant sent him the unconditional order for carpets, that was an acceptance of his offer, and the bargain was struck, and the moment that the carpets were delivered to the Express, the agent designated by the defendant to receive and transport them and collect the bill, the delivery was made, and the property passed to the defendant. But, if that were not so, our case is stronger than that. Consider the case as if the first offer was made by the defendant to the plaintiff. The defendant knowing that the plaintiff was a carpet vender, sent him an unconditional order for carpets, specifying the Express as the agent to receive and transport them, and to collect the bill, and the order was filled to the letter. Thereby, the offer was accepted, the property in the carpets passed to the defendant, and he became liable for the price, as for goods sold and delivered. The or-

der was an offer, the filling the order was an acceptance; and (747) an *offer* and an *acceptance* is the common definition of a contract.

The defence is put upon this ground: the defendant's letter to plaintiff was only an offer, there was no contract until the plaintiff accepted it and notified the defendant; and the notice ought to have been by mail, within a reasonable time.

The plaintiff says, that he did assent immediately upon the receipt of the order, and forwarded the carpets as soon as he could have them made up, which was within a reasonable time — seven days, and that this was all he had to do. The point of divergence between the plaintiff and defendant is, that the defendant says, the plaintiff ought to have notified him by mail that he had accepted the offer, and forwarded the goods; that merely filling the order, although in the exact terms thereof, was not an acceptance, without notice. The propriety of giving notice by mail, must depend a good deal upon the circumstances of each particular case; — as, if the order requires it, or, if the order is not sufficiently specific, and leaves something further to be arranged, or if considerable time must pass in the manufacture of the article, or, if the route or means of transportation is not known, or the voyage long and dangerous, and the like. But if an offer and an acceptance — an unconditional and specific order, and an exact fulfillment, as in this case, does not complete the contract, how would it be possible to complete a contract by mail? A sends an unconditional order to B, and, instead of B's filling the order, he writes back that he accepts the order and will fill it, but in the meantime, A may have changed his mind, and lest he has, he must write back to B and so on, for ever. *Adams v. Lindsell*, 1 B & Ald. 681, is the leading English case, illustrating, and repudiating, this circumlocution; and that case has been followed ever since both in England and America, as is said (748) in 1 Parsons on Contracts, note p, page 483. In that case, it was said, speaking of the above rule, "If it were not so, no contract could ever be completed by post. For if the defendant was not bound by his offer, when accepted by the plaintiff, until the answer was received, then the plaintiff ought not to be bound until after he had received the notification that the defendant had received his answer and asserted to it. And so it might go on *ad infinitum*.

We admit that the rule, that filling an order completes the contract, is confined to unconditional and specific orders. And, if the purchaser thinks proper, he can make his order as guarded as he pleases. He may say, "I want such goods, — can you furnish them? If so, at what price, and within what time? Inform me by return mail. I will pay if the goods arrive safe, — otherwise not," — and

the like. Then he will not be liable unless the terms are strictly complied with.

In the case before us, the order was unconditional and specific, and was complied with to the letter. The defendant did not ask the plaintiff to inform him whether he would fill the order. He had no doubt about it. It was the plaintiff's business to fill such orders, and the defendant had confidence in him. So far from requiring the plaintiff to notify him by mail, he impliedly informed him that he need not do so: Send the goods by Express, C. O. D., without more say; and send the bill by Express for collection; or, if you are afraid to trust me, then, and in that case only, you may write to me and I will send the money, before you ship the goods, — is, substantially, what the defendant said in his order to the plaintiff. There was no use in informing the defendant by mail of the shipment of the goods, because the Express is as speedy as the mail; and there is certainly no magic in sending by mail. And sending the goods is the (749) best notification.

The defendant also complaint that the plaintiff did not answer his telegram. The answer is, that neither the mail nor the telegraph had been designated as the means of communication, but the Express. And it was the defendant's misfortune, if not his fault, to go elsewhere than to the place designated, for information. His duty ended when he delivered the goods to the agent designated by the defendant, the Express, with the bill for the price to collect. The goods were at their destination — the Express office — when the defendant sent his telegram. He did not go to the Express office at all, and offers no explanation why he did not, but left the plaintiff to infer, as he seems to have done, that his purpose was to avoid the contract.

RODMAN, J., *(dissenting.)* The question in this case is, whether what took place between the plaintiff and defendant amounted to a complete contract of sale, or to a binding contract by the defendant to accept and pay for the goods, so as to enable the plaintiff to recover the price.

The letter of the defendant of December 10th, was merely an offer to purchase the goods named: it is called an *order:* but an order on a merchant or manufacturer for a specified article — that is, a request to sell the article to the writer — *can be* nothing but an offer to purchase. It does not bind the proposed vendor, until it is assented to by him; nor can it bind the proposed vendee, until the vendor himself becomes bound; a contract which binds only one of the parties, (except in certain special cases, as where one of the parties is an infant, etc.,) is an impossibility.

"A mere affirmation or proposition is not enough," "There must be a request on one side, and an assent on the other:" 1 Pars. Cont. 475, Chit. Cont. 9—15. "A contract includes a concurrence of intentions in two parties, one of whom promises something (750) to the other, who, on his part, accepts such promise. A pollicitation is a promise not yet accepted by the person to whom it is made:" 1 Pothier Obl. 4.

" 'It takes two to make a bargain,' is a maxim of law, the soundness of which strikes the good sense of every one, so that it has become a common saying." Pearson, J. in *Spruill v. Trader,* 50 N.C. 41.

It is unnecessary to attempt to enforce so familiar a principle by illustration; but the decision of this case depends on bearing it in mind, and fairly applying it. The assent must be given in a reasonable time. If the proposition be by letter, the assent must be given by letter, by the first post on the next day, unless farther time be allowed by the proposition: 1 Pars. Cont. 483, note p; *Dunlop v. Higgins,* 1 H. L. Cases 381; *Mizell v. Burnett,* 49 N.C. 249; *Meynell v. Surtees,* 31 E. L. & E. 475.

The point of the case is, was the proposition of the defendant assented to by the plaintiff, so as to convert it from a mere offer into a binding contract?

First, to put away what is not material: The letter from plaintiff to defendant, of 16th January 1867, was not such an assent, because it was not intended as such, and was not given in reasonable time, even if we admit that the defendant's original offer was kept open by his telegram of 26th December, for a reasonable time thereafter: *Mizzell v. Burnett,* and *Dunlop v. Higgins, ubi. sup.*

So that the question becomes at last, whether the delivery of the goods to the carrier on the 21st of December was such an assent. In considering this, it must be borne in mind, that the defendant never received any notice other than this, either that the plaintiff assented to his proposition to purchase and would send the goods accordingly, or that he had complied with it by a delivery to the carrier, or any reply to his telegram of the 26th of December, inquir- (751) ing if the plaintiff intended to send the goods.

The proposition, that the mere delivery of the goods to the carrier on the 21st of December was equivalent to an assent communicated to the plaintiff in a reasonable time, and completed the contract, so as to vest the property in the defendant, or to bind him to accept and pay for the goods, can only be maintained on one of two grounds:

1. That a compliance with the terms of a proposition to purchase goods that require to be manufactured, or in some way pre-

pared for use, and which preparation must occupy a time more or less considerable, but greater than what would be a reasonable one within which to give an assent to the proposition, is a sufficient assent, or will suffice in lieu of such assent; or,

2. That the carrier was the agent of the defendant to manifest such assent, and did manifest it, by receiving the goods.

As to the first ground, which seems principally relied on: When goods are sent in compliance with an order, and are accepted by the vendee, of course no question as to his liability for the price can arise. If they are sent immediately upon the receipt of the order, or within what would be a reasonable time for giving an assent thereafter, and a bill of lading or equivalent document is sent to the vendee, as is usually the case, or if he is informed of the arrival of the goods at their destination; that also is sufficient notice of the vendor's assent. Notice of the assent in due time is indispensable, but it is not material how or through whom it is given. It is only when there is a delay in the transmission, beyond what would be deemed a reasonable time for the vendor's assent, either from a difficulty in collecting or preparing the goods, or from any other cause,

(752) that the question whether a compliance with the proposition is equivalent to or dispenses with the vendor's assent, is likely to arise. In such a case I hold that mere compliance by preparing and sending the goods within what, considering the time necessary for the preparation, is a reasonable time *for that purpose,* but within what is an unreasonable time for the communication of the vendor's assent, is insufficient, and that the proposition to purchase must be assented to in a reasonable time, and notice of the assent given to the proposed vendee. It is from not noticing the distinction between cases in which a delay does or does not occur, that any difficulty in the decision of this case can arise, and attention to it will reconcile and explain every case in which it is held that a delivery to a carrier vests the property in the consignee, a doctrine which, properly understood, is incontestable. If the proposition were true, it would form so wide and important exception to the general and admitted rule, requiring a personal communication of assent to a proposing purchaser, that, as such, it could scarcely have escaped prominent notice by the able writers on the law of contracts with whose works the profession is familiar. Yet no such exception is found, and no case has been cited, and we may suppose none can be found, in which, in a case substantially like this, an assent like that which it is contended is sufficient in this case, has been so held. The contrary is expressly stated in 1 Pars. Cont. p. 475, note c, citing the cases of *Johnson v. Fessler,* 7 Watts 48, and *Ball v. Newton,* 7 Cush. 599.

There are many cases in which it has been held that upon an offer to guaranty, a compliance with the offer is not sufficient; notice must also be given to the proposing guarantor that his terms are accepted: 1 Pars. Cont. 478, note h, *McIver v. Richardson,* 1 M. & S. 557; *Mozley v. Tinker,* 1 M. G. & R. 692; *Cope v. Albinson,* 16 E. L. & E. 470; *Shewell v. Knox,* 12 N.C. 404, 2 Pars. Cont. 13. These cases are strictly analogous. The same principle (753) must necessarily apply to an offer to purchase goods, as to an offer to make any other contract.

In the case of an order for goods, such as in this case, where a certain time, more or less considerable, must be consumed in obtaining or manufacturing them, so that there is a delay in complying with the order, it would be unreasonable to hold that the party making the offer to purchase, was to remain ignorant during all such time, whatever its duration may be, whether or not the vendor had assented to his offer; and to remain bound while the other was loose; and finally to receive no other notice that his letter had been received and his offer assented to, than such as may be implied from a delivery of the goods to a common carrier. Instead of being only for a carpet, which, as it happened, required only ten or eleven days to be prepared for use, the offer might have been for a steam-engine, or other elaborate article which would require months in its fabrication; or, it might have been for an article of fluctuating value, which, if the rule contended for, were established, the vendor might legally send or not, according to his interest. The value or the character of the goods cannot change the principle of law requiring an assent to the proposal. To hold otherwise will be, in my opinion, to violate a recognized principle of universal commercial law, to encourage negligence and a wanton disregard of settled commercial usage; and to introduce a perplexing and injurious uncertainty into a very important class of commercial dealings.

But it is said, it was the duty of the Express Company to have given notice to the defendant of the arrival of the goods. This may be conceded. But the question would still remain, whether such notice would have been a sufficient and legal assent by the plaintiff. I think it would not have been, because not in reasonable time *for that purpose.* Moreover, if the Express Company neglected (754) their duty in this respect, to whom is it liable? To the owner of the goods, certainly; but the question of ownership is the one in controversy, and it is a begging of the question, to assume that the defendant could recover of the Company for such omission.

Again, it is said, it was the duty of the defendant to have called at the Express office in Wilmington, where he would have heard of the arrival of the goods. But how could this duty be thrown on the

defendant, until he had received an answer to his letter to the plaintiff? Was it not more convenient for the plaintiff to answer that letter, than for the defendant and all others similarly situated, to call daily at the Express office, for an indefinite time, inquiring for goods which they had received no notice would be sent? Is this the common usage in the great commercial cities? If it is, it could scarcely fail to be well known to us from the inconvenience it would occasion. How long was the defendant to continue calling? I think these questions cannot be answered without displaying the erroneous conception on which the whole argument for the plaintiff is founded.

Again, it is said, the plaintiff is a dealer in carpets, and offered to all the world to sell them; and that the letter of the defendant, therefore, instead of being an offer to purchase, was, in fact, an assent to the plaintiff's offer to sell. This principle, it is true, applies to a class of cases in which a public officer, or a private individual, offers a certain reward to any one who will capture an offender. In such cases, the terms are fixed and certain, and the doing the act for which the reward is offered, before the offer is revoked, and notice that it has been done, suffices. But those cases are *sui generis*, and a well known exception to the general rule, which arises out of the impossibility of giving a previous assent to the offer. When was such a principle ever applied to the case of a merchant or
(755) manufacturer? Is such an one so notoriously bound to manufacture and send his goods to every one who will send him an order, C. O. D., that the person sending such an order, has no occasion to look for a reply to his letter, but may confidently go to the Express office to get them in a reasonable time for their manufacture after the receipt of his order in due course? How can he know how long it will take to manufacture the goods, or that the merchant will trust him to pay on delivery? The goods may be spoiled in the course of manufacture for the use of all others. The merchant or manufacturer may be out of the particular goods, or he may have quit business, or there may be many other reasons to prevent a compliance. There is no proof that the plaintiff in this case offered his goods for sale, otherwise than as merchants and manufacturers in general do, and it will probably take the mercantile community somewhat by surprise, to discover that the consequences of a general advertisement are such as are supposed.

As to the second ground: All the reasons which support the necessity for an assent to an offer to purchase, imply that the notice of the assent must be to the proposed purchaser in person, or to some agent appointed by him *for that purpose*. Did the defendant appoint the Express Company his agent for that purpose? The defendant in fact never made the carrier his agent for any purpose, even

to receive the goods — *he offered to do so;* — but to say that this offer, unaccepted by the plaintiff, was a complete and effective contract for that purpose, is to beg the very question we are discussing, and to confound all distinction between an offer to contract, and a completed contract.

But, waiving that point, it seems clear that the defendant never made, or intended to make, the carrier his agent to receive notice of the acceptance by the plaintiff, of his offer to purchase. Brown, (Actions, 200,) takes the distinction thus: *"Where the sale is complete,* so that the vendee is bound at all events to re- (756) ceive the goods, or, if he do not, is liable to an action by the vendor for the price, a delivery by the vendor to the carrier, is, in law, a delivery to the vendee," etc. "But where the sale is not complete, (as in the case of a sale of goods above the value of 10 L., where the provisions of the Statute of Frauds have not been complied with,) a delivery to a carrier not named by the vendee, is not sufficient, as there must be an acceptance by the vendee, (within the meaning of the Statute,) as well as a delivery by the vendor. And an acceptance by a carrier not named by the vendee, is not an acceptance by him." He says that the question in a case where the carrier was named by the vendee had not been decided, but in a note he intimates the opinion that such naming would make no difference. Certainly the mere offer to authorize the carrier to receive the goods in this case, cannot be construed to confer on the carrier, the additional power of completing the sale. The naming the carrier simply as carrier, can confer on him no power beyond that of carrying the defendant's goods. Whether or not any particular goods were the defendant's, must depend on the proof of the contract between him and the plaintiff, and is independent of any act of the carrier.

It being thus shown that the defendant by naming the carrier gave him no authority to contract for him, or to receive the plaintiff's assent to his offer; did any such authority result simply from his employment and duty as a public carrier? If such be the power of a public carrier, and such the result of a mere delivery of goods to him, why has it ever become a general, if not universal, usage, for a consignor to take from the carrier a bill of lading receipt or equivalent document, and to forward it to the consignee? If the carrier is so far the agent of the consignee, that a delivery to the carrier must be presumed to be known *eo instanti* to the assignee, such a custom would for most of its purposes be unnecessary, and (757) could never have grown up. That it is a usual, and ordinarily an indispensable duty of a consignor on a shipment by sea, is too notorious to need, or to find, support from decisions. It is also usual

on a shipment by river or canal: 1 Pars. Ship. and Ad. 180; *Dows v. Green,* 16 Barb. 72; *Bryans v. Nix,* 4 N. & W. 775. Such a document is the symbol of property: without it, in general, upon a shipment, the property does not pass to the consignee, and certainly a consignor who omitted to take and forward it, would be liable to the consignee for all damages which might result. That the same rule applies on land, we have high authority. Mr. Parsons says: (1 Ship. & Ad. 186) "It is now quite common for our railroad companies and perhaps other carriers to give a receipt closely resembling a bill of lading, etc." And Chancellor Kent (2 Com. 499) says: "A delivery to any general carrier, when there are no specific directions out of the common usage, is a constructive delivery to the vendee; and the rule is the same, whether the goods be sent from one inland place to another, or beyond sea. The delivery to the agent must be so perfect as to create a responsibility on the part of the agent to the buyer, and if the goods be forwarded by water, the vendor ought to cause them to be insured if such had been the usage, *and he ought in all cases to inform the buyer with due diligence, of the consignment.*"

In *Clarke v. Hutchins,* 14 East. 475, Lord Ellenborough says that when a vendor receives an order for goods to be forwarded by a carrier, it is his duty to deposit them with the carrier in the usual and ordinary way, and with the usual precaution, and to do whatever is necessary to secure the responsibility of the carrier for the safe delivery of the goods, and to give the purchaser an indemnity in case of loss. In *Buckingham v. Levi,* 3 Camp. 414, it was held to be the duty of a vendor in such a case to take a receipt, and
(758) that a mere delivery without taking a receipt, and (as is implied) sending it to the vendee, would not charge the vendee. See also 1 Pars. Cont. 533.

If the necessity for this custom were not proved by its existence, many reasons might be assigned for it. Without some document of title, (bill of lading, receipt or correspondence, *Bryans v. Nix, ub. sup.)* the consignee might have a difficulty in obtaining possession of the goods; he might want to insure them during their transit, or to sell, or to borrow money on them. The rule must be the same whether the goods be a carpet, or many bales of cotton. Neither can it make any difference whether the voyage be a short one, as from Baltimore to Wilmington, or a comparatively long one, as from San Francisco to New York; or whether it be wholly by land or water, or partly by both. The rules of law are founded on deeper principles than to be affected by such accidents as the nature of the highway, or of the vehicle.

Per curiam.

Affirmed.

Cited: Ober v. Smith, 78 N.C. 316; *Bank v. Miller,* 106 N.C. 349; *Hunter v. Randolph,* 128 N.C. 92; *Cowan v. Roberts,* 134 N.C. 421; *Stone v. R. R.,* 144 N.C. 229; *Waters v. Annuity Co.,* 144 N.C. 669; *Gaskins v. R. R.,* 151 N.C. 21; *Pfeifer v. Israel,* 161 N.C. 414; *Gardner v. Telegraph Co.,* 171 N.C. 409; *Early v. Flour Mills,* 187 N.C. 345; *Golding v. Foster,* 188 N.C. 218; *Building Co. v. Greensboro,* 190 N.C. 504.

(759)

C. H. WOMBLE, EX'R., ETC., AND OTHERS v. A. M. GEORGE AND WIFE.

In a case where the creditors of an estate refused to receive Confederate money for their debts, it was held that the executor was not chargeable for failing to sell slaves which came into his hands in May 1863, and were afterwards lost by emancipation; but that he was chargeable as for the subsequent hire of such slaves.

An executor is not chargeable with the rents and profits of the realty. He is not to be credited with sums paid for taxes due upon *the land* after the testator's death; nor with money advanced to procure supplies for the widow and her family after her husband's death.

EXCEPTIONS to a report, tried by *Tourgee, J.,* at Spring Term 1870 of CHATHAM Court.

The plaintiff C. H. Womble, as executor of Cornelius Womble, deceased, filed his bill in equity, alleging the loss of the personalty belonging to his testator by *accident,* connected with the results of the late war, and asking for license to sell the realty, for the purpose of paying debts. The answer set up as a defense, that the personalty had been lost, not by *accident,* but by the *laches* of the plaintiff's predecessor in his office as executor. There was a reference upon this issue. The referee made a report, and exceptions were filed thereto by both parties.

The testator died in March 1863, bequeathing to his widow and children a considerable estate, real and personal, and appointing his four sons executors. Of these Jehu qualified at May term 1863. He was conscribed into the Confederate army, October 6th, 1864, was afterwards captured, and died in captivity in May 1863. The plaintiff qualified as executor at November term 1865. This bill was filed to Fall term 1867.

It is unnecessary to state the contents of the will, except that

the testator devised to the defendants a tract of land "after
(760) paying me the purchase money for said land, which is about $480, and if they fail to pay the purchase money with the lawful interest, etc., as much as may remain unpaid is to be taken out of their portion of my estate." In the event it turned out that there was no *portion* of the estate going to the defendants; whereupon they claimed that, as this result was owing to the laches of the executor, he, and not they, were chargeable with the $430 and interest. On the other hand the executor claimed that it was a subsisting debt, charged upon the land, and to be paid to him as a part of the personal assets.

After the qualification of Jehu Womble, upon learning that the creditors of the estate would not receive Confederate money in payment of their debts, he turned over the personalty, consisting of slaves, stock upon the farm, furniture, etc., etc., with the general consent of the creditors and legatees, to his mother, the widow, for safe-keeping, and they remained with her upon the land of the testator, the slaves, until they were emancipated, and the other property, until her death in October 1865.

Upon the qualification of the plaintiff, it was found that the personalty, other than slaves, was much wasted and depreciated. A sale of what could be found thereof was had. The proceeds being insufficient for the purpose of paying the debts, this bill was filed.

So much of the report as the discussion in the Opinion renders it necessary to state, is:

1. That Jehu Womble was to be charged with the value of the slaves and other personal property, inventoried by him.

2. That he was to be charged also with the rents of the land.

3. That he was to be credited with receipts for taxes paid
(761) upon the property of the testator for 1863-'4-'5.

4. That an account presented by one S. T. Womble for $94.02, was not due from the estate.

The facts in connection with this item were stated to be, that it was for thirty bushels of wheat lent by S. T. Womble to Jehu to enable him to pay an account due by the estate to a physician, for attendance upon the testator.

5. He did not charge him with the proceeds of the lands whilst in his mother's possession.

Each party filed several exceptions to this report. Of these it is important to state only the following:

Exception 3rd *by the plaintiff,* That Jehu Womble, was charged with the value of the slaves;

4th. That he was charged with the other personal property by him inventoried;

5th. That the account of S. T. Womble was not allowed.

Exception 2d, *by the defendant,* Because the referee did not charge Jehu Womble with the hire of the slaves for 1864, and parts of 1863 and 1865;

3d. Because he credited him with the tax receipts;

5th. Because he credited him with money paid by him for salt, cotton, a plow, etc., furnished to the widow after the testator's death.

His Honor overruled all the exceptions upon both sides. Each party appealed from so much of the judgment as overruled the exceptions filed by them respectively.

Headen and Phillips & Merrimon for the plaintiffs.
Manning contra.

DICK, J. The exceptions filed by the plaintiff and defendants raise objections to nearly every part of the report of the referee. We will consider the legal questions which arise on the report, without following the precise order in which they are (762) presented.

Cornelius Womble died in the Spring of 1863, leaving a will in which he disposed of his estate by various devises and bequests. At May Term 1863, the will was admitted to probate, and Jehu J. Womble, one of the executors, was duly qualified. As there was no money on hand, under ordinary circumstances it would have been the duty of the executor to sell the personal property, and pay off the debts of the estate. Upon inquiry, he ascertained that the principal creditors would not receive Confederate money in payment of their debts.

In the summer of 1863 Confederate money was the only currency of the country, and the personal property could not have been sold for its full value if payment had been demanded in specie.

Under these circumstances, the executor, with the assent of most of the creditors and other persons interested, placed the property in the possession of the widow, the principal legatee, to be kept until there should be a more favorable time to make a sale. We think that the executor acted wisely in not selling the property, and that he is only accountable for such property as was wasted or lost by the negligence of his agent. He was compelled to have an agent to take care of the property, as he was conscripted and carried to the army in 1864, and died in the military service. He selected a prudent agent who was interested in taking good care of the property, and is not liable for loss occasioned by ordinary use, natural causes, accident, or by operation of law: *Finger v. Finger, ante* 183; *Fike v. Green, ante* 665.

The real estate was not under the control of the executor, and the rents and profits did not constitute assets. The real estate passed to the devisee subject to the power of the executor to obtain a license to sell for the payment of debts upon a deficiency of personal (763) assets; *Floyd v. Herring, ante* 409; *Fike v. Green, ante* 665.

The executor, prompted by natural affection, allowed the negroes to remain on the farm, and labor for the support of his aged mother and dependent sisters, but in law he is chargeable for hire, if all the negroes, taken together, would have yielded a profit. His kindness to his mother did not free him from legal obligation, but it ought to appeal successfully to the generosity of his brothers and sisters.

The fourth exception of the defendant must be allowed so far as it relates to taxes on the land, as it was not the duty of the executor to pay such taxes.

The fifth exception of the defendant must be allowed, as the articles were not purchased for the benefit of the estate. But the amounts must be properly scaled.

The fifth exception of the plaintiff must be allowed, as the account of S. G. Womble was a debt against the estate.

The sum of $430 mentioned in the will, is a part of the personal estate, and is a charge upon the Moran tract of land, and must be collected by the present executor and accounted for in his settlement.

As the report will be reformed, we have not noticed the exceptions as to the commissions allowed.

There was error in the ruling of his Honor upon the exceptions, and the report must be reformed in the particulars above indicated.

As both parties appealed, and some of the exceptions of each side are allowed, neither party is entitled to costs in this Court.

Let this be certified.

Per curiam.

Ordered accordingly.

Cited: Speed v. Perry, 167 N.C. 129; *Barbee v. Cannady,* 191 N.C. 533.

(764)

WILLIE WALSTON v. BATTLE BRYAN.

In a case where, prior to the act suspending the C.C.P., judgment had been taken in the Clerk's office for want of answer, etc., and the defendant appealed to the Judge: *Held*, that the Judge had power to strike out such judgment, and allow an answer or demurrer to be filed.

The interest which a lessor reserves, for rent, in the crop of his tenant, is not, before a separation thereof, liable to be levied on, under an execution against the lessor.

CIVIL action, before *Jones, J.*, at Chambers, for EDGECOMBE, March 16, 1869.

The complaint stated that the plaintiff was assignee of one Griffin, of a crop of cotton, (26 bales,) raised by the latter, upon land leased to him by John L. Bridgers as executor of one Powell; that Griffin was to have paid Bridgers one-fourth of the crop for rent, but claimed that as Bridgers owed him a debt, contracted by a partnership of which Bridgers had been a member, which was greater than the value of the rent, therefore he would retain the rent due to *him* as executor; and that the defendant, as sheriff, had levied upon and sold six bales of the cotton, after it had been bought by the plaintiff, under an execution against Bridgers as executor of Powell. It demanded judgment for the money realized by the defendant at such sale.

The summons was issued, and service thereof was accepted, upon the 26th of January 1869. It was returnable to the Clerk's office, and required an answer or demurrer within twenty days, etc. On the 3d day of March 1869, the plaintiff demanded judgment, as no answer or demurrer had been filed. This was resisted by the defendant, upon the ground that the complaint did not set forth a sufficient cause of action, and he moved to dismiss the action upon that account.

The Clerk refused to allow such motion, and the defendant appealed to the Judge. (765)

At Chambers, the defendant renewed the above motion, and also moved to vacate the judgment and to be allowed to demur.

These motions were overruled, and the defendant appealed to this Court.

Howard for the appellant.
Battle & Sons contra.

RODMAN, J. For the reasons given in *Thomas v. Womack, ante* 657, we think the Judge had the power to allow all amendments of

the process and pleadings which were necessary to bring the case before him for decision on its merits.

Without injustice to the Judge, we may assume that he would have allowed all such amendments if he had thought it within his power to do so. This Court has frequently recommended to the Judges a liberal allowance of amendments in the process and pleadings, when the object is to present a case fairly, on its merits. It is the object of all systems of procedure and pleading, that cases should be so tried, and every case that goes off otherwise than by a decision on its merits, except where one party is grossly negligent, is a discredit either to the system or to the pleaders. We think that we are at liberty to consider this case, as if the proper amendments were made, and as if the defendants had demurred generally to the complaint. We suppose that a decision from this point of view will be more acceptable to the parties, than one which would merely send it back to the Judge, to allow amendments which would at last bring it, to this question.

We are of opinion that the plaintiff states in his complaint a sufficient cause of action. It has been often decided that where
(766) a tenant agrees to pay a certain part of the crop as rent, the property of the whole crop is *in him* until the decision. The principle is the same, when the landlord is to pay a certain part of the crop to a laborer for his wages; in such case, the property in the crop is with the landlord until a decision. In whom the property remains until the separation, depends in all cases upon the agreement; it is not a rule of law, it is simply a question of the interpretation of a contract. He who owns the soil during the year, owns the crop raised on it. Here the declaration states that Bridgers rented the land to Griffin, who agreed to pay part of the crop as rent; the separation therefore was to be made by Griffin, and the property in the whole crop vested in him until the separation was made. Here it was never made. The claim of Griffin to a set off against the rent, is wholly immaterial, and does not affect the case. Neither does any question of the lien of a landlord on the crop for rent, arise here. Such a claim is personal to the landlord, or to his assignee, and the defendant who represents an execution creditor of the landlord, is not such assignee. In other words, the right of the landlord to the rent, was a mere chose in action, which perhaps a creditor might have made available by supplemental proceedings, under sec. 264, *et seq.*, of the C.C.P., but certainly his execution gave him no right, by a mere levy to separate the rent from the whole crop, and then to sell any particular bales of cotton as being that share. The rent, for aught the creditor could know, might have been paid, in whole or in part; certainly he could not know that any particular six bales

of cotton represented that rent. The execution in the hands of the defendant authorized him only to levy on the tangible property of Bridgers; the cotton which he levied on, was not the property of Bridgers at all, but of the plaintiff. The act of the defendant, therefore, was unlawful, and the plaintiff might recover from him, either the value of the cotton, or the sum which the defendant (767) sold it for. The plaintiff claims only the last. Considering a general demurrer to have been entered, we think it should have been overruled.

The judgment of the Court below, therefore, was substantially right, and is affirmed.

The plaintiff will recover his costs in this Court.

Per curiam.

Judgment affirmed.

Cited: Harrison v. Ricks, 71 N.C. 11; *Kesler v. Cornelison,* 98 N.C. 385; *Nassaney v. Culler,* 224 N.C. 327.

WILLIAM CRUMP v. J. H. MIMS AND OTHERS, TRUSTEES, ETC.

If a road be dedicated by the owner of the soil to the use of the public, and be used by them under such dedication, it becomes a public road *immediately;* it is only for the lack of other evidence of dedication, that the lapse of twenty years is resorted to.

Where the dedication of a public road is once established, either by the lapse of time or otherwise, such obstruction or disuse as will afterwards defeat the dedication, must continue for twenty years.

A public road over a ford is not done away with by the building at the same passage, a bridge which affords the public a more acceptable transit, provided that the ford is used when the bridge is out of repair, or down; and this, even where the owner of the adjacent lands erects a fence across the approaches having a slip gap in it at the road, which is used by the public whenever they have occasion to pass.

The raising of the water at the ford by a dam of a Navigation Company chartered by the State, so as to render it unfordable, only suspends *the use* of the franchise, and upon the destruction of the dam enjoyment of the franchise is restored.

The rules of pleading at common law, in regard to *materiality, certainty, prolixity, obscurity,* etc., prevail under the Code of Civil Procedure.

INJUNCTION, before *Tourgee, J.,* on a motion to dissolve, at Spring Term 1870 of CHATHAM Court.

The defendants, as Township Trustees, had employed one
(768) Thomas to open, from the abutments of a bridge, a way to an old ford across Cape Fear River at Haywood; and upon his doing this, the plaintiff, who owned the land at that place, brought this action for damages, for pulling down a fence, etc., and for an injunction. He obtained an order of restraint in vacation. At term the defendants answered, alleging that the way opened by them was a public road; and thereupon they moved to vacate the order.

It appeared by the testimony that the ford was known as *Quilla's Ford* as far back as in the year 1799; there being some evidence that the owner of the land had dedicated the passage to the use of the public even before that date. Previous to that time the town of Haywood had been laid out, with one of its principal streets leading to the ford. Previous to 1818, the ford was part of a road worked and used by the public. In 1818 a bridge was built across the ford, which, after standing for six or eight years, was washed away. While the bridge stood, both it and the ford were used, at the option of travelers, and the ford continued to be used after the destruction of the bridge. Afterwards another bridge was built, which was carried away in 1830. During its continuance, the ford was used whenever convenient.

In 1835 or 1836, another bridge, called Minnis', was erected, which stood about *fifteen* years. In 1837 or 1838, a fence was built across the passage to the ford, *i.e.*, as we assume, on the *locus in quo*, which remained until the bridge was removed, except when temporarily swept away by freshets. This fence was provided with draw bars, which were let down by the travelling public at pleasure, and the ford was used whenever the bridge was unsafe. In 1852 or 1853, another bridge was erected, which remained until 1854, and the ford was used as before. A dam of the Deep River Navigation Company raised the water at the ford so that it could not be used
(769) until 1865, when the dam was burned.

His Honor allowed the motion to vacate; and the plaintiff appealed.

Howze for the appellant.
Phillips & Merrimon contra.

RODMAN, J. (After stating the case as above.) The above statement of facts fully supports, we think, the general conclusions arrived at by his Honor. We are not called on to make a final decision on the facts. This will be the duty of a jury hereafter, when the parties go to trial upon the issue joined. Our duty is only to say

whether the plaintiff has made a case entitling him to a continuance of the injunction.

It seems to us that he has not.

Independent of the long use, there is *some* evidence tending to show that before 1799 the then owner of the *locus in quo* had dedicated a road over it to the public. It does not require a user of twenty years, or of any definite time, for this purpose; any act done by an owner which clearly shows such an intention on his part, and a subsequent use by the public will suffice: *State v. Marble,* 26 N.C. 318.

Putting that aside, however, it seems that ever since a time prior to 1799, the ford, and of necessity the approach to it, which is the *locus in quo,* has been used by the travelling public at its pleasure or convenience, with no other obstruction than the fence with bars, which existed for about fifteen years after the building of Minnis' bridge in 1837. Put aside for the present the effect of such an obstruction, we see no argument which can be urged against the acquisition by the public of the franchise in controversy. It is not disputed that a user for twenty years will raise a presumption in favor of a public road: *Woolard v. McCullough,* 23 N.C. 437.

In this case the user seems to unite all the requisites: it (770) was over a road leading from a town to the capital of the State; it was sufficient in time; it was *"nec vi, nec clam, nec precario."* The erection and public use of a bridge over, or along side of, the ford, was no interruption or abandonment of the right to the ford and its approaches, although it might, and doubtless did, diminish the frequency of its use. There may be two public roads parallel and contiguous to each other, or super imposed one above the other, as is often the case when a railway crosses another road at a different level.

Then what is the effect of the erection of bars by the plaintiff? We are referred, on this point, to *Ingram v. Hough,* 46 N.C. 39, to show that such an exercise of authority rebutted the presumption of the easement. But we do not think that case supports the plaintiff's view. In the first place, the road there claimed was a private one, not capable of being granted by a parol dedication, as a public road may be; it did not appear to have been used for twenty years before the erection of the gates; it had been turned by the defendant, with the acquiescence of the plaintiff; and there were other circumstances; all of which justified the Judge in leaving it to the jury to say whether the presumption of a grant was not rebutted.

In this case, the full period had run in favor of the public, and a right to the franchise must be presumed to have existed when the obstruction began. The burden is on the plaintiff to make good, his

claim in derogation of the public right. No doubt, on a non-use of a public road for twenty years, an abandonment by the lawful authority would be presumed; and so after an acquiescence in an obstruction for that time of a right to continue it. But the plaintiff lacks the capital element, of time. Moreover, the ford was
(771) not abandoned; when it was impassable, or the bridge was in good order, the public, having no inducement to use the ford, permitted the plaintiff to keep up his bars, but under other circumstances they left them down. But as we wish carefully to abstain from saying anything which might prejudice the plaintiff in case of a trial by jury, we express no opinion as to the character of the occupation.

The disuse of the ford while the water was raised by the dam of the Deep River Company, can have no bearing; a right given to that Company cannot help the plaintiff. When the dam was burned, the ability of the public to use the road returned; the *right* was never suspended.

We take occasion here to suggest to pleaders that the rules of the common law as to pleading, which are only the rules of logic, have not been abolished by the Code. Pleas should not state the evidence, but the facts, which are the conclusions from the evidence, according to their legal effect; and complaints should especially avoid wandering into matter which if traversed would not lead to a decisive issue. It is the object of all pleading to arrive at some single, simple and material issue. If the plaintiff alleges immaterial matter, if traversed it leads to a jury trial, and consequent expense and delay, and upon such a verdict no judgment can be pronounced. To use the present case as an example: the plaintiff might have alleged simply a trespass on his land, and put the defendants to justify under the right of way. The statement of the facts going to support the plaintiff's demand for an injunction, should have been put in an affidavit separate from the complaint; and so of those alleged by the defendants in answer. Argumentative pleading is demurrable, the error, however, should be distinctly pointed out. The Judge will allow an amendment, of course, but ordinarily it will only be on payment of costs.

The injunction was properly dissolved. The defendant will
(772) recover costs in this Court.

Per curiam.

Affirmed.

Cited: S. v. Long, 94 N.C. 899; *Lassiter v. Roper,* 114 N.C. 18; *Webb v. Hicks,* 116 N.C. 604; *Clark v. Guano Co.,* 144 N.C. 72;

Tise v. Whitaker, 146 N.C. 376; *Moore v. Meroney,* 154 N.C. 163; *Threadgill v. Wadesboro,* 170 N.C. 642; *Haggard v. Mitchell,* 180 N.C. 261; *Draper v. Connor,* 187 N.C. 21; *Bynum v. Bank,* 219 N.C. 119; *Chason v. Marley,* 223 N.C. 740.

CAROLINE FERGUSON v. STEWART HAAS.

In all cases where there is a transmutation of possession under a deed, and, by any means other than a declaration of an express trust in writing, the trust estate becomes disjoined from the legal estate, parol evidence of the acts, dealings and declarations of the parties, becomes competent, to ascertain the nature and limits of such trust; *therefore*

Where A made a deed for land, without consideration, to his brother, B, and the latter, afterwards, under a parol agreement with A, bought the same land, when sold under executions against A, and both continued to live together upon such land for several years, and until their deaths; upon a controversy arising between their respective heirs, in regard to the title: *Held,* that the facts in regard to the manner in which the money that was paid at the sheriff's sale was raised, and the terms upon which A and B lived together upon the land, as well as the declarations and admissions of B as to the rights of A in the land, were competent evidence to establish a trust in said land in favor of A.

BILL in equity, filed in 1866, and heard upon bill answer and proofs, by *Mitchell, J.,* at Spring Term 1870 of CALDWELL Court.

The bill alleged that Allen Ferguson was seized of a certain piece of land; that John Ferguson, his brother, and one Langston, his brother-in-law, had obtained judgments against him; and that their executions had been levied on the land. Allen was (773) then in prison; and it was agreed between him and John, that Allen should convey the land to John, who should also buy it in at the execution sale, and hold one-half of it in satisfaction of the execution debts, and the other half in trust for Allen in fee. In pursuance of this agreement, Allen, on Sept. 8th 1858, made an absolute deed in fee for the land to John, and shortly afterwards John bid it off at the execution sale, for $1300, it being worth $2500 or $3000, and took a deed from the Sheriff to himself alone. As proof of the agreement as to the ownership of the land, it was stated that $800 was borrowed for the benefit of Allen, from one Earnst, and that a mortgage was made to him (it is not said by whom) to secure that sum, which was subsequently paid off by Allen; but the mortgagee re-conveyed to John. Allen resided on the land up to his death, and

his widow and children (the plaintiffs) have so continued up to the filing of the bill. Allen and John cultivated the land together, and divided the crops, and also the rents, equally; John during his life frequently admitted verbally, that Allen owned half the land, and both John and Allen treated it as their common property. John died, and his administrator filed a petition to sell the whole of the land as his property, to pay his debts. The plaintiffs pray that the heirs of John may be declared trustees for them, as to one-half of the land, and for other relief, etc. The defendants answered, and evidence was taken; and upon the hearing, the Judge found a state of facts in substance such as that stated in the plaintiff's bill. His Honor decreed for the plaintiffs, and the defendants appealed. The case was argued as upon a general demurrer to the bill, admitting the facts charged.

(774) *Folk for the appellants.*

At common law a *use* might be raised on anything which passed by feoffment and livery, but when the thing could not pass without deed, a deed or writing was required to raise the use: Gilbert on Uses, 260, 271, 2 Story's Eq. Jur. 235. When, afterwards, a deed was required to pass lands, a deed or writing became necessary to raise a use therein: *Brothers v. Harrell,* 55 N.C. 209.

2. All contracts to sell or convey lands, or any interest in them, shall be in writing. Rev. Code, ch. 50, sec. 11. In contemplation of a Court of Equity, a *trust* is embraced in the words *lands* or *interest,* etc. The *forum* where they are litigated, constitutes the only difference between trusts and legal estates. Whatever would be the rule of law, if it were a legal estate, is applied in equity to the trust. The same canons of descent are applied to both, they are subject to the same division: of freeholds and inheritances; of freeholds and less than freeholds; of estates in possession, remainder and reversion; of estates divided and undivided. They are liable to the same laws against perpetuity, legal charges, devolution and transfer. The trust, and, the land, are convertible terms. The word *land,* in a Court of Equity, should read *trust,* or a mischievous exception is made to the maxim, *equitas sequitur legem.* This construction is sustained by the rule applied where deeds absolute are converted into mortgages. A mortgagee is a trustee, first to secure his debt, then for the mortgagor; there is no difference between him and a trustee proper. A provision requiring trusts to be proved by writing, was necessary in the English statute, not in ours. Uses at common law stood upon their own reasons, differing from cases of possession. When, after the statute 27 Hen. 8, the Court of Chancery re-acquired jurisdic-

tion of them under the name of trusts, the chancellor applied the rules of construction which had made uses odious, and continued so to construe them until Stat. 29th Cha. II. The clause in that statute concerning trusts, was to compel the chancellor (775) to conform to the rules regulating legal estates. It would have been unnecessary, had the maxim "equity follows the law" been then established; it was not established until Lord Nottingham held the Great Seal. But when our statute was passed, it was constantly applied. Equity follows statutes. Trusts are entailable, although *tenements* is the only word used in the statute. By *Dedonis,* fines are levied, and recoveries suffered, of them, and these are as necessary to bar equitable as legal estates. A devise of a trust must be with the same ceremony as a devise of a legal estate; a jointure of a trust is as good as one of legal estate, to bar dower and is a "competent livelihood of freehold" for that purpose. Some analogy exists with regard to the statute of limitations, and statutes generally. If a trust of land may be raised by parol, it may be transferred by parol, and thus the good intention of the statute, by a small evasion, is taken away, and evils, boundless in their range and pernicious in their consequences, introduced: Kent, Com. vol. 4, p. 914; Green. Cruise, vol. 1, p. 392; *Burgess v. Wheate,* 1 W. Blackstone's Rep. 160. If the parol agreement was, that John was to re-convey one-half of the land to Allen, then the bill cannot be maintained: *Campbell v. Campbell,* 55 N.C. 364.

On the question of fraud, see *Burroughs v. Jenkins,* 62 N.C. 93.

Malone contra.

1. It is well settled in this State that a "trust" in regard to lands may be declared by *parol,* and that the enforcement of the execution of a trust is not within the statute of frauds: See this same case, 62 N.C. 113; *Cloninger v. Summitt,* 55 N.C. 513; *Lyon v. Chrisman,* 22 N.C. 268; *Steel v. Black,* 56 N.C. 427; *Hargrave v. King,* 40 N.C. 430; *Turner v. King,* 37 N.C. 132; *Shelton v. Shelton,* 58 N.C. 292; *Cohn v. Chapman,* 62 N.C. 94; *Seymour v.* (776) *Freer,* 8 Wall. 213; *Riggs et als. v. Swan, Adm'r,* 59 N.C. 118.

2. The *confidential relation* of the parties — their conduct — their mode of treatment of the property, the inadequacy of consideration, together with other facts in the case, are sufficient to create a trust by implication of law, without the proof of a declaration of a trust: 2 Story's Eq., Jur. 1255, 1231; Adams' Equity, 153, 163; *Futrill v. Futrill,* 58 N.C. 61; *Estis v. Hartley,* 62 N.C. 167.

3. The defendants have not relied upon the statute of frauds, in their answer: *Lyon v. Chrisman,* 22 N.C. 268.

RODMAN, J. (After stating the facts as above.) The defendant contends that the case made by the bill is simply that of an oral declaration of a trust of the legal estate, which is invalid, by reason that the statute of frauds, Rev. Code, ch. 50, sec. 11, avoids all contracts to sell or convey any lands, etc., unless put in writing, and signed by the party to be charged therewith. His counsel, in an able and ingenious argument, endeavored to maintain that although the provision which is found in the English statute of frauds, 29 Car. II, c. 3, requiring all declarations of trust to be evidenced in writing, is not found in our statute, yet what is above cited is equivalent to it, and forbids a valid declaration of trust, except it be evidenced by writing.

He admitted that the decision in *Shelton v. Shelton,* 58 N.C. 292, was opposed to his view, and argued that that decision was an innovation, opposed to reason and authority. We think the counsel misapprehended the case of *Shelton v. Shelton,* and also the case of the present plaintiffs. The case in *Shelton v. Shelton* was, in substance, this: Mrs. Morgan purchased a piece of land, and caused the deed to be made to her grandson, Vincent Shelton. By a principle (777) of common application in the English, as well as in our, law, in the absence of any proof to the contrary, a presumptive trust would have arisen in favor of Mrs. Morgan; and after her death, her heirs filed the bill to enforce such a trust against the defendants, who were, the mother of Vincent Shelton and her children. *To repel this presumption,* and substitute a different trust from the one which the law presumed, the defendants proved oral declarations and acts by Mrs. Morgan, tending to establish a trust for them; and, among other things, a possession by them for many years during her life. Whether or not mere oral declarations by a holder of the legal estate are sufficient to create a trust for the benefit of a stranger, it is clear that no such point was decided in *Shelton v. Shelton.*

The authorities cited in 1 Spence, Eq. Jur., 495-497, prove that prior to 29 Car. II. declarations of trusts by words only were theoretically allowable, although we may suppose that such evidence by itself would be rarely deemed sufficient. As late as 28 Car. II. (1676) Lord Nottingham said, Express trusts are declared either by word or writing; and these declarations appear either by direct and manifest proof, or violent and necessary presumption. These latter are commonly called presumptive trusts; and that is when the Court upon consideration of all circumstances presumes there was a declaration either by word or writing, although the plain and direct proof thereof be not extant; *Cooke v. Fountain,* 3 Swanst. 291.

The statute of Charles, passed in the next year, avoided all declarations of trusts not evidenced by writing, but, by section 8, expressly excepted such trusts as are presumed by construction of law, *(Spence, ub. sup.)* and, under the heads of implied resulting and also constructive trusts, the English Courts have familiarly enforced a vast number of trusts not evidenced by writing. A common instance of a resulting trust is that, where one person pays (778) the consideration for land conveyed to another, as in *Shelton v. Shelton.* But in such a case it is the constant practice of the English Courts to permit the presumption to be repelled, and a trust to be established different from what would be presumed upon that state of facts merely, by proof of acts and declarations inconsistent with it. It is only in express trusts of real estate that a writing is required; 1 Spence 571; 2 *Id.* 20; 201 Lewin, Trusts 155; *Dyer v. Dyer,* 2 Cox 93; *Murless v. Franklin,* 1 Swanst. 13; *Sidmouth v. Sidmouth,* 2 Beav. 447. In this last case, (which, however, did not relate to real estate) the Master of the Rolls, after stating the general rule, that a purchase by a parent in the name of a child, is an advancement, says, "but still the relation of parent and child is only evidence of the intention of the parent to advance the child, and that evidence may be rebutted by other evidence, manifesting an intention that the child shall be only a trustee," etc. That cotemporaneous acts, and even cotemporaneous declarations of the parent, may amount to such evidence, has often been decided.

In this point of view, the case of *Shelton v. Shelton* is consistent with the English decisions under their Statute, and of course with our Statute *in pari materia,* which contains no clause making void declarations of trusts not evidenced by writing.

And in this State it is very far from standing alone, as a reference to the following cases will show: *Foy v. Foy,* 3 N.C. 131; *Gay v. Hunt,* 5 N.C. 141; *Henderson v. Hoke,* 21 N.C. 119; *Cook v. Redman,* 37 N.C. 623; *Clement v. Clement,* 54 N.C. 184; *Briggs v. Morris, Id.* 193; *Taylor v. Taylor, Id.* 246; *Riggs v. Swann,* 59 N.C. 118; *Baker v. Evans,* 60 N.C. 652.

We see no occasion to alter any of the expressions in the case under discussion. None of them imply that proof of *mere words* by the owner of the legal estate, will suffice to create (779) a trust; or even that *mere words* will suffice to repel a presumptive trust, though how this last may be, we are not called upon to say. Indeed, it is hard to conceive of a case which could be founded on words only, without some corroborating acts and circumstances.

How does the case stated in the plaintiff's bill, stand in connexion with the matters really decided in *Shelton's* case? Allen Ferguson

owned certain lands; judgments had been obtained, and executions issued against him by John Ferguson and one Langston; these were levied on his land: Allen conveyed the land to John by deed; no money was then paid to Allen; John agreed, by words, to pay off the executions, *for* half the land, and to hold the other half for Allen; in pursuance of the agreement, John bid off the land at the execution sale; during the lives of Allen and John, and for several years, they used and possessed the land in common, according to the agreement; the heirs of John now claim the whole. This is the general case, stated as simply as possible, and with the omission of a great number of circumstances, — such as the mortgage to Earnst, etc., — which are alleged merely as evidence of the material parts of the case. Thus viewed, this bill is certainly not an attempt to create a trust by mere words; it states a case of a conveyance without consideration, in which a trust resulted to the grantor. John, being a trustee for Allen, could not better his condition by his purchase at the execution sale. Therefore, evidence of the acts, dealings and declarations of the parties becomes competent, to ascertain the nature and limits of the trust which is to be attached to the legal estate. This is so wherever a trust is presumed by construction of law, and it would seem to be only saying the same thing in another form, to say that it is so in every case where there is a transmutation of the possession by deed, and, by any means, other
(780) than the declaration of an express trust in writing, the trust becomes disjoined from the legal estate.

The decree of the Judge below is affirmed; the plaintiffs will recover costs.

Per curiam.

Affirmed.

Cited: Cobb v. Edwards, 117 N.C. 252; *Gaylord v. Gaylord,* 150 N.C. 237; *Lefkowitz v. Silver,* 182 N.C. 347; *Cunningham v. Long,* 186 N.C. 531; *Tire Co. v. Lester,* 190 N.C. 416; *Furniture Co. v. Cole,* 207 N.C. 844.

HENDERSON THOMAS v. JESSE A. NORRIS.

In an action for malicious prosecution by a States' warrant for larceny, it appeared, that the warrant had been a joint one, against the plaintiff and one *Tobe*, — that the preliminary oath made by the defendant was, *to the contents of the warrant*, which contained the usual recital, — that the defendant was a man of more than ordinary intelligence, — that the warrant was drawn by his friend, who had come to the magistrate with him, and who afterwards served it, — that in the conversation with the magistrate preliminary to the taking out the warrant, the defendant did not charge the plaintiff with stealing the article, but charged *Tobe*, his own servant, with stealing it, and the plaintiff with harboring *Tobe*, — that upon the trial of the warrant, some sharp words having been used by the plaintiff in regard to the charge, the defendant said that he did charge *him* with stealing; and that the defendant, on the trial, assisted in conducting the examination of the witnesses: *Held*,

1. That evidence going to show that at the time of taking out the State's warrant, the defendant had malice towards *Tobe*, was competent, as going to show the state of his mind at that time towards the plaintiff:

2. That the Judge was warranted in instructing the jury That if they believed the evidence, the defendant had *knowingly* prosecuted the plaintiff for larceny;

3. That he was warranted in declining to instruct them, That if they believed that the defendant did not mean by his affidavit to charge the plaintiff with *stealing*, he could not be liable;

4. And that he was also warranted in declining to instruct them, That if the defendant stated *the facts* to the magistrate, such *facts* not constituting a criminal offence, and the magistrate issued the warrant upon such statement, the defendant would not be liable.

TRESPASS on the case, for malicious prosecution, tried before *Watts, J.*, at December Special Term 1869 of WAKE (781) Court.

Upon the trial it appeared that in February 1868, the defendant and one Wilbourn had applied to a Justice of the Peace for a State's warrant against the plaintiff and one *Tobe*, a colored boy, for stealing a blanket: that during the preliminary conversation the defendant did not charge the plaintiff with *taking* the blanket, but with *harboring Tobe*, the defendant's servant, who had stolen it; that the warrant was drawn by Wilbourn as he was sitting close by the defendant, that, after it was drawn and signed, the magistrate read it over to the defendant, and administered an oath to him as to the truth of its contents; that it was thereupon delivered to Wilbourn, as an officer, to be executed; that during the same day it was tried before the same magistrate; that, upon the trial, the plaintiff, who was shown to be a man of more than ordinary intelligence, examined the witnesses for the prosecution, and that after the plaintiff

had angrily denounced the defendant for making such a charge against him, the latter replied, "I do not charge you with stealing the blanket."

The material parts of the warrant were: "Whereas, this day, information hath been made to me, A. N. Betts, one of, etc., by Jesse A. Norris, on oath, that Tobe Norris, (colored,) and Henderson Thomas, hath stolen and taken and concealed one blue blanket, to the value of three dollars, from said Jesse A. Norris, which is contrary to law and the peace and dignity of the State, this is, therefore, to command any lawful officer to take the bodies of the said Tobe Norris, (colored,) and H. Thomas," etc., etc.

Upon the trial of this action in the Court below, the plaintiff, with a view of showing *malice* on the part of the defendant, offered evidence, that during the day on which the blanket was taken, a very severe whipping had been given to *Tobe,* who was then
(782) a servant of the defendant, in the presence of the defendant, and with his consent.

This was objected to by the defendant as being irrelevant, and calculated to prejudice the jury, but was admitted by the Court.

Upon being requested by the plaintiff so to do, the Judge instructed the jury, that if they believed the evidence, the defendant had knowingly prosecuted the plaintiff upon a charge of larceny.

The defendant requested the Judge to instruct the jury: 1, that if, upon all the circumstances, they should conclude that it was not the real intent and meaning of Norris, in making affidavit before Betts, to charge Thomas with stealing, the plaintiff could not recover; and 2, that if they believed that Norris stated *the facts* in regard to the blanket, to Betts, and that statement did not constitute a criminal offence, and Betts issued the warrant upon such statement, the plaintiff could not recover.

His Honor declined to give the second instruction, on the ground that there was no evidence to support it; upon the former, he charged the jury, that if upon the whole case, they believed that the defendant did not know to what he was swearing, or that he honestly thought that the affidavit charged the plaintiff only with *harboring* an apprentice, the plaintiff could not recover.

Verdict for the plaintiff; Rule, etc. Judgment, and Appeal by the defendant.

Fowle & Badger and Haywood for the appellant.
Phillips & Battle and A. M. & R. G. Lewis contra.

READE, J. I. As the defendant had charged the boy Tobe and the present plaintiff with stealing the blanket, it was competent for

the plaintiff to show the defendant's malice towards Tobe, as tending to show the defendant's malice towards the plaintiff also: *Caddy v. Barlow,* 1 M. & Ry. 275. There is no force, there- (783) fore, in the first cause assigned for error by the defendant.

II. The plaintiff asked his Honor to charge, and his Honor did charge, that if the jury believed the evidence, then the defendant did knowingly prosecute the plaintiff for stealing; and to this the defendant excepted.

The warrant charged the plaintiff with stealing, in plain, unmistakeable language, and the warrant was read over to the defendant, and he swore to it; and he is stated to be a man of more than ordinary intelligence. There is no pretence that he did not understand it, or that it was falsely read, but he puts his objection upon the ground, that in his statement, *outside of* the oath which he made to the Magistrate when he applied for his warrant, and afterwards, he said that he did not charge the plaintiff with stealing the blanket, but that he charged Tobe with stealing, and the plaintiff with harboring Tobe. The answer is, that he swore to the warrant, well knowing that it charged the plaintiff with stealing; and he cannot excuse himself for this false and malicious oath and act, by any accompanying or subsequent words not under oath, that he did not mean to do what he knew he was doing; *Protestatio contra factum, non valet.* If the charge in the warrant did not have his approval, he ought to have refused to swear to it, or to sue it out; but he did sue it out, and tried to convict the plaintiff before the Magistrate under the warrant, all the time admitting that he was not guilty of the stealing but only of the harboring! And this very thing it was, of prosecuting the plaintiff under the forms and solemnities of legal proceedings for a crime of which the defendant not only knew he was innocent, but by his own admission furnished the indubitable evidence that he knew it, — that furnished the plaintiff with the grounds for this action. It is as if he had said, "I know the plaintiff is innocent, but I will nevertheless degrade him by pros- ecuting him, in connection with a negro, for an infamous (784) offence."

III. The defendant asked his Honor to charge, that if the jury believed that the defendant did not mean by his affidavit to charge the plaintiff with stealing, then they must find for him. His Honor declined to charge in those terms, but did charge, that, if the jury believed that the defendant did not know that he was charging the plaintiff with stealing, but supposed that he was only charging him with harboring, then they should find for the defendant.

This was certainly as favorable for the defendant as he could claim; for there was no evidence that he did not know that the

warrant charged the plaintiff with stealing. He did know it, and swore to it, and he is answerable for the plain meaning of his words and acts, and cannot be heard to say, "Art thou in health, my brother?" while he stabs his reputation.

IV. The defendant asked his Honor to charge, that if the defendant stated the facts (outside of his oath,) to the magistrate, and if this outside statement did not constitute a criminal offence, and the Justice issued the warrant on such statement, the defendant would not be guilty of a malicious prosecution. His Honor declined to give the charge, upon the ground that there was no evidence to support it. There might be some force in the defendant's point if the Magistrate had issued the warrant upon the outside statement, and had not brought it to the attention of the defendant, or taken his oath; but there was no evidence to support this view. On the contrary, all the evidence shows that the warrant was not issued upon the outside statement, as distinguished from the oath, but upon the oath, and the warrant was read to the defendant, and sworn to. There is no error.

Per curiam.

Judgment affirmed.

Cited: Ellis v. Hampton, 123 N.C. 195.

APPENDIX.

(785)

OPINIONS OF THE JUSTICES OF THE SUPREME COURT IN REGARD TO THE TERM OF OFFICE OF THE GENERAL ASSEMBLY THAT WAS ELECTED IN APRIL 1868.

At the opening of January Term 1870, the following Resolution was communicated to the Justices:

RESOLUTION REQUESTING THE OPINION OF THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT.

WHEREAS, there is a difference of opinion in regard to the tenure of office of members of this General Assembly, therefore,

Resolved, That the Chief Justice, and Associate Justices of the Supreme Court, be requested, in view of the importance of determining the doubt, to indicate what would be its construction of the constitutional provisions relating thereto, in case the question should be presented in due course of law.

In General Assembly, read three times and ratified, this 11th day of December, A.D., 1869.

To this, the Justices transmitted the following replies:

BY CHIEF JUSTICE PEARSON, AND JUSTICE DICK.

STATE OF NORTH CAROLINA,
SUPREME COURT,
Raleigh, Jan. 10th, 1870.

To the Honorable TOD R. CALDWELL, *Lieutenant Governor, ex-officio President of the Senate, and the Honorable* JO. W. HOLDEN, *Speaker of the House of Representatives:*

The joint resolution of the Senate and House of Representatives, requesting the Justices of the Supreme Court, in substance, to give their opinions as to the terms of the present members of the General Assembly, that is, according to the provisions of (786) the Constitution, whether they hold their seats until the first Thursday in August 1872, or other members are to be elected on the first Thursday in August 1870? — has received full consideration.

The question is more easy of solution now, when it can be treated as a dry matter constitutional law, than it might be hereafter,

when complicated with collateral considerations. Should the General Assembly, for the two years referred to, be composed of new members, and it turns out that the body ought to have been composed of the present members, there will be a state of confusion. On the other hand, should the General Assembly, for the two years referred to, be composed of the present members, and it turns out that the body ought to have been composed of new members, there will be the like confusion; so it is of importance to have the matter settled at the outset.

A preliminary question presented itself — Do the constitutional duties of the Justices forbid a compliance with this request of the General Assembly?

I am relieved from all doubt by the precedent in the matter of *Waddell v. Berry,* 31 N.C. Appendix — which is in point. There the right to *a seat in the Senate* was contested, and the Judges of the Supreme Court, at the request of the Senate, expressed an opinion, not as a *Court,* but as *Judges,* as to the right of certain citizens to vote; and this action of the Judges is put on the ground that the main purpose being to determine the right to a seat in the Senate, although "not an act of official obligation, the Judges deem it a duty of courtesy and respect" to comply with the request. Here the main and only purpose is to aid the General Assembly to determine the right to *all of the seats in both Houses.* So the question is of the same character, and of much greater magnitude. The action of the Judges of the Supreme Court in giving an opinion on the meaning of the word "crime," at the request of Governor Worth, is also a precedent in point: "See *In the matter of Hughes,* 61 N.C. 57." The action of the Justices of this Court in declining to express an opinion, at the request of the General Assembly, in regard to a Homestead Act affecting pre-existing debts, is not relevant to the subject now under consideration, for it is put on the ground that the question involved "the rights of property," and "would in all probability come before the Court for decision," and the Justices were of opinion that their constitutional duties did not permit them to prejudge it.

The Constitution fixes the terms of office, as a general and fundamental principle: *ex gratia* — of the Governor, four years — of the Justices of the Supreme Court, (I confine myself to these, to avoid prolixity) eight years — of the members of the General
(787) Assembly, two years. Whoever alleges an exception to this general principle, must assume the burthen of proving it. 1. In regard to the Governor, Justices and members elected at the first election, a reason appears on the face of the instrument, for making an exception, to the extent of adding a few months to the beginning

of the terms. This election was ordained to be held "when the vote shall be taken on the ratification of the Constitution," which would be more than two years before the first regular election, and it was necessary to add some time to the beginning of these terms, to make the subsequent terms fit in and run on smoothly. So this exception is admitted.

2. In regard to the Governor, a reason appears, on the face of the instrument, for adding from August to the first day of January next ensuing, to the end of his term — *i.e.* His successor is not to be inaugurated until that day. So this exception is admitted.

3. In regard to the Justices of the Supreme Court, no reason appears, on the face of the instrument for making an exception by also adding two years to the end of their terms — and, in the absence of reason, it will require words so plain and positive as to admit of no other reasonable construction, to have that effect.

Article 4, section 32, of the Constitution is relied on:

"The officers elected at the first election held under this Constitution shall hold their offices for the terms prescribed for them respectively, next ensuing after the next regular election for members of the General Assembly. But their terms shall begin upon the approval of this Constitution by the Congress of the United States."

The next regular election for members of the General Assembly is to be held on the first Thursday in August 1870 — Article II, section 29. So the Justices are to hold their offices for the terms prescribed for them respectively, *"next ensuing after,"* that date. These words are plain and positive, and admit of no other construction. There is no other section which conflicts with, or can controvert this construction, and it will be observed, the wording differs very materially from that in respect to the members of the General Assembly. I am led to this conclusion, although no reason for adding to the term appears on the face of the Constitution, simply because *it is so written.* This is the only matter which has any weight in my judgment, in support of the position that some time is also to be added to the end of the terms of the members of the General Assembly elected at the first election, and a full and candid exposition of my conclusion upon that subject, made a reference to this necessary and proper.

4. In regard to the members of the General Assembly, no reason appears on the face of the instrument for making an exception by also adding two years to the end of their terms, (788) and so, in fact, giving them two terms instead of one, and, in the absence of a reason, the question is narrowed down to this: Does the Constitution use words so plain and positive as to admit

of no other reasonable construction? The *onus* is on those who allege an exception, and the burthen is made heavier (as we shall see) by a provision in direct opposition to a double term.

To sustain the exception, the second clause of section 27, of Article II, is relied on. It is in these words:

"SEC. 27. The terms of office for Senators and members of the House of Representatives shall commence at the time of their election; and the term of office of those elected at the first election held under this Constitution shall terminate at the same time as if they had been elected at the first ensuing regular election."

The words of the second clause are general and vague; and to make sense of it, the rules of construction must be resorted to: "First ensuing regular election" — *"ensuing"* what date? the adoption of the Constitution, or the first election of members of the General Assembly? It is not necessary to say which, as both took place on the same day. "Election" of whom? of members of the General Assembly, — that being the subject on hand, this clause should read:

The term of office of those elected at the first election held under this Constitution, shall terminate at the same time as if they had been elected at the first regular election *of the members of the General Assembly,* ensuing *the adoption of this Constitution.* Filling up the sense in this way, the meaning turns on the word "election." An election is the act of choosing, and taking the word literally, new members are to be actually elected at the first regular election ensuing the adoption of the Constitution, at which very time, by a fiction, the members before elected are to be considered as having been elected. And the effect of this election of new members, according to the first clause of this section — "the terms of office of Senators, etc., shall commence at the time of their election," — and the last clause of the 29th section, — "the members then elected shall hold their seats until their successors are elected at a regular election," — will be to put an end to the term of the first set of members the very instant that they are, by a fiction, supposed to be elected — the fiction having answered the purpose of adding a few months to the beginning of their terms.

This is clearly the result of a literal construction. To meet the difficulty, it is said, the word "election" is not to be taken literally, or to imply an actual election of new members, but, by a fair construction, as having reference only to the regular time *for holding*

the ensuing election, which, however, is not actually to be
(789) held, and it ought to be read the "first ensuing election *day.*"

There is nothing whatever to support this construction. The 27th section, taken by itself, does not sustain an exception to the

general principle, and looking at other sections the construction contended for is not only unsupportable, but is excluded, for (passing by the 28th section, which has no bearing and is evidently out of place) the 29th section provides:

The election for members of the General Assembly shall be held for the respective districts and counties, at the places where they are now held, or may be directed hereafter to be held, in such manner as may be prescribed by law, on the first Thursday in August, in the year one thousand eight hundred and seventy, and every two years thereafter. But the General Assembly may change the time of holding the elections. The first election shall be held when the vote shall be taken on the ratification of this Constitution by the voters of the State, and the General Assembly then elected, shall meet on the fifteenth day after the approval thereof by the Congress of the United States, if it fall not on Sunday, but if it shall so fall, then on the next day thereafter; and the members then elected shall hold their seats until their successors are elected at a regular election."

Here it is ordained that an election for members of the General Assembly shall be held at the place and in the manner prescribed by law, *on the 1st Thursday in August, 1860.* The words are plain and positive — there is no room for construction. An election for members of the General Assembly must be held on that day, or else the Constitution will be violated. This is a stubborn fact. It presents an insurmountable obstacle to the construction giving a double term. A new set of members must be elected in August 1870. If the present members are to hold over, there will be two sets of members for the same term!!! The only mode of escape from this absurdity is, either to follow a literal construction of the second clause of the 27th section, by which the terms of the present members, terminate at the time of the election of a new set of members, or else to treat it as surplusage — being ambiguous, unnecessary, (for the last clause of sec. 29 covers the same ground,) and conflicting with the 29th section, which is expressed in plain and positive words, — is of vital importance, as containing the provisions necessary to put in operation the legislative branch of the government — and is complete of itself, and needs no aid from the 27th section. I am of opinion that by the true construction of the Constitution, the terms of the present members of the General Assembly terminate on the 1st Thursday in August 1870. Such would be the construction, if it were proved, supposing the evidence admissible, that it was the intention of the makers of the Constitution, to give the members elected at the first election, a term of four years.

"In putting a construction upon an instrument, the question (790)

for the Court is, not what the draftsman means, but what the words of the instrument mean. It sometimes happens, for this reason, that the draftsman is less to be relied on than almost any other person, to construe an instrument, whether it be a Constitution, statute, deed, or will." *McAdoo v. Benbow,* 63 N.C. 464.

There is another question, which, although not covered by the words of the resolution, grows out of it, and is so intimately connected with the purpose of the question proposed, as to call for the expression of an opinion, in order to cover the whole ground:

The 29th section, Article II, has this clause: "But the General Assembly may change the time of holding the election." Does this confer power to change the time in respect only to the day, or the month, of such *years* as are fixed by the Constitution — or to confer power, as well, as to change *the years* in which elections for members of the General Assembly are to be held?

The former is the true construction:

1. It harmonizes with the clause next preceding, which requires an election to be held on the first Thursday in August 1870, and "every two years thereafter," and with sections 3 and 6, — Senators and members of the House of Representatives "shall be biennially chosen by ballot."

2. It satisfies the words and gives to them a suitable meaning, *i. e.,* power to change the day or the month, should a change in this respect be deemed expedient; for time, in these particulars, is mere matter of detail, and is not of the essence of the thing.

The latter construction is excluded by many grave considerations:

1. Although the words are broad enough to include power to change the time in respect to *years,* this construction is in direct conflict with the clause next preceding, and with sections 3 and 6. And a construction which confers power in the General Assembly to *alter the Constitution,* is inadmissible.

2. The connection in which this clause is inserted restricts its meaning, and shows that it is confined to mere matter of detail — the places or manner of holding elections, as by one, two or three judges, and the like details.

3. It is assumed in the next preceding clause, that the General Assembly has power to prescribe the *manner* of holding elections, but this does not extend to the manner of voting *viva voce;* for voting by ballot is a fixed principle of the Constitution, and is of the essence, and not matter of detail. So biennial elections is a fixed principle of the Constitution, and the power to direct elections to be held annually or every five or ten years, instead of every

two years, is as clearly excluded as the power to prescribe (791) the manner of voting *viva voce*.

4. Under this broad construction, the present members of the General Assembly, if so minded, might put off the time of the election for ten, twenty or thirty years, and, as by the Constitution they hold their seats until their successors are elected, they may hold their seats as long as it is their pleasure to do so! Any one looking at the naked proposition, can see its fallacy. The power must be restricted to the day or month, treating the years as fixed by the Constitution, or else it is unlimited. There is no middle ground.

This is the restriction put on members of the General Assembly; but the present members are more restricted. I do not believe they have the power to change the day, or the month, or the year, for it is written in the Constitution — "the election for members of the General Assembly shall be held on the first Thursday in August 1870."

Respectfully,
R. M. PEARSON.

I concur in the opinion of Chief Justice Pearson.

Respectfully,
ROBT. P. DICK.

BY JUSTICE READE.

To the Honorable the General Assembly of North Carolina.

I have received, through the Secretary of the Senate, the resolution of your honorable body, passed December 11th 1869, requesting the Justices of the Supreme Court to indicate their opinions, as to the term of service of the present members of the General Assembly.

At the last session of your honorable body, a like request was made for our opinion in regard to the Homestead, and we then declined to give an opinion, for reasons which we then stated. I had supposed our action then was decisive, and that it would be a precedent on all future occasions. The Justices, however, are not unanimous in that view of our duties, and as I still adhere to that precedent, I think it proper that I should give my reasons for it.

My learned brother, the Chief Justice, cites two instances in which the Judges gave their opinions when asked for them — one, the contested election of Berry and Waddell, in 1849, (792) as to the right of certain persons to vote; and the other in 1867, in the matter of Hughes, (who was demanded of Gov. Worth by the Governor of New York,) as to the definition of "crime." In both cases the opinions were given as matter of courtesy. And

probably, under the old Constitution, as the Court was then constituted, it was allowable for the Judges to do so. I certainly did not think otherwise in the matter of Hughes, for I was then on the bench. But upon reflection, I now doubt whether it was proper. But I repeat that the Court is not constituted now as then. The duties and powers of the old Court, were not prescribed in the Constitution at all. That was done by act of the Legislature. It may be that the Legislature had the power to make it the duty of the Judges to give their opinions when asked for; and although the act which organized the Court did not impose such duty, yet, if it might have been done by *that act,* then it might have been done by any *subsequent* act. And, treating a *request* that they *would,* as a *command* that they *should,* the giving the opinions became, not a courtesy, but a duty. This was certainly so, unless it was forbidden by the general provision, which is both in the old and new Constitution, that the "Legislative, Executive and Judicial departments of the government shall be forever separate and distinct." And I am now of the opinion that that provision did forbid the old or the new Judges to give their opinions now as asked for.

The obvious meaning of that clause is, that neither of these departments shall exercise the functions, nor influence or control the other. Under this constitutional prohibition, I do not think it a mere question of propriety, and that I may or may not answer at pleasure. I think it is substantially an interference with the legitimate business of the Legislature, and that the Constitution forbids it.

I think it is much clearer under the new Constitution than under the old. The new Constitution not only *establishes* the Court, but *prescribes its duty.* And it does not make it the duty of the Court to give its opinion to the Legislature, except in the instance of claims against the State. And is not the requiring it in this *one* instance, the same as to *forbid* it in *all* others?

I know that this objection is sought to be avoided by considering the question as addressed to us as private individuals, and not as Judges, or as a Court. This may *evade* the *letter* of the difficulty, but it leaves its *spirit* in full force. And, with my convictions, to *evade,* is to *break* the Constitution.

Nor is the objection met by saying that we do not meddle with the Legislature officiously, but only courteously, and at their request. The Legislature has no more right to ask, than we have
(793) to answer. We must let each other alone — "forever separate and distinct."

If the Legislature asks our advice with the view to regulate its action accordingly, are they not delegating those functions to us, and are we not substantially exercising the powers of legislation?

And is not that the evil intended to be guarded against by the Constitution? Legislators are responsible to their constituents. They cannot shift that responsibility. I appreciate their anxiety to act upon the fullest information. But I think the Justices are forbidden to interfere.

It is not true that the question is referred to us as individuals. It is to us as Justices, as the Supreme Court. We are asked how we will "decide" the question "when it comes before us lawfully." And in whatever form we might answer, the Legislature and the public will understand it to be the opinion of the Supreme Court.

To test the force of my objection, suppose we were to venture our advice without being asked; or, when some case is before us, suppose the Legislature were to indicate to us how we ought to decide it! Can it be that the solution of these objections depends upon politeness, courtesy, punctilio?

I beg your honorable body not to infer from my failure to answer that I have arrived at a different conclusion from the Chief Justice upon the merits, nor yet to infer the contrary. I put my objection solely upon the ground that the Constitution forbids me to answer.

Respectfully,
E. G. READE.

BY JUSTICE RODMAN.

RALEIGH, January 9th, 1870.

To the Hon. T. R. CALDWELL, *Lieut. Governor, etc.:*

SIR: — I acknowledge the honor which the General Assembly has done the Justices of the Supreme Court, in requesting their opinions concerning the duration prescribed by the Constitution for the offices of the present members of the Assembly.

In my opinion, the Constitution has wisely separated the judicial from the political departments of the government. The sole duty of the Judges is to decide controversies between parties concerning their rights under the law; and in the case of the (794) Justices of the Supreme Court, this duty is limited to such cases as come before that Court on appeal. In a free country, there must always be parties, professing different views of public policy, and contending with each other for the control of the government.

The judiciary is set apart, in order that in all the revolutions of political power, it may pass without bias on questions of private right. The reasons which induced the framers of the Constitution to confine judicial duty within the limits mentioned, are equally strong to restrain the Legislature from asking the Judges from doing so,

except on occasions of the most manifest necessity. We are not informed that the General Assembly proposes to make our opinion the rule of its action. That opinion might be against a tenure of office continued beyond 1870, and the General Assembly might still omit the legislation necessary for holding an election in that year. In such a case, there would be the possibility of a contest between rival bodies for the possession of the legislative power, and it must be obvious that nothing could be more unfortunate for the State, than for the Supreme Court to have made itself, in advance the partisan of either. Courts must recognize the actual possessors of political power without inquiry into the lawfulness of their possession. If you shall determine to have no election in 1870, and shall continue to sit and enact laws, being *de facto* in possession of the legislative power, and recognized by the Executive department of the government, I know not by what authority the Courts could refuse to obey your statutes. And so, if you shall order an election in 1870, no Court can question the right of your successors. History tells us of Legislatures which have tried and executed the King, and of Executives that have expelled Legislatures, but I know of no case in which a Court has undertaken to question the legitimacy of the actual reigning sovereign.

From these considerations, it seems to me to follow, that the question which you present to us is an exclusively *political* one. It can never directly, nor, so far as I can see, indirectly, be made a legal question, or a subject of judicial determination. Its ultimate decision must rest with the political departments of the government, and any attempt by the Courts to prejudge it, or influence it, at the request of either of them, would be an encroachment on the powers, opposed at least to the spirit of the Constitution, and hurtful in its consequences. I am, therefore, constrained, respectfully, to decline expressing any opinion professing to be either judicial or legal, on the question presented. If I could suppose that the Legislature desired my opinion as an individual merely, I should consider myself at liberty to give it on this as on any other subject. I should, in that case, feel at liberty to look at it from the same elevated
(795) point of policy and statesmanship from which you must decide it. It is manifest that the two clauses of the Constitution, which relate to the subject, are repugnant to each other; no amount of ingenuity can reconcile them — one must give way to the other; and which shall it be? When such a question is brought before a Court, on the construction of a private instrument, and the Court is unable from the writing alone, with the help of the few surrounding circumstances which it is authorized to look at, to ascertain with moderate certainty, what meaning the parties really intended

to express, it resorts to certain artificial and somewhat arbitrary rules by which it wrings out a meaning, even in a case when probably the parties themselves did not have any definite one. This it does, because it is absolutely necessary to decide the controversy by some rule, and these by long usage may be considered in such cases as a part of the law. But the meaning thus extracted is a forced and not a natural one, and the process is wholly inapplicable to the decision by you of the question presented. The question to you is not, as it must be to a lawyer, "what do the words express?" — but, what did the people mean? How did they understand the instrument when they adopted it? Did they suppose they were electing you for four years, or for two only? In obtaining an answer to this question, you may call in to your aid every circumstance within your knowledge. If you should conclude that the people supposed they were electing you for two years only, you would not hesitate about your course. And even if you should be left in doubt, it seems to me that a wise and becoming policy would require you to give to the people the benefit of the doubt.

I remain, with great respect,

Your obedient servant,

WILL. B. RODMAN.

BY JUSTICE SETTLE.

RALEIGH, January 11th, 1870.

HON. TOD R. CALDWELL, *President of the Senate, and* HON. JO. W. HOLDEN, *Speaker of the House of Representatives:*

SIRS: — I have maturely considered the resolution of the General Assembly, requesting the Justices of the Supreme Court to indicate what would be the Court's construction of the constitutional provisions relating to the tenure of office of mem- (796)
bers of this General Assembly, in case the question should be presented in due course of law.

With the greatest respect for the General Assembly, and with every disposition to cultivate the good understanding which exists between the co-ordinate departments of the government, I must decline to express any opinion on the question.

THOMAS SETTLE.

Cited: Loftin v. Sowers, 65 N.C. 253; *In Matter of Advisory Opinions,* 196 N.C. 829.

R. Y. McADEN, "TAX PAYER," ETC. v. D. A. JENKINS, TREASURER, ETC., AND THE WILMINGTON, CHARLOTTE, ETC., RAILROAD COMPANY.

By act ratified January 29, 1869, the General Assembly ordered $4,000,000 of State bonds to be issued to the above Company, in payment of a like amount of stock therein to be subscribed for by the State, and $3,500,000 were issued accordingly; by Act ratified February 5, 1870, the Company was ordered to *return* to the Treasurer all such bonds as it then had on hand, etc.; by Act ratified March 8, 1870, the act of January 29, 1869, with other like acts, was *"repealed,"* and the bonds issued thereunder again ordered to be *returned;* by Act ratified March 12, 1870, the General Assembly ordered the Treasurer to deliver to the Company $500,000 of certain *First Mortgage Bonds* of such Company, theretofore by it deposited in the State Treasury as indemnity to the State against risks by it incurred for the Company, (See *Bank, etc. v. Jenkins, etc., ante* 719,) *"upon the surrender to him of $500,000 of State bonds;"* and on the 1st day of June, 1870, the private stockholders of the Company, "in special meeting," respectively *assented* to, and *accepted,* the two acts last mentioned; *Held:*

By PEARSON, C.J. That, taking the acts of February 5th, March 8th and March 12th together, the Treasurer was not, by the latter act, authorized to receive, in exchange for the bonds by him to be delivered, *State bonds included in the terms of the two former acts;* and this, without regard to the question of the constitutionality of those former acts, — as it must be supposed that the General Assembly regarded them as constitutional.

Suits brought on behalf of all the *tax-payers,* etc., of the State against a public officer, when once entertained by a Court, cannot be dismissed by the plaintiff, without an order of the Court first had and obtained.

Whatever effect the action of the stockholders (above) may have *wanted* for the purposes designed by them, in the absence of an ability on their part to return the whole of the State bonds to the Company issued: such action confirms the above view, excluding *such* bonds from being applied in *exchange,* etc.

The words used in charters, amendments thereto, etc., are to be taken to be, in some respects, the words of their *"promoters,"* or, in other words, of those who *"lobby"* for them, and not as the words of the State.

MOTION for an injunction, heard by PEARSON, C.J., at Raleigh, July 1st, 1870, and again, upon a motion to vacate the order (797) made upon such former motion, July 22d 1870, the other Justices of the Supreme Court being present upon both occasions.

The complaint was filed in WAKE Court, July 1st, 1870, by the plaintiff, on behalf of all the property holders and tax payers of the State, against the Treasurer of the State, and a Railroad Company, to enjoin a transaction alleged as about to be completed between them.

It set forth that, by an act ratified January 29th, 1869, the General Assembly had authorized $4,000,000 of State bonds to be issued to the Company in payment of a like amount of stock, by the State to be subscribed for to its capital; that $3,500,000 thereof accordingly had been issued; that by Act of February 5th, 1870, the General Assembly had ordered so many of such bonds as were still in the hands of the Company, to be *returned* to the State Treasurer; that on the 8th of March, 1870, another act had been ratified, *"repealing"* the act of January 29, 1869, with other acts of the same sort, and repeating the order for a *return* of the bonds; and, that upon the 12th day of March 1860, by a fourth act, the General Assembly had ordered the Treasurer to deliver to the Company $500,000 of certain of *its First Mortgage Bonds,* that had been previously deposited in the Treasury to indemnify the State against the risks by it incurred on account of suretyship for the said Company, (see *Bank, etc. v. Jenkins, etc., ante* 719,) "upon the surrender to him of $500,000 of State bonds."

It also stated that upon the 1st day of June, 1870, the private stockholders of said Company in special meeting had formally "assented to" the act of March 8th 1870, and declared that thereby the State was no longer a stockholder in the Company, and had also *accepted* the act of March 12, 1870; and that, in order to carry out the provisions of the last act as to a *surrender* of State bonds in exchange for its own bonds, the Company was about to tender, and the Treasurer to receive, $500,000 of the bonds issued under the act of January 29, 1869, which had been already ordered to be *returned;* and which the plaintiff was advised were not the sort of bonds designated by the General Assembly.

The judgment demanded was an injunction, etc.

Phillips & Merrimon for the plaintiff.

Upon the 2d day of July, his Honor delivered the following Opinion:

PEARSON, C.J. Upon the facts set out in the complaint, treating it as an affidavit, and the argument of counsel, I declare my opinion to be that the plaintiff, as one of the property-holders and tax-payers in the State, is entitled to institute the action (798) in his own name, and the names of all of the other property-holders and tax-payers of the State; the legal effect of which, is that the plaintiff will not be at liberty to dismiss the action without an order of the Court first had and obtained.

I further declare my Opinion to be, that by the true construction of the act of March 12th 1870, in connection with the acts of February 5th 1870, and March 8th 1870, the Treasurer is not authorized by the former act to receive of the Company any of the bonds of the State which are embraced within the meaning and provision of the act of March 8th 1870. The act of March 12th, does not specify the kind of State bonds the Public Treasurer is to receive, but it cannot, with consistency, be made to include any of the bonds issued under the authority of acts which are repealed by the act of March 8th 1870. This conclusion follows without reference to the question of the constitutionality of the act of March 8th, for it must be taken, that the General Assembly supposed this act to be constitutional, and did not intend, by the act of March 12th, to recognise any of the State bonds coming within its provisions, to be valid and of legal effect.

I further declare my Opinion to be, that by reason of the acts referred to, and the alleged action of the W. C. & R. R. R. Co., on the 1st day of June 1870, the act of March 12th 1870 does not authorise the Public Treasurer to receive from the Company, any part of the bonds alleged to be remaining in the hands of the Company, and issued under the act of January 29th 1869.

It is, therefore, considered by me, that the facts set out in the complaint are sufficient to entitle the plaintiff, in behalf of himself and of the other property-holders and tax-payers in the State, to demand the injunction as claimed. It is ordered that the Clerk of the Superior Court of Wake County issue a writ restraining the defendant Jenkins from receiving, in execution of the act of March 12th 1870, any State bonds which are embraced by the act of March 8th 1870, or any of the State bonds issued under act of January 29th 1869 which are still in the hands of the W. C. & R. R. R. Co., and restraining the defendant, the W. C. & R. R. R. Co., from handing over to the Public Treasurer, in execution of the act of March 12th 1870, any of the bonds above referred to; the plaintiff first giving an undertaking in writing, with two or more sufficient sureties, to be *justified before me*, that he will pay all damages not exceeding the sum of twenty-five thousand dollars, ($25,000,) which the defendants may sustain by reason of the injunction, if the Court shall finally decide that the plaintiff was not entitled to recover. The plaintiff will be allowed five days from this instant to procure sureties; upon giving an undertaking in writing, to pay all dam-
(799) ages which the defendant may sustain by reason of the delay, not to exceed the sum of one thousand dollars, ($1,000,) in the event, that he fails within that time to perfect his undertaking for the order of injunction.

A notice of this order upon the defendants will be forthwith issued, and will have the effect of a restraining order.

Order granted.

Upon the 8th day of July, an application was made to the Chief Justice, to vacate the order above directed to be entered, and the motion to vacate was argued upon the 22d day of July.

Guion and Battle & Sons for the motion.
Phillips & Merrimon contra.

Afterwards, his Honor delivered his Opinion as follows:

PEARSON, C.J. When this motion was before me on the 2nd inst., my first impression was so clear that the Opinion was delivered in some haste. Not having the aid of argument on the side of the defendants, I was pleased to have an opportunity to re-hear, with the aid of argument on both sides: the cause of truth is always served by full argument. With the benefit of this aid, and a partial examination and re-consideration of all the statutes bearing on the question, I am satisfied the first conclusion was the true one.

The act of March 12th 1870, does not specify what kind of "State bonds" the Public Treasurer was to receive; "provided nothing in this section shall be construed to prevent the Public Treasurer upon the *surrender* to him of $500,000 of State bonds, from delivering the bonds of the Company, etc., and he is instructed to make said delivery *immediately* after the ratification of this act." Mr. Guion and Mr. Battle admitted that the words do not point with precision to the State bonds issued to the Company under the acts 1868-'69, in satisfaction of the State subscription of four millions of stock, but they insisted that such was the intention, and that it so appeared on a consideration of the circumstances and other words of the act:

1. The object was to enable the Company to complete the road, for which end the Company was to have the half million of its bonds deposited with the Treasurer, "to be applied to the completion of the road and to no other purpose whatever." The State was to be benefitted by getting in a like amount of its bonds, and thereby lessen the public debt, and would be collaterally (800) benefitted by the completion of the road, and enhancing the value of the mortgage to secure one million of bonds guaranteed by the State. This arrangement, mutually beneficial to the State and the Company, would be defeated if the Company was forced to go into the market, and buy one-half million of old bonds;

2. The instruction to the Treasurer, to deliver to the Company "*immediately* after the ratification of the act," shows that the exchange was to be done *at once,* and was not to be deferred until such time as the Company could get into market, and buy old bonds: this points to the bonds issued to the Company and still in its hands;

3. The word "surrender" is used in reference to the bonds to be received by the Treasurer. "Surrender," "a return or giving up of something in hand," points to the bonds issued to the Company.

The reply is: 1. The act (secs. 2 and 3) authorizes the Company to borrow by an issue of its bonds, two and a half millions, these bonds to be secured by a mortgage on the road, which shall have priority over any lien held by the State. So the State already surrenders its first mortgage and leaves its guaranty naked and unprotected; and also gives up the bonds of the Company secured by the first mortgage, held as an indemnity fund, in exchange for what? *State bonds,* which by act of Feb. 5th 1870, are required to be delivered back to the Treasurer, and by act of March 8th are nullified so far as the State had power to do so, by repealing the act of January 29th 1869? This cannot be the meaning of the act of March 12th 1870, unless we suppose "the indulgent head of the family" intended to give up everything.

2. The implication drawn from the word "immediately" is too slight to control the construction, taken in connection with the fact that but a few days before the State had ordered the return of all of these bonds, and nullified them: besides, how does it appear that the Company was not presumed to have put itself in a condition to comply with its part of the bargain (if it is to be looked at in that view) by procuring the requisite amount of old State bonds.

3. The same may be said of the word "surrender." It is most frequently used in the sense of returning, but often in the sense of delivering. Surely if the act had reference to the "nullified bonds," it was but fair to say so in so many words, and not to leave the meaning to implication: *R. & G. R. R. Co. v. Reid, ante* 158. It is equally well settled that contracts made by the State with individuals, in granting charters, are not to be construed by the same rules as contracts between individuals. In the latter, the rule of the common law, which is the same as common sense, is "words are to be taken in the strongest sense against the party using them," on the idea that self-interest induces a man to select words most
(801) favorable for himself. It is otherwise when the State is a party; for it is known that in obtaining charters, although the sovereign to be presumed to use the words, in point of fact the bills are drafted by individuals seeking to procure the grant, and

that "the promoters," as they are styled in England, or "lobby members," as they are styled on this side of the Atlantic, have the charters or acts of incorporation drafted to suit their own purposes, and a matter of this kind instead of being in its strict sense *a contract,* "is more like the act of an indulgent head of a family, dispensing favors to its different members, and yielding to importunity. So the Courts, to save the old gentleman from being stripped of the very means of existence by sharp practice, have been forced to reverse the rule of construction, and adopt the meaning most favorable to the grantor."

It is held, *(State v. Krebs, ante* 604,) that general words will be construed in subordination to the existing law; for if the purpose is to make an exception, it is so easy to use express words, when a particular meaning is intended, that the Courts, in construing statutes of this nature, take general words in the sense most favorable to the State, on the ground that the draftsman resorted to general words for fear the bill would be defeated, if plain and direct words were used, because he supposed the members would not vote for the bill on principle, or lest it might not meet with the approbation of their constituents. It is not what the draftsman intends, but what the words mean according to settled rules of construction, that the Courts adopt as the true meaning. The Constitution itself is not free from objection in the use of general words: *e.g.* "Any debt." The rule referred to, has not, however, been applied to the construction of the Constitution, but in regard to acts of incorporation and the like, it is fixed law.

What effect will be given to the action of the Company, June 1st 1870, accepting the act of March 12th, and ruling the State out as a stockholder, is not now presented. Had the Company been in a condition to tender back to the State, the four millions of bonds issued to discharge its subscription, by surrendering the bonds on hand, and paying over the money received by the sale of the others, it may be that the State would no longer have any rights as a stockholder; but coolly to rule the State out as a stock-holder, make no offer to return anything, and presume to use the bonds of the State issued in payment of the stock, for the purpose of getting control of the half million of the bonds of the Company deposited as an indemnity fund, might well have caused the Public Treasurer, even had these bonds been specified in the act of March 12th, to hesitate before receiving them; as by the action of the Company, the State, being no longer considered a stockholder, was of course entitled, not only to have back these bonds, but to be compen- (802) sated for the bonds that had been disposed of.

Motion refused.

Cited: S. v. Jones, 67 N.C. 217; *R. R. v. Jenkins,* 68 N.C. 501; *S. v. Biggs,* 133 N.C. 733.

EX PARTE ADOLPHUS G. MOORE AND OTHERS.

Upon the 16th day of July 1870, petitions were presented to Chief Justice Pearson, at the Chambers of the Supreme Court, by Messrs. Battle & Sons, Graham, Bragg, Merrimon and Parker, upon behalf of Adolphus G. Moore, and three other citizens of Alamance County, representing that they had been arrested upon the day before, and were still detained, by one George W. Kirk, under a show of military force, and asked for writs of *Habeas Corpus.*

The writs were accordingly issued upon the same day, returnable immediately, at the same place.

Upon the 18th day of July, these writs were returned, with the following affidavit:

A. C. McAllister makes oath, that on Sunday the 17th of July 1870, between the hours of 10 and 11 o'clock, A.M., in the County of Alamance, on the highway, leading from Company Shops in said County to Yanceyville, in the County of Caswell, in said State, about nine miles from said Company Shops, he delivered to George W. Kirk, who was at the time, apparently in command of a large body of armed men, the writ of *Habeas Corpus,* of which the paper writing hereto attached is a true and perfect copy; that the said George W. Kirk said, on receiving the said writ, and having part of the same read to him, and hearing what the same was, and inspecting the signature of the writ, that he could take no notice of such papers; that they had "played out." That he was acting under orders from Gov. Holden, with instructions to disregard such papers. He further said: Take the papers back and tell them that the Court has been appointed to try them, (meaning the men in custody,) that he would surrender them on Gov. Holden's order, but not otherwise, unless they sent a sufficient force to whip him, and take them, (meaning the persons mentioned in the several writs,) away from him. He said to a person appearing to be a subordinate of his: "I told you, if any such paper came, not to allow them to be brought to me." Affiant is a citizen of Alamance County, and a quali-
(803) fied elector of the State of North Carolina. He delivered the

said writ to the said Kirk, at the request of E. G. Parker, Esq., Attorney for the petitioner, the Sheriff of Alamance County having been arrested, and still being held in custody by said George W. Kirk.

(Signed,) A. C. MCALLISTER.

Sworn to, etc., this 18th of July 1870.

W. H. BAGLEY, Clerk.

The above paper having been read to the Chief Justice, after some discussion, the matter was deferred until 3 P.M., and at the latter hour, in consequence of the following communication to the Governor of the State, a reply to which the Chief Justice said he would await until the next morning, the further hearing of the case was postponed until the morning of the 19th.

STATE OF NORTH CAROLINA.
AT CHAMBERS,
RALEIGH, July 18th, 1870.

To His Excellency W. W. HOLDEN, *Governor of North Carolina:*

SIR: — I have the honor to enclose copies of four writs of *habeas corpus* — issued by me to Col. George W. Kirk — together with affidavits, setting out that Col. Kirk refused to make return of the writs, and stated that he made the arrests by your order. As Col. Kirk does not make return, I do not feel at liberty to assume the fact that he acted under your orders, from the conversation set out in the affidavits.

Please inform me if Col. Kirk acted under orders from you in making the arrests.

Very respectfully, yours, etc.,

R. M. PEARSON,
Chief Justice Supreme Court.

Upon the morning of the 19th Mr. Badger, as counsel for the Executive, appeared and read the following letter:

EXECUTIVE OFFICE, (804)
RALEIGH, July 19, 1870.

To the HON. RICHARD M. PEARSON,
Chief Justice of North Carolina:

SIR: — Your communication of yesterday concerning the arrests made by Col. George W. Kirk, together with the enclosed, is received.

I respectfully reply: — That Col. George W. Kirk made the arrests and now detains the prisoners named by my order. He was instructed firmly but respectfully to decline to deliver the prisoners. No one goes before me in respect for the civil law, or for those whose duty it is to enforce it, but the condition of Alamance County, and some other parts of the State, has been, and is, such, that, though reluctant to use the strong powers vested in me by law, I have been forced to declare them in a state of insurrection.

For months past there has been maturing in these localities, under the guidance of bad and disloyal men, a dangerous secret insurrection. I have invoked public opinion to aid me in suppressing this treason! I have issued proclamation after proclamation to the people of the State to break up these unlawful combinations! I have brought to bear every civil power to restore peace and order, but all in vain! The Constitution and laws of the United States and of this State are set at naught; the civil courts are no longer a protection to life, liberty and property; assassination and outrage go unpunished, and the civil magistrates are intimidated and are afraid to perform their functions.

To the majority of the people of these sections the approach of night is like the entrance into the valley of the shadow of death; the men dare not sleep beneath their roofs at night, but abandoning their wives and little ones, wander in the woods until day.

Thus civil government was crumbling around me. I determined to nip this new treason in the bud.

By virtue of the power vested in me by the Constitution and laws, and by that inherent right of self-preservation which belongs to all governments, I have proclaimed the county of Alamance in a state of insurrection. Col. Geo. W. Kirk, as commanding the military forces in that county, made the arrests referred to in the writ of *habeas corpus*, and now detains the prisoners by my order.

At this time I am satisfied that the public interest requires that these military prisoners shall not be delivered up to the civil power.

I devoutly hope that the time may be short when a res-
(805) toration of peace and order may release Alamance county from the presence of military force and the enforcement of military law. When that time shall arrive I shall promptly restore the civil power.

W. W. HOLDEN,
Governor.

After reading the above, Mr. Badger read various Proclamations, issued from the Executive office, at various times within the

last two years, in reference to various outrages and disorders in the Counties of Jones, Lenoir, Alamance, etc.

The Chief Justice then said:

Before the argument opens, I will observe to the counsel that the object of argument is to aid me in forming an opinion on four questions of law:

1. Do the facts set out by his Excellency show that Col. Kirk had a "reasonable excuse" for not making return to the writs of *habeas corpus,* so as to release him from the powers and penalties of an attachment?

2. Do the facts set out show an "insurrection," and a condition of things putting the lives and property of our citizens in such imminent peril as to suspend the writ of *habeas corpus* in the Counties subject to military occupation?

3. Suppose the writ not to be suspended: as in the present condition of the country it is highly probable, nay, in my opinion *certain,* that an order to the sheriff of a county to call out "the power of the County," and with force take the petitioners out of the hands of the military authorities, will plunge the whole State into civil war, — should not the act of 1868-'69, be so construed as to make it subservient to that clause of the Constitution, which confers power on the Governor to call out the militia to suppress riots and insurrection, in Counties where the Governor has exercised this power, and taken military possession?

4. If so, should the writ be directed to the Governor?

I shall be pleased to hear an argument on these subjects as questions of law; and will leave it to the good sense of the counsel to decide, whether an excited disussion, such as on yesterday, will be calculated either to aid me in forming an opinion, or to answer any other useful purpose.

Thereupon the counsel for the petitioners moved:

1. That an attachment should issue against George W. Kirk for failing to make return to the writs, and

2. For a writ, to be directed to the sheriff of some County in the State, commanding him, with the power of the County, if necessary, to take the petitioner out of the hands of George W. Kirk, and bring him before the Chief Justice. (806)

These motions were debated *pro* and *con,* by the counsel for the petitioners and for the Governor, above named, until Thursday July 21st.

Upon the 23rd the Chief Justice delivered the following Opinion:

PEARSON, C.J. Upon proof of service and the failure of Col. Kirk to return the writ, the counsel of the prisoner submitted two motions.

The fact of service and the failure to make return was a sufficient foundation for these motions. But the affidavit sets out further that G. W. Kirk said "he was acting under the orders of Gov. Holden, and should make no return."

This extraneous matter, if true, had in my judgment an important bearing on the pending motions, and not being at liberty to assume it to be true on the verbal statement of Col. Kirk, I addressed a communication to his Excellency, asking to be informed if Col. Kirk had his orders. The purpose was, to have the orders to Col. Kirk avowed or disavowed, and make it a fixed fact one way or the other; and to afford an opportunity to his Excellency, if avowed, of setting out the ground of his action, and of being heard by counsel. The cause of truth is always served by argument on both sides.

1. The main question, and one on which both motions depend, is this: Does the fact that the Governor has declared the County of Alamance to be in a state of insurrection, and has taken military possession, have the legal effect to suspend the writ of *habeas corpus* in that County? If so, the prisoner takes nothing by either motion; if otherwise, it will become necessary to give them further consideration.

It was insisted by the counsel of the prisoner that the Governor's reply is no part of this proceeding, and cannot be noticed. In my opinion it forms a part of the proceeding to the extent of the avowal of the orders given to Col. Kirk, (that is in direct response to my inquiry,) and of the fact that in the exercise of the power conferred on him, he had declared the County of Alamance to be in a state of insurrection — taken military possession and ordered the arrest and detention of the petitioner, as a *military* prisoner; the action of his Excellency is relevant, for, if the privilege of the writ of *habeas corpus* be suspended, the writ now sued for ought not to be awarded. In *Ex parte Tobias Watkins,* 3 Peters 193, the Chief Justice says: "The writ ought not to be awarded, if the Court is satisfied that the prisoner would be remanded." This case is cited and approved in *Ex parte Milligan,* 4 Wallace 111.

His Excellency was also pleased to set out some of the special facts that satisfied him, that the civil authorities of the County were unable to protect its citizens in the enjoyment of life and
(807) property; it is not mine to pass upon these facts, or judge of their sufficiency.

Mr. Badger, of counsel for his Excellency, relied on the Constitution, Art. XII, § 3, "The Governor shall be Commander-in-Chief, and have power to call out the militia to execute the law, suppress riots or insurrections, and to repel invasion," — and on the Statute of 1869-'70, chap. 27, sec. 1 — "The Governor is hereby authorized and empowered, whenever in his judgment the civil authorities in any County are unable to protect its citizens in the enjoyment of life and property, to declare such County to be in a state of insurrection, and to call into active service the militia of the State, to such an extent as may become necessary to suppress the insurrection;" and he insisted that:

1. This clause of the Constitution, and the statute, empower the Governor to declare a County to be in a state of insurrection, whenever, in *his judgment,* the civil authorities are unable to protect its citizens in the enjoyment of life and property. The Governor has so declared in regard to the County of Alamance, and the judiciary cannot call his action in question, or review it, as the matter is confided solely to the judgment of the Governor;

2. The Constitution and this statute, confer on the Governor, all the powers "necessary" to suppress the insurrection, and the Governor has taken military possession of the county, and ordered the arrest and detention of the petitioner as a *military prisoner.* This was necessary, for unlike other insurrections, it is not open resistance, but a novel kind of insurrection, seeking to effect its purpose by a secret association spread over the country, by scourging, and by other crimes committed in the dark, and evading the civil authorities, by masks and fraud, perjury and intimidation; and that,

3. It follows, that the privilege of the writ of *habeas corpus,* is suspended in that county, until the insurrection be suppressed.

I accede to the first proposition; full faith and credit are due to the action of the Governor in this matter, because he is the competent authority, acting in pursuance of the constitution and the law. The power, from its nature, must be exercised by the executive, as in case of invasion or open insurrection. The extent of the power is alone the subject of judicial determination.

As to the second, it may be that the arrest and also the detention of the prisoner is necessary, as a means to suppress the insurrection. But I cannot yield my assent to the conclusion: the means must be *proper,* as well as necessary, and the *detention* of the petitioner as a military prisoner, is not a proper means. For it violates the Declaration of rights, "The privilege of the writ of *habeas corpus,* shall not be suspended," — *Constitution, Art. I, Sec.* 21. (808)

This is an *express* provision, and there is no rule of construction, or principle of constitutional law, by which an express pro-

vision can be abrogated and made of no force by an *implication* from any other provision of the instrument. The clauses should be construed, so as to give effect to each, and prevent conflict. This is done, by giving to Art. XII, Sec. 3, the effect of allowing military possession of a county to be taken, and the arrest of all suspected persons, to be made by military authority, but requiring, by force of Art. I, sec. 21, the persons arrested, to be surrendered for trial, to the civil authorities, on *habeas corpus,* should they not be delivered over without the writ.

This prevents conflict with the *habeas corpus* clause, and harmonises with the other articles of the "declaration of rights," *i.e.* trial by jury, etc., all of which have been handed down to us by our fathers, and by our English ancestors, as great fundamental principles, essential to the protection of civil liberty.

I declare my opinion to be, that the privilege of the writ of *habeas corpus* has not been suspended by the action of his Excellency; that the Governor has power, under the Constitution and laws, to declare a county to be in a state of insurrection, to take military possession, to order the arrest of all suspected persons, and to do all things necessary to suppress the insurrection, but he has no power to disobey the writ of *habeas corpus,* or to order the trial of any citizen otherwise than by jury. According to the law of the land, such action would be in excess of his power.

The judiciary has power to declare the action of the Executive, as well as the acts of the General Assembly, when in violation of the Constitution, void and of no effect. Having conceded full faith and credit to the action of his Excellency, within the scope of the power conferred on him, I feel assured he will in like manner give due observance to the law as announced by the judiciary. Indeed he cannot refuse to do so, without taking upon himself the responsibility of acting on the extreme principle, "The safety of the State is the supreme law." I will venture to hope, as evil as the times may be, our country has not yet reached the point, when a resort to extreme measures has become a public necessity.

2. The motion for an attachment against Col. Kirk, is based on the *habeas corpus* act, Acts 1868-'69, chapter 1, sec. 15. "If any person on whom a writ of *habeas corpus* is served, shall refuse or neglect to obey the same by producing the body, etc., within the time required, and *no sufficient excuse be shown,* it shall be the duty of the Judge or Court forthwith to issue an attachment against such person, to the Sheriff of any county in the State, commanding him immediately to arrest such person, and bring him before the
(809) Judge, or Court, and such person shall be committed to jail, until he shall make return to the writ, and comply with any

order that may be made in *relation to the party* for whose relief the writ shall have been issued."

Col. Kirk has refused to make return. The question is, do the facts before me, "show a sufficient excuse?" The affidavit sets out that Col. Kirk put his refusal on the ground that he had orders from his commander-in-chief, who is the Governor of the State, not to obey the writ. His Excellency avows that Col. Kirk was acting under his orders. So we have this case: Col. Kirk is commanded by the Chief Justice to produce the body. He is ordered by his commander-in-chief not to obey the writ. What was the man to do? He elected to obey his orders. In my opinion there was sufficient excuse for refusing to return the writ. The motion is not allowed.

The act in question does not rest on the idea of punishing for *a contempt of the Judge, or Court,* but of compelling a return to the writ, and the production of the body. It is a substitute for the provision in the old *habeas corpus* act, which punished the officer or person refusing or neglecting to make due return, "upon conviction by indictment," with a fine of $500 for the first offence, and of $1,000, and incapacity to hold office, for the second. The late act is an improvement upon the former, by substituting the speedy remedy of attachment in place of indictment, and the severe punishment of imprisonment in the place of fine. Both acts are evidently intended to punish for not making return, and the last is also intended for the immediate relief of the party in whose behalf the writ is issued. The notion of punishing for a contempt of the Judge, or Court, is not involved in either act, certainly not in that of 1868-'69; that is provided for by "the contempt act," (same session.) The proceeding is, by *a rule to show cause* why an attachment should not issue. And yet I was urged, with such vehemence, by learned and aged counsel, to rule Col. Kirk up for a contempt of the Chief Justice, in this: The affidavit of service sets out that Col. Kirk, when the writ was served, said, "tell them such things are played out; I have my orders from Gov. Holden, and shall not obey the writ. I will surrender them on Gov. Holden's order, but not otherwise, unless they send a sufficient force to whip me." This, was as well said by Mr. Badger, is the language of a rude soldier, and is not as courteous as we usually find it in judicial proceedings. The motion for a rule to show cause for this contempt, is not pertinent to the matter now on hand. The evidence on which it rests comes in a questionable shape — extraneous matter, put into an affidavit of service to excite prejudice, and the motion made at the instance of one who is under arrest for the horrid crime of murder by midnight assassination! At a time when, as Mr. Bragg feelingly remarked, "we are in the last ditch! we look to the Judiciary as our only (810)

hope! if that fails us, the country is gone! gone! gone!" I do not feel it to be my duty to leave grave matters, and then turn aside, to put a rule on a rude soldier to show cause, for making a flippant speech. I will be borne out by every member of the profession, in saying that during the thirty-five years I have had the honor of a seat on the bench, I have never been slow to punish for contempt, and preserve the dignity of the Court, when I believe there was an attempt to assail it. I know my duty, and trust I have firmness enough to discharge it. These remarks seem called for because of the earnestness with which the motion was pressed, in language more courtly but fully as strong, as that used by the rude soldier, and because of the excited manner in which I was reminded of my duty, and exhorted to perform it; nay, the oath of office was read to me, and I had the benefit of hearing read much of the lofty language of Lord Mansfield!

3. The motion for a precept directed to the sheriff of some county, to bring the petitioner forthwith before me, and if necessary, to take with him the power of the county, is based on the 17th and 18th sections of the *habeas corpus* act. "The Court or Judge may direct a precept to any sheriff, coroner, or other person to be designated therein, commanding him to bring forthwith before such Court or Judge the party, (wherever to be found,) for whose benefit the writ of *habeas corpus* shall have been granted." "In the execution of this writ the sheriff or person designated may call out the power of the county."

The petitioner is entitled to this writ. The only question is, to whom should it be directed. The motion is that it should be directed to the sheriff of some county.

I have considered the matter fully, and have come to the conclusion not to direct it to a sheriff. The act gives a discretion. In the present condition of things, the counties of Alamance and Caswell being declared to be in a state of insurrection, and occupied by military forces, and the public mind feverishly excited; it is highly probable, nay, in my opinion, certain, that a writ in the hands of a sheriff, (with authority to call out the power of the county,) by which he is commanded, with force if necessary, to take the petitioner out of the hands of the military authorities, will plunge the whole State into civil war.

If the Sheriff demands the petitioner of Col. Kirk, with his present orders, he will refuse, and then comes war. The country has had war enough. But it was said by the counsel of the petitioner, "if in the assertion of civil liberty, war comes, let it come! The blood will not be on your hands, or on ours; it will be on all who disregard

the sacred writ of *habeas corpus*. Let justice be done if the heavens fall."

It would be to act with the impetuosity of youth, and not with the calmness of age, to listen to such counsels. "Let (811) justice be done if the heaven falls," is a beautiful figure of speech, quoted by every one of the five learned counsel. Justice must be done, or the power of the Judiciary be exhausted; but I would forfeit all claim to prudence tempered with firmness, should I, without absolute necessity, add fuel to the flame, and plunge the country into civil war, provided my duty can be fully discharged without that awful consequence. Wisdom dictates, if justice can be done, "let heaven stand." Unless the Governor revokes his orders, Col. Kirk will resist; that appears from the affidavit of service.

The second branch of the motion, That the power of the county be called out if necessary, to aid in taking the petitioner by force out of the hands of Kirk, is as difficult of solution as the first.

The power of the county, or *"posse comitatus,"* means *the men of the county in which the writ is to be executed:* in this instance Caswell, and that county is declared to be in a state of insurrection. Shall *insurgents* be called out by the person who is to execute the writ, to join in conflict with the military forces of the State?

It is said that a sufficient force will volunteer from other counties. They may belong to the association, or be persons who sympathize with it. But the *"posse comitatus"* must come from the county where the writ is to be executed; it would be illegal to take men from other counties. This is settled law. Shall illegal means be resorted to in order to execute a writ?

Again; every able-bodied man in the State belongs to the militia, and the Governor is by the Constitution "commander-in-chief of the militia of the State," Art. III, sec. 8. So the power of the county is composed of men who are under the command of the Governor; shall these men be required to violate, with force, the orders of their Commander-in-Chief, and do battle with his other forces that are already in the field? In short, the whole physical power of the State is by the Constitution under the control of the Governor. The Judiciary has only a moral power. By the theory of the Constitution there can be no conflict between these two branches of the government.

The writ will be directed to the Marshal of the Supreme Court, with instructions, to exhibit it and a copy of this Opinion to his Excellency, the Governor. If he orders the petitioner to be delivered to the Marshal, well; if not, following the example of Chief Justice Taney, in *Merriman's* case, (Annual Cyclopædia, for the year 1861,

page 555,) I have discharged my duty; the power of the Judiciary is exhausted, and the responsibility must rest on the Ex-
(812) ecutive.

The following is the order of the Chief Justice to the Marshal;

To David A. Wicker, Marshal of the Supreme Court:

You are hereby commanded, in the name of the State of North Carolina, forthwith to bring Adolphus G. Moore, wherever to be found, before me, Richmond M. Pearson, Chief Justice of the Supreme Court, at the room of the Supreme Court in the city of Raleigh.

Herein fail not, have there this writ and make due return.

R. M. PEARSON.
Chief Justice Supreme Court.

INSTRUCTION: — You will wait upon his Excellency the Governor, exhibit to him this writ, and a copy of the Opinion in Moore's case, and make due return to me.

R. M. PEARSON.
Chief Justice Supreme Court.

Upon the 27th of July, the following response was received from the Governor:

EXECUTIVE DEPARTMENT.
RALEIGH, July 26, 1870.

To the HON. R. M. PEARSON,
Chief Justice of the Supreme Court of North Carolina:

SIR: — I have had the honor to receive, by the hands of the Marshal of the Supreme Court, a copy of your Opinion in the matter of A. G. Moore; and the Marshal has informed me of the writ in his hands for the body of said Moore, now in the custody of my subordinate officer, Col. George W. Kirk.

I have declared the Counties of Alamance and Caswell in a state of insurrection, and have taken military possession of them. This your Honor admits I had the power to do, "under the Constitution and laws." And not only this, "but to do *all* things necessary to suppress the insurrection," including the power to "arrest all *suspected* persons" in the above mentioned Counties.

Your Honor has thought proper also to declare that the citizens of the Counties of Alamance and Caswell are *insurgents,* as the result of the Constitutional and lawful action of the Executive, and that, therefore, you will not issue the writ for the production of the body of Moore to any of the men of the said Counties; that

"the *posse comitatus* must come from the County where the (813) writ is to be executed," and that any other means would be illegal.

I have official and reliable information that in the Counties above named, during the last twelve months, not less than one hundred persons, "in the peace of God and the State," have been taken from their homes and scourged, mainly, if not entirely, on account of their political opinions; and that eight murders have been committed, including that of a State Senator, on the same account; that another State Senator has been compelled, from fear for his life, to make his escape to a distant State. I have reason to believe that the governments of the said Counties have been mainly, if not entirely, in the hands of men who belong to the Ku Klux Klan, whose members have perpetrated the atrocities referred to; and that the County governments have not merely omitted to ferret out and bring to justice those of this Klan who have thus violated the law, but that they have actually shielded them from arrest and punishment. The State judicial power in the said Counties, though in the hands of energetic, learned and upright men, has not been able to bring criminals to justice: indeed, it is my opinion, based on facts that have come to my knowledge, that the life of the Judge whose duty it is to ride the circuit to which the said Counties belong, has not been safe, on account of the hatred entertained towards him by the Klan referred to, because of his wish and purpose to bring said criminals to justice. For, be it known to your Honor that there is a wide-spread and formidable secret organization in this State, partly political and partly social in its objects; that this organization is known, first, as *"Constitutional Union Guard,"* — secondly, as *"The White Brotherhood,"* — thirdly, as *"The Invisible Empire;"* — that the members of this organization are united by oaths which ignore or repudiate the ordinary oaths or obligations that rest upon all other citizens to respect the laws and to uphold the government; that these oaths inculcate hatred by the white against the colored people of the State; that the members of this Klan are irreconcilably hostile to the great principle of political and civil equality, on which the government of this State has been reconstructed; that these Klans meet in secret, in disguise, with arms, in uniform of a certain kind intended to conceal their persons and their horses, and to terrify those whom they assault, or among whom they move; that they hold their camps in secret places, and decree judgment against their peaceable fellow-citizens, from mere intimidation, to scourgings, mutilations and murder; and that certain persons of the Klan are deputed to execute these judgments; that when the members of this Klan are arrested for violation of

law, it is most difficult to obtain bills of indictment against them, and still more difficult to convict them, first, because some of
(814) the members, or their sympathizers, are almost always on the grand and petit juries, and secondly, because witnesses who are members or sympathizers, unblushingly commit perjury, to screen their confederates and associates in crime; that this Klan, thus constituted, and having in view the objects referred to, is very powerful in at least twenty-five Counties of the State, and has had absolute control for the last twelve months of the Counties of Alamance and Caswell.

Under these circumstances I would have been recreant to duty, and faithless to my oath, if I had not exercised the power in the several counties, which your Honor has been pleased to say I have exercised constitutionally and lawfully; especially as, since October 1868, I have repeatedly, by proclamations and by letters, invoked public opinion to repress these evils, and warned criminals and offenders against the laws, of the fate that must in the end overtake them, if, under the auspices of the Klan referred to, they should persist in their course.

I beg to assure your Honor that no one subscribes more thoroughly than I do to the great principles of *habeas corpus*, and trial by jury. Except in extreme cases, in which beyond all question "the safety of the State is the supreme law," these privileges of *habeas corpus* and trial by jury should be maintained.

I have already declared that, in my judgment, your Honor and all the other civil and judicial authorities are unable, *at this time*, to deal with the insurgents. The civil and the military are alike Constitutional powers — the civil to protect life and property when it can, and the military only when the former has failed. As the Chief Executive I seek to restore, not to subvert, the judicial power. Your Honor has done your duty, and in perfect harmony with you I seek to do mine.

It is not I, or the military power, that has supplanted the civil authority; that has been done by the insurrection in the Counties referred to. I do not see how I can restore the civil authority until I "suppress the insurrection," which your Honor declares I have the power to do; and I do not see how I can surrender the insurgents to the civil authority until that authority is restored. It would be a mockery in me to declare that the civil authority was unable to protect the citizens against the insurgents, and then turn the insurgents over to the civil authority. My oath to support the Constitution, makes it imperative on me to "suppress the insurrection" and restore the civil authority in the counties referred to, and this I must do. In doing this I renew to your Honor expressions of my profound

respect for the civil authority, and my earnest wish that this authority may soon be restored to every County and neigh- (815) borhood in the State.

I have the honor to be, with great respect,

Your obedient servant,

W. W. HOLDEN,

Governor.

This letter having been read upon Wednesday the 27th, the counsel for the petitioner moved:

1. For an attachment, or rule to show cause, against the Governor, for not making a sufficient return to the writ of *Habeas Corpus;*

2. If that be not proper, then for a like attachment or rule against George W. Kirk;

3. That the marshal of the Supreme Court be directed to proceed further in the execution of the writ directed to him, to bring the body of the prisoner before him.

Upon the 28th, Chief Justice Pearson rendered the following decision:

The first motion is refused: The Chief Justice of the Supreme Court has no power under the *habeas corpus* act, to order the arrest of the Governor of the State.

The second motion is refused: It has been adjudicated by me, that Col. Kirk had a reasonable excuse, his orders having been avowed by the Governor.

The third motion is refused: It would be an idle form to require the Marshal to go to the camp of Col. Kirk and make a demand, as the Governor has taken upon himself the responsibility of declining to produce the body of the petitioner. In *Stacy's case,* 10th Johnson 327, Chancellor Kent, on the return to a writ of *habeas corpus* directed to Gen. Lewis, held the return: "The party is not in my custody," to be insufficient, and that it should have been; "The party is not in my custody, or *under my control.*" The custody of a subordinate is the custody of a superior.

The petitioner, if it will serve his purpose of applying to the Chief Justice of the Supreme Court of the United States for a writ of *habeas corpus,* as was suggested by his counsel — may take the fact to be, that the Marshal proceeded to the camp of Col. Kirk, and informed him of the writ, and that Col. Kirk relied on his orders, and refused to deliver the body of the petitioners.

(816)

EX PARTE JOHN KERR AND OTHERS.

Upon the 26th day of July 1870, the above counsel presented to Chief Justice Pearson, petitions for writs of *Habeas Corpus* on behalf of John Kerr and eighteen others who had been arrested on the 18th day of July, and were detained by George W. Kirk, under circumstances similar to those in the case above. The writs were issued, and upon the 29th the following affidavit in the case was filed:

GEORGE WILLIAMSON makes oath that, he is a citizen of the County of Caswell, and a qualified elector of the State of North Carolina; that writs of *habeas corpus* in behalf of all the persons above-named, issued by Richmond M. Pearson, Chief Justice of the State, were placed in his hands for service upon George W. Kirk. That he went to Yanceyville with the said writs, on the 27th of July 1870; that the prisoners above-named, were, as he was informed, confined in the Court House at that place; that he found armed sentinels surrounding the Court House; that for the purpose of seeing the said George W. Kirk, and serving the said writs, he attempted to enter the Court House square, when he was stopped at the gate thereof by a sentinel at the said gate; affiant told him he wished to see Col. Kirk; an officer was then called, and came out; he was said, in affiant's presence, to be the Adjutant; he asked affiant what was his business; affiant told him he had a communication for Col. Kirk; he asked the nature of it; affiant told him, he preferred to see Col. Kirk; the said Adjutant then entered the Court House, and a person, said to be Major Yates, came out to affiant — asked affiant's name, and that of another person with affiant, which were given to him. The said Yates then asked affiant what was the nature of the communication he had for Col. Kirk. Affiant told him that they were writs of *habeas corpus,* issued by Chief Justice Pearson, (taking the said writs from his pocket at the time,) which he wished to serve upon the said Kirk. He told affiant that he would have nothing to do with them, — and that he, affiant, could not see Col. Kirk. He, the said Yates, finally said Col. Kirk was busy, but might see him in half an hour. Affiant then retired to the piazza of a store, in view of the Court House. Some half hour or more afterwards, seeing the said Yates at the gate of the Court House square, affiant again went to him, and asked him what Col. Kirk said, and whether he could see him. He replied that Col. Kirk refused to have any communication with affiant. Affiant then retired some fifty yards, and took his seat under a tree. He saw two persons standing at an upper window in the Court House, one of whom he was informed was Col. Kirk; and affiant then attempted to approach
(817) the window, holding up the said writs in his hand; the person

said to be Col. Kirk immediately retired; affiant had not gone within the line of the sentinels, but after his attempt to approach the said window, he saw the same person who he had been told was Col. Kirk, when at said window, in the vestibule of the Court House, on the lower floor; he seemed to be giving orders or instructions to the soldiers outside; immediately a drum was beaten; affiant then retired under the tree as aforesaid: some thirty or forty armed men upon the beat of the drum formed a line; and seemed to be loading their muskets. They approached affiant, but before getting to him were halted, and in a few moments returned to the Court House, and just after, a squad of seven men, armed with muskets, and under the command of the said Major Yates, came to affiant, and affiant was ordered to leave, or he would be fired into. Affiant then left, and made no further attempt to deliver the said writs to the said George W. Kirk.

GEO. WILLIAMSON.

Sworn and subscribed before me this the 29th day July, A.D. 1870.

W. H. BAGLEY, *Clerk.*

A motion to attach George W. Kirk, was grounded upon this affidavit, and this having been debated, the Chief Justice delivered the following Opinion:

The counsel of the petitioner, on the affidavit of George Williamson, who is a qualified voter and a citizen of the county of Caswell, submitted a motion for an attachment or rule against G. W. Kirk, for not making return to the writ of *habeas corpus,* if, upon the facts set out, it be considered that the writ was duly served, or for an attachment for wilfully obstructing and preventing service, or for any other writ to which upon the facts disclosed the petitioner may be entitled.

I declare my opinion to be that there is no ground for an attachment, or for a rule to show cause, but that the petitioner is entitled to have an order, authorizing some qualified voter of the State to make proper service of the writ; for that purpose I shall designate the Marshal of the Supreme Court.

By the *habeas corpus* act, sec. 32, it is provided, "The writ of *habeas corpus* may be served by any qualified voter of the State, thereto authorized by the Court or Judge ordering the same."

George Williamson was not authorized by me to make service of the writs upon Col. Kirk. In the case of Moore and (818) others, when the writs were signed, I asked the counsel, "shall I order witnesses to be summoned?" the reply was, "We will attend to that matter." I added, "Whom shall I authorize to serve the

writs?" and was answered, "The Sheriff of Alamance is under arrest; we will get some one to serve them, and make affidavit of service." I was thinking about the old *habeas corpus* act, and supposed the late act had changed the law. Why the counsel of the petitioner did not ask to have some elector authorized to serve the writs, is a matter not known to me. Far be it from me to believe that the omission was of purpose to bring about a collision. On the contrary, I believe it was a *bona fide* inadvertence on their part as it was on mine, in not looking at the provisions of the new *habeas corpus* act.

But so it is — the matter passed, and on the application for the writs in favor of Kerr and others, I signed the writs, and nothing was said about the service.

It thus has happened, that the person who served the writ for Moore and others, and the person who attempted to serve the writs for Kerr and others, were not authorized to do so; and Colonel Kirk was justified in treating Williamson as an intruder into his camp, the more aggravated because Williamson was one of the insurgents of the County of Caswell. I say "insurgent," for although Mr. Battle, in his remarks in moving for an attachment against the Governor, on the coming in of his reply to the proceedings had by the Marshal, took occasion to say, that while he agreed generally with the conclusions in the opinion filed by me, he differed on the question, that all of the citizens of a county declared to be in a state of insurrection are to be deemed insurgents, I adhere to that opinion — they are all to be taken as being insurgents, until the insurrection is suppressed and some change in their relations is made. Indeed, I did not enter into a discussion of the question, and took the principle to be settled — on the plain ground that as long as a man remains in the County he must be taken to be an insurgent; because, in the nature of things, it is impossible to make any distinction. Who is to decide while a county is in a state of insurrection, whether this man or that man is well affected or disaffected? This inquiry can only be made after the insurrection is suppressed.

Mr. Battle put this case: The county of Guilford is declared to be in a state of insurrection, — is Justice Dick to be deemed an insurgent? Certainly, unless he "comes out from among them," or his status be fixed by proceedings had after insurrection is suppressed. I am glad to find that Chief Justice Chase, in *Mrs. Alexander's Cotton* case, takes the same view, (2d Wallace, page 404.) He says,

"We must be governed by the principle of public law so often
(819) announced from this bench, as applicable alike to civil and international wars, that *all the people of each State or district in insurrection* against the United States, must be *regarded as ene-*

mies, until by the Legislature and the Executive, or otherwise, that relation is thoroughly and permanently changed."

This principle goes as far back as our Anglo Saxon ancestors. By the common law, every inhabitant of "a hundred" or township, was liable for the value of any goods stolen within its bounds, unless the thief was apprehended and brought to justice, "or hue and cry made." Hence the cry, "stop thief." Justice Dick, who is curious in such matters, informs me that the word "neighbor" is derived from two Saxon words, meaning "near, pledge;" — every man being a pledge for those who lived in the same "hundred," and all being liable, as "the rain falleth on the just as well as the unjust."

It would have been well, and saved much cost, and much danger of civil strife, had the "neighbors" or citizens of the County of Caswell considered every man as a "pledge" for the good behavior of all of the other inhabitants, and seen to it, that the perpetrators of a murder, committed in the Court House, on the day of a political meeting, and in the day time, were brought to justice, or a "hue and cry" made, if the murderers fled.

Col. Kirk seems to be, in some measure, justified in not permitting an insurgent, who was not authorized by me, to make service of the writs.

But I have declared my opinion to be that the writ of *habeas corpus* is not suspended, *(Ex parte Moore,)* and I feel it to be my duty to enforce the writ, or exhaust the power of the Judiciary. The writ will be handed to David A. Wicker, Marshal of the Supreme Court, with authority to make service in pursuance of the *habeas corpus* act.

The writ having been served, the following *return* was made:

HEAD QUARTERS, 2ND REG. N. C. S. T.,
Camp Holden, Yanceyville, N. C.,
August 1st, 1870.

I respectfully reply to the service of the writ in the case of John Kerr, Samuel P. Hill, Jesse C. Griffith, F. A. Wiley, J. T. Mitchell, Thomas J. Womack, A. G. Yancey, John McKee, A. A. Mitchell, Yancey Jones, J. M. Neal, W. B. Bowe, Barzillai Graves, N. M. Roan, Robert Roan, James R. Fowler, M. Z. Hooper, James C. Williamson and Peter H. Williamson, that I hold the prisoners under orders from W. W. Holden, Governor and Com- (820) mander-in-chief of militia.

GEO. W. KIRK,
Col. Com'd 2nd Reg. N. C. S. T.

Thereupon, upon the 2nd of August, motions were made by the counsel for the petitioners:

1. To attach George W. Kirk, for an insufficient return;
2. For a writ to some competent person to bring the bodies of the petitioners, and for that purpose to call out the posse of the county if necessary.

Upon this, his Honor made the following order:

The first motion is not allowed. The objection, that the return, as the Counsel termed it, is not sworn to, and other objections taken, are not relevant; for this does not purport to be *a return,* but a refusal to make *a return* by the orders of the Governor.

Treating it however as a refusal, the second motion is not allowed, for the reason set out in the opinions delivered by me. I can say no more than what I have already said: The power of the Judiciary is exhausted — I have no *posse comitatus.* In this particular, my situation differs from that of Chief Justice Taney, in *"Merriman's* case." He had a *posse comitatus* at his command, but considered the power of the Judiciary exhausted, without calling it out — he did not deem it to be his duty to command the marshal with the *posse* "to storm a fort."

It is gratifying to be able to say that the other Justices have been in unreserved conference with me, and that all concur in these *habeas corpus* proceedings.

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(821)

STATE v. F. A. WILEY AND OTHERS.

Upon the 15th day of August 1870, the Governor transmitted to Chief Justice Pearson, at that time at his residence in Yadkin County, the following communication:

EXECUTIVE DEPARTMENT,
STATE OF NORTH CAROLINA,
Raleigh, Aug. 15, 1870.

To the Hon. R. M. Pearson, Chief Justice Supreme Court of N. C.:

DEAR SIR: — In my answer to the notices served upon me by the Marshal of the Supreme Court, in the matter of Adolphus G. Moore and others, *ex parte,* I stated to your Honor, that at that time, the public interest forbade me to permit Col. Geo. W. Kirk to bring before your Honor the said parties; at the same time, I assured your Honor that as soon as the safety of the State should justify it,

I would cheerfully restore the civil power, and cause the said parties to be brought before you, together with the cause of their capture and detention.

That time has arrived, and I have ordered Col. Geo. W. Kirk to obey the writs of *habeas corpus* issued by your Honor. As the number of prisoners and witnesses is considerable, I would suggest to your Honor that it would be more convenient to make return to the writ at the Capitol in Raleigh. Col. Kirk is prepared to make such return, as soon as your Honor shall arrive in Raleigh.

With great respect,
Your ob't servant,
W. W. HOLDEN,
Governor.

On receiving it, the Chief Justice immediately repaired to Raleigh, and replied as follows:

RALEIGH, August 18th 1870.

To His Excellency Gov. Holden:

DEAR SIR: — Your communication of the 15th inst., was handed to me by Mr. Neathery. I will be in the Supreme Court Room at 10 o'clock, A.M., inst., to receive the return by Col. Kirk, of the bodies of A.G. Moore, and the others, (in whose behalf (822) writs of *habeas corpus* have heretofore been issued here,) together with the cause of their arrest and detention.

Receiving the return after the delay to which you allude, of several weeks, is not to be taken as concurring on my part in the necessity for the delay, or as assuming any portion of the responsibility in regard to it. The entire responsibility rested on you. I was unwilling to plunge the State into a civil war upon a mere question of time.

With great respect, your ob't serv't.
R. M. PEARSON, Ch. J. S. C.

Upon taking his seat at the Chambers of the Supreme Court, the persons named in the return of George W. Kirk, above — page 819, were surrendered, and thereupon were placed in the custody of the Sheriff of Wake County.

Attorney-General Olds for the State.

Messrs. K. P. and R. H. Battle, Watt and J. Winston for the petitioners.

On behalf of the petitioners, was filed the following application in writing:

AT CHAMBERS.
August 18th, 1870.

To the HON. R. M. PEARSON, *Chief Justice of North Carolina:*

In the matter of the several petitions of John Kerr, Samuel P. Hill, N. M. Roan, Robert Roan, F. A. Wiley, and others, for writs of *habeas corpus,* your Honor having stated in the opinions filed in the several cases bearing date August 2d 1870, that your power was exhausted; and the said petitioners, in consequence thereof, deeming themselves without remedy from the Judiciary of the State, having obtained writs of *habeas corpus* from Hon. G. W. Brooks, Judge of the District Court of the United States for the District of North Carolina, returnable before him at Chambers in Salisbury this day, as counsel for the said prisoners, and on behalf of our associate counsel, we respectfully ask leave for the said prisoners respectively, to withdraw their said petitions; and we do hereby abandon further proceedings under the writs, in their several cases.

W. H. BATTLE & SONS,
Counsel for Petitioners.

(823) At the same time the Attorney-General applied for Bench warrants against several of the prisoners, charging some of them with participation in the killing of John W. Stephens, late of Caswell County; and others with the killing of Wyatt Outlaw, late of Alamance County, or with various other crimes and misdemeanors.

These motions having been argued, upon the 19th the Chief Justice delivered the following judgment:

The motion on the part of the prisoner to enter a *nolle prosequi, or retraxit,* is allowed. The proceeding has taken a turn for which my experience, and the labor of the learned counsel, furnish no precedent.

1. Upon a "common sense" view of the question, I can see no reason why the prisoner, if so advised, should not be allowed to withdraw his application.

2. The Attorney-General, anticipating the course that would be taken on the part of the prisoner, had applied for and obtained a bench warrant. This cuts off all collateral questions, and reduces the matter to this: If probable cause can be made out on the part of the State, I shall commit the prisoner for trial in the due course of law; if probable cause be not shown, I shall discharge him.

I hope it is not necessary, but from what I see in the newspapers, I think proper to say that I enter upon this investigation of the question of "probable cause" with an eye single to truth and justice.

3. It was said by Mr. Battle, of counsel for the prisoner, that upon information I was obliged to take notice of the fact that the prisoner had made application to his Honor, Judge Brooks, for a writ of *habeas corpus,* which his Honor had granted. That is true, but I am so entirely satisfied that his Honor has no jurisdiction to pass upon a charge of murder, and to bind prisoners over for a trial before the State Courts, that I take the responsibility of proceeding on this bench warrant, without fear of any conflict of jurisdiction. The prisoner is now out of the hands of the military, and in the hands of the civil authority, and will be dealt with according to law.

Now we have plain sailing; if there be "probable cause" against the prisoner, let the State prove it.

No more need be said about the manner in which the military was organized, or about a traverse of the fact, declared by his Excellency, that the County of Caswell was in a state of insurrection.

With the consent of the prosecution, the following persons were discharged from custody, at this or some other subsequent stage of the proceedings — no testimony being produced against them: John Kerr, S. P. Hill, T. J. Womack, N. M. Roan, Z. Hooper, B. Graves, R. L. Roan, J. M. Neal, Yancey Jones, A. G. Yan- (824) cey, W. B. Bowe, J. C. Griffith, P. H. Williamson, J. R. Fowler, A. A. Mitchell, John McKee, J. C. Williamson and Robert Roan, citizens of Caswell; also, A. G. Moore, J. E. Boyd, J. S. Scott and J. T. Hunter, citizens of Alamance.

The cases of F. A. Wiley and others, charged with the killing of J. W. Stephens, were first taken up. The examination commenced upon the 22d of August, and was proceeded with for several days, in the presence of the Chief Justice, and of Justices Dick and Settle.

The Attorney-General, Boyden & Bailey, Badger and McCorkle for the State.

Battle & Sons, Bragg, Merrimon, Watt and J. Winston contra.

Upon Monday, August 29,1870, the Chief Justice and his Associates pronounced the following judgment in regard to F. A. Wiley, J. T. Mitchell and Felix Roan:

After a careful consideration of the evidence, we are of opinion that "probable cause" has been shown.

On a charge of capital felony, the rule is, "When the guilt is manifest, or the presumption strong, the party should be committed to jail: when the evidence does not produce entire conviction, but makes in the mind a belief of the party's guilt, security to answer the charge should be required.

It is considered that the prisoners be severally recognized in the sum of $5,000, with two or more sufficient sureties, to appear at the next term of the Superior Court to be held for the County of Caswell, to answer a charge of the murder of John W. Stephens; Wiley and Mitchell as principals, and Roan as accessory before the fact.

In this stage of the proceeding, it would not be proper to enter into a critical analysis of the evidence, but it seems to us to be proper to set out in a general way, the grounds on which our conclusion rests:

1. Strange as it is, the fact is fixed, that on the 21st of May, 1870, when a large number of the citizens of Caswell were assembled in the Court House at a meeting of the Democratic party, and in the day time, the Senator of that County, a Republican, was choken down to death, by means of a cord about nine feet long, with a slipping noose adjusted near the middle.

The intelligent testimony of Dr. Roan fixes the fact that the murder was done in the room, (formerly occupied by the Clerk and Master in Equity,) where the body was found on the next morning, with "the cord" buried in the neck to the level of the skin, a
(825) stab on each side of the neck, and a stab in the breast. Dr. Roan gave it as his opinion, being an expert, that the stabs were made after the blood had near all receded to the heart, (which accounted for the small effusion of blood;) and further, that the choking was done *in that room,* for the reason that the cord had not slipped from its first print where it was imbedded in the flesh, and the slight spirts of blood on the wood in front, and the wall at the side of the body, could not have made the impression it did, except as it jetted from the wounds, so the *corpus delicti,* and the place are fixed.

2. *As to the time,* we are satisfied that the murder was committed while the meeting was going on up stairs, the deceased having left the meeting and come down at the instance of Wiley. *After the meeting adjourned,* (about half past four,) and until the Assessor locked his door, about six o'clock, (this room adjoins the room where the murder was done,) a number of persons were in his room and in the passage; so the murder could not have been committed during that period, without a general alarm. The testimony, that the deceased was seen after six o'clock, in the public square, walking to the east, turning the corner of the railing and then going

south, is unsatisfactory. There is no trace of his ever coming back to the Court House, and no evidence tending to show that he might have been killed outside, and his body brought and put in that room; by half an hour of sunset, his brothers and friends were looking for him, and after night-fall, "a guard was set around the Court House."

3. *As to the persons,* the testimony makes out probable cause, and would be sufficient to require *commitment,* provided the witnesses are to be relied on. That is a question peculiarly fit for a jury — how much reliance can be put in the testimony of reluctant white witnesses, and of persons who have been slaves, and are now citizens? This is a practical question, and the learning of the law does not aid much in its solution.

So that our duty is discharged by requiring bail.

No motive is assigned for this murder, except "political animosity." The circumstances show it was done on premeditation, with fatal skill, and by a number of conspirators, (either taking part in the killing, or else keeping watch, and being on the lookout,) to whom the unsuspecting victim was led up for sacrifice.

Possibly at the trial, further light may be thrown upon a deed, which now leaves a foul mark on the reputation of the County of Caswell.

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(826)

THE STATE v. TARPLEY, GRAY AND OTHERS.

The Chief Justice and his Associates then proceeded to an investigation of the bench warrants issued upon charges made of crimes committed in Alamance County. This was continued from day to day, until the first day of September, when the following decision was rendered:

"Probable Cause" has been made out. The parties, except Tarpley, will be recognized severally in the sum of $2,000, and Tarpley, in $10,000, with two or more sufficient securities, to appear at the next term of the Superior Court of Alamance County, to answer the charge.

Here we might have stopped, but for the remark of the counsel for the prisoners, that "according to the ruling in *Wiley's* case, they admitted that probable cause had been shown."

The ruling in that case was put on the ground that, although the

evidence made on the minds of the Justices a belief of the guilt of the prisoners, there was such a conflict of testimony by reluctant white witnesses, and by persons formerly slaves, as to make a case peculiarly fit for a jury.

In the case before us there is no conflict of testimony; it rests upon a principle of law recognized and acted on as far back as the common law can be traced. We need only to refer to *State v. Harden and Hancy,* 2 Dev. and B. 390 and 408: "The testimony of an accomplice, if it produces entire belief of the prisoner's guilt, is sufficient to warrant a conviction."

The witness, John W. Long, proves the guilt of the prisoner directly. He swears that after Caswell Holt had been whipped, by order of one of the camps in Alamance, there was a meeting of *two camps* or *Klans,* in which it was moved: That as Caswell Holt, after being whipped, made information before a Justice of the Peace, and had failed to establish the charge against the parties arrested, he should be whipped the second time; whereupon the prisoner, Tarpley, substituted a motion that "Caswell Holt be put to death," giving as a reason, "dead men tell no tales." After discussion, the death motion was carried by a unanimous vote. It was then moved that "he be hung to a tree, and his body be left exposed;" it was then moved, let him be killed, and his body secreted, or let him be drowned in Haw River. Finally it was agreed to leave the matter to the discretion of the Chief of Klan No. 10, on whom the execution of the "death sentence" was put. This, on Monday night. Witness was charged to carry the order to Job Fossett, Chief of No. 10; he started by sunrise on Tuesday, and delivered the order to (827) ..... by 10 o'clock of that day. The reply was, "it will be done." The deed was not done. Jacob W. Long, the head Chief of Alamance, thought it was going too far, and countermanded the order.

The character of this witness for truth and honesty is impeached by Green Andrews, who admits that *he* joined the Ku Klux, being Deputy Sheriff, but took no part with them; he believes three or four of his sons are members of the Ku Klux, or the "White Brotherhood," as it is now called; three of them are prisoners now on trial; but he frequently told his boys to have nothing to do with the whippings or killing, also by John A. Moore, — He is a member of the order, took no part in the whipping or killing, and believes he saved the life of Senator Shoffner, whose death had been decreed. But over and above this proof of a bad character, there is the fact that this witness is an accomplice, and has turned "State's witness" on a promise of pardon; he admits that he obeyed the order to inform Fossett, head of No. 10, to put Caswell Holt to death — and he did

so on Tuesday, and expected the deed would be done on the next Friday night. So it falls under the decision. (See *Haney* and *Hardin supra,)* and the question is: Does the other evidence contradict, or corroborate this witness?

It was the subject of remark, between us, that in our experience as lawyers and as judges, we had never known a witness on the examination in chief, to expose himself more fully to contradiction, (unless he was telling the truth,) by stating, with detail as to place, time and the persons present, the whipping of Sellars, in which he was an actor, the whipping of Holt, and of Trollinger, and Corliss; all of which he narrated as reported by members of the Klan; also the burning of the school house, in which he took part, the contemplated murder of Holt and of Shoffner, and the actual murder of Outlaw and Puryear, by the K. K., or White Brotherhood; and by stating in the general, from reports made to his camp, that the number of members in Alamance was between seven or eight hundred, in Guilford, one thousand two hundred, in Orange, Chatham, Rockingham and other counties, not informed as to the number, but the order extended over the State, and amounted to forty thousand; was said to have originated with ex-President Johnson, and to extend over the whole South, for the political purpose of preventing negro equality by whipping, hanging and other acts, necessary to effect that object; and by stating the oath — not to reveal any secrets of the order, to *obey the commands of the chief,* to go to the rescue of a member, to swear for him as a witness, and acquit him as a juror. In short, this witness disclosed a condition of things showing, if true, that the civil authorities were unable to protect life or property, and this is confirmed by the fact, that in no one instance, have the perpetrators of these crimes and (828) "known felonies," been brought to justice.

It was a further subject of remark, that this witness sustained himself under a most searching cross examination, as well as any person we had ever seen in similar circumstances.

This witness was not contradicted in a single particular, either in the detail, or in the general. Andrews and Moore, who swear that his character is bad, were forced to admit, that so far as their knowledge extended, he had told nothing but the truth. And Moore confirms him in the general, by stating that on the night that Corliss was taken out of his house in the village of "Company Shops," at about 1 o'clock at night, he saw seven or eight men in "white disguises," taking Corliss along, — a colored man and the watchman ran out, but immediately retired; he met with seven or eight of the citizens roused by the noise, but all, *including himself,* refused to interfere, *for fear of the consequences,* although Mrs. Corliss was

running about the street entreating all persons to save her husband; whilst "in a short time," or as Dr. Moore said, *in about half an hour,* Corliss came back, and the Doctor dressed his wounds.

Again, Moore confirms him, by saying, that being told by Boyd that Shoffner was to be killed on that night, he met "the party" at Gilbreath's bridge, (on next day he said it was some seven miles from the bridge, in the direction of Hillsboro',) told them that Shoffner was not at home, had gone to Greensboro'; one of the party said, "I have come 40 miles to obey this order, if you are deceiving us, it will be your time next;" thinks there were eight in the party; this was the only plan that he could adopt to save Shoffner; an appeal to the civil authorities was out of the question; the sheriff and deputy sheriff belonged to the order.

This witness is also confirmed by Euless: He belonged to the "Constitutional Union Guards," a distinct organization from the White Brotherhood, sworn to support the Constitution *as it was;* and supposed in all they numbered some seven hundred in Alamance, twelve hundred in Guilford, and forty thousand or fifty thousand in the State; one Patterson, a chief of the "White Brotherhood," told him he had an order from the head chief of Orange, to kill Shoffner, and asked his advice; Thompson Euless gave Shoffner a hint to leave home, and in that way saved his life; one Foust, a member of the order of White Brotherhood, told witness he saw the party, or "was one of the party," that met at Gilbreath's bridge, on their way to kill Shoffner; thought there were sixty of them; but hearing that Shoffner was not at home, the party dispersed.

Boyd's testimony is to the like effect, and confirms the witness in several particulars, and in the general; — as to Tarpley, who is the leader of the "Christian Church" at Company Shops, being a member; as to leading and official members of other Churches
(829) being members, among others Robert Hanner and Thos. G. McLean, and as to many other particulars.

So John W. Long, although an accomplice, is not contradicted, but is confirmed; and the case falls under the decision in *Haney's* and *Hardin's* cases. We, on this evidence, not merely believe, but are fully convinced of the guilt of the prisoners.

We think proper to add, that General Hunt, commanding the U. S. troops in this State, was invited by us to take a seat on the bench, and heard the whole proceedings.

STATE v. W. W. HOLDEN, GEORGE W. KIRK, AND OTHERS.

Upon the 2d day of September 1870, application was made to his Honor Justice Dick, at the Chambers of the Supreme Court, Chief Justice Pearson and Justice Settle being present, for a bench warrant, against the persons, and under the circumstances, set forth in the Opinion, which was rendered upon the next day; present, Justices Dick and Settle.

Upon the affidavit of Josiah Turner, Jr., a motion is made for a bench warrant against Gov. Holden, Col. G. W. Kirk, Lt. Col. G. W. Burgen and Alexander Ruffin, for the unlawful arrest and detention of the affiant.

The affiant alleges that he was arrested without any lawful authority, in the County of Orange, by a military force acting under the order of Gov. Holden.

The Constitution and laws of the State authorize and empower the Governor to organize and use the military forces of the State to suppress insurrection, etc., and the Judiciary have no jurisdiction to arrest the Governor, while acting in that capacity, *for any alleged transcending of his authority in the discharge of Executive duties.* "The Legislative, Executive, and Supreme Judicial power of the government ought to be forever separate and distinct from each other." Const. Art. 1, sec. 8. Each of these co-ordinate departments has its appropriate functions, and one cannot control the action of the other, in the sphere of its constitutional power and duty. The government was formed for the benefit of all the citizens of the State, and it would be of little force and efficiency, if the Governor, (in whom is vested the supreme Executive power of the State,) could be arrested, and thus virtually deposed, by a warrant from the Judiciary, issued upon the application of an indi- (830) vidual citizen, for alleged excess of authority in the performance of what the Governor may consider his executive functions.

This peculiar immunity, which pertains to the Governor as the representative of the dignity and sovereignty of the State, does not extend to his subordinate officers and agents, so as to protect them from arrest for alleged offenses, although they acted under the orders of the Governor. The Governor is not above the law. He is as much subject to its obligations and penalties, as the humblest citizen. But the Constitution provides a Court of Impeachment, as the proper forum for the trial of the Governor, for any abuse of executive power. After he is deposed, or his term of office expires, he is liable to indictment and punishment for such violations of the laws of the State, during his term of office.

The learned counsel, in the argument which we requested, were unable to show any precedent, or direct authority, which would sustain the application of the affiant; and this fact goes far in showing that no such judicial power exists. In the case of the *State of Mississippi vs. Johnson,* in the Supreme Court of the United States, (4 Wallace 475,) the point was made, but was not decided by the Court; but there is convincing force in the able argument of the Attorney-General. See also, *Attorney General vs. Brown,* 1 Wis. 513.

The question as to the liability of the Governor to arrest for his violations of law *in his individual capacity,* is not before us. After full consideration, the motion in this case, for a warrant against the Governor of the State, is not allowed.

The only difficulty we have as to the other parties included in the application of the affiant, is, whether we have authority to issue a warrant, which can be executed in the insurrectionary Counties of Alamance and Caswell, against the military officers of the Governor.

The laws of the State authorize the Governor, under certain circumstances, to declare a County or Counties in a state of insurrection, and call out the militia to arrest insurgents, etc.: See the Opinion of Chief Justice Pearson in the case of *A. G. Moore and others.*

This is a discretionary power, vested in the Governor by the Constitution and laws of the State, and cannot be controlled by the Judiciary, but the Governor alone is responsible to the people for its proper exercise. The laws upon this subject would be virtually repealed, and the powers of the Governor rendered wholly ineffectual, if it could be stopped or impeded by the Judiciary upon the application of insurgents, the friends and sympathizers of insurgents, or other persons. We have nothing to say as to the pol-
(831) icy of the law; as Judges, we can only consider its legal effect.

This also is an important and difficult question, and there are no direct authorities to aid us in its solution. In determining the matter, we are governed by the well-recognized rules for the construction and interpretation of statutes. In the opinion of the Legislature there was a necessity for the statute, as the common law did not furnish a sufficient remedy for the mischief to be provided against. The intention of the Legislature, and the remedy aimed at, are manifest, and under such circumstances it is the duty of Judges to give such an interpretation of the law as shall "suppress the mischief and advance the remedy, putting down all subtle inventions and evasions for continuance of the mischief, *et pro privato com-*

modo; and adding force and life to the cure and remedy, according to the true intent of the makers of the act, *pro bono publico.*" Parke, B. 2 Exch. 273.

We are of the opinion that we have no authority to issue a bench warrant to the insurrectionary counties of Alamance and Caswell, against the military officers and agents of the Governor, while they are acting under his orders in suppressing the insurrection. Outside of the insurrectionary districts they may be arrested, as the powers of the Court are in full force there.

The motion for a bench warrant against G. W. Kirk, G. W. Burgen and Alexander Ruffin is allowed.

The warrants will be directed to the Sheriff of Wake County, to be executed in any part of the State except the counties of Alamance and Caswell.

(832)

HABEAS CORPUS CASES BEFORE JUDGE BROOKS,
OF THE UNITED STATES COURT FOR THE DISTRICT OF NORTH CAROLINA.

The petitioners in the *Habeas Corpus* cases above, through their counsel, upon the 28th day of July 1870, and afterwards, forwarded applications for writs of *Habeas Corpus,* to his Honor Judge Brooks, at Chambers, in Elizabeth City. To these were added petitions (making, in all, 42) by other persons, subsequently arrested by Col. Kirk.

These petitions, after setting forth the arrest and detention, stated the applications made, as above, to Chief Justice Pearson, together with the proceedings therein, and the result before him, as upon page 815.

His Honor granted the writs accordingly, directed to George W. Kirk, and returnable before himself at Salisbury, during the approaching session of the District Court of the United States.

At the time and place of the return, the persons were accordingly surrendered, excepting such of them as were included in the writs previously issued by Chief Justice Pearson, who, as appears above, upon the same day were produced before the latter at Raleigh.

Boyden & Bailey, Badger and McCorkle for the State.
Bragg, Battle, Graham, Merrimon and Parker contra.

No evidence having been offered by the State against them, they were discharged.

As to those of the petitioners who were included in the writs issued by Chief Justice Pearson, Col. Kirk answered: That when those writs were issued he had failed to make return, because of orders to that effect by his superior officer, Governor Holden; that, subsequently, upon the 17th of August 1870, those orders had been revoked, and he had been ordered to surrender the prisoners to Chief Justice Pearson, and that upon the 18th day of August, in accordance with such orders, as also with the advice of counsel learned etc., he had so surrendered them, and since then had not had them in his custody, etc.

Upon this a rule, was made upon him, to show cause, at Raleigh on the 23d day of August, before Judge Brooks, why he should not be attached for contempt, in not surrendering these persons, in accordance with the U. S. writs.

Accordingly, on that day, he answered, that in failing to surrender such persons, as above, he had intended no disrespect or contempt; but had acted upon advice to the effect that the writs
(833) theretofore issued by Chief Justice Pearson were still in force, and that he, the respondent, was bound to obey *the first* mandate, under penalty of committing a contempt of the jurisdiction which issued it.

This matter having been debated by counsel at length upon that and following days, his Honor discharged the rule.

Afterwards his Honor, on the application of some of the parties who had been arrested as above, issued a warrant against George B. Bergen, who was Lieutenant Colonel in Col. Kirk's regiment, to compel him to give security for the peace. The defendant, who was already in the Marshal's custody under civil writs for damages, issued at the instance of some of the petitioners, was also charged with the warrant, as a detainer, and still remains in custody.

In issuing the above writs of *Habeas Corpus*, his Honor founded himself upon the act of Congress of February 5th 1867, *(Habeas Corpus);* and, as to the Security of the Peace, upon the joint effect of the XIVth Amendment of the Constitution of the United States, and the act of Congress of July 16th 1798.

NOTE. — The Reporter has been disappointed in not being able to append Judge Brooks' Opinions in the above cases. Application was made to his Honor for them, and he kindly promised to forward them at an early day. Something has occurred to prevent their being received, and the completion of this Number admits of no longer delay. Judge Battle's projected report of the *Habeas Corpus* cases, etc., will serve to diminish the regret with which the announcement of this failure might have been received.

Oct. 1.

INDEX.

APPEAL.

1. The Supreme Court has appellate jurisdiction over questions *of law* only, and so cannot review the exercise of a discretionary power over matters *of fact: Simonton v. Chipley*, 152.

2. *Therefore*, it cannot review a question as to the propriety of an order striking out a judgment for irregularity turning, in some degree, upon whether it were given without a verdict, and in the absence of the defendant and his attorney. *Ibid.*

3. Where an order of amendment given in the County Court, had been appealed from, and, pending the appeal, that Court had been abolished, and its records transferred to the Superior Court; *Held*, that, upon an affirmation of the order, the amendment should be made in the latter Court. *Ibid.*

4. Where the question raised by the appeal, is, whether there be *any evidence, etc.*, it will be taken for granted that the record sent up contains the whole of the evidence bearing upon the point. *Patton v. Hunt*, 163.

5. The *immateriality* of an error, on the trial below, must clearly appear on the face of the record, in order to warrant the Court in treating it as surplusage. *McLenan v. Chisholm*, 323.

6. A bond had been executed by the defendant, leaving the name of the obligee blank; the bond was afterwards executed by others, and then the blank was filled with the name of the plaintiff, and the date was altered; suit having been brought upon the bond, on the trial the plaintiff offered to show, "that the signers of the paper authorized him to fill the blank and make the alteration of date, or assented to what he had done:" *Held*, that, as parties who appeal from rulings below in regard to the evidence, must set forth in distinct terms the evidence rejected, so that this Court may pass upon its admissibility, and, as the proposition above did not show *the sort of evidence* tendered, there appeared to be no error in its exclusion. *Bland v. O'Hagan*, 471.

7. Where it is suggested in the Superior Court, that a certain case called for trial, was to abide the result in another case that had been determined in that Court: *Held*, that the finding by the Judge, in favor of the suggestion, cannot be reviewed upon appeal. *Carroll v. Haywood*, 481.

8. Where an appeal from a magistrate is regular in form, and the Court discovers no error in the proceedings, — the judgment should be one affirming that given below, and not, dismissing the appeal. *Barringer v. Holbrook*, 540.

9. Directions for stating *cases* upon appeal. *Pearsall v. Mayers*, 549.

10. Upon an appeal from an order vacating a judgment, *for want of service* of the process by which the action was constituted, it is necessary that the record show *how* the Judge *found* upon the question of such service; it must present *the fact* as found, and not (as here) only *the evidence* bearing on such fact. *Cardwell v. Cardwell*, 621.

11. The decision of the Judge upon such fact is conclusive; except a question be made whether there were *any evidence* tending to establish it, or whether a given state of facts constituted service. *Ibid.*

12. Where an appellant *elects* (under C.C.P., § 490,) to carry a case from the Probate Court to the judge *in vacation*, it is still within the discretion of the latter to hear it *in term time;* and *vice versa. Rowland v. Thompson*, 714.

13. In case of such an appeal, if there be a further appeal from the Judge to the Supreme Court, the latter tribunal can review no point before the Probate Court that was not passed upon by the Judge. *Ibid.*

CONSTITUTION—*Continued.*

11. It is doubtful whether it be practicable for the Courts to give effect to regulations imposed by Constitutions upon the *exercise* of the tax power: Whether the *power* to tax do or do not exist, is a proper subject for judicial enquiry: Whether the exercise of a conceded power in any particular case were proper, is to be left to the constituents of the body which imposed the tax. *Ibid.*

12. Where an injunction was sought against levying a tax, on the alleged ground, that it was to be applied to build a particular bridge which was to be constructed at an inconvenient place, was connected with no public road, was upon a plan too costly, and was therefore, unconstitutional: *Held*, that, as the general head of repairing and building bridges came under the "necessary expenses" of the county, it was not competent for the Court to review a decision of the County Commissioners as to what particular bridge, as regards either location or description, is, or is not necessary. *Ibid.*

13. The "equation of taxation" established by the Constitution of 1868, (Art. V, § 7,) does not apply to prevent a County from providing for the payment of its debts existing when that Constitution was adopted. *Pegram v. Comm'rs of Cleveland Co.*, 557.

CONSTRUCTION OF CONTRACTS.

1. Where the terms of a contract are certain, their construction is for the Court, — not for the jury. *Swepson v. Summey*, 293.

2. Where a negotiation was pending for the settlement of a debt of about $30,000, and a question arose as to what would be the exact balance after applying certain payments, etc., — such balance having been *assumed* by the parties to be a certain amount, it was also agreed that if it were more than that — *a few hundred dollars either way should not matter; Held*, that, considering the amount of the whole debt, $2,160.00, might be included in the expression *a few hundred dollars. Ibid.*

See Scale.

CONTEMPT.

1. The proper method of bringing before the Supreme Court for review, the order of a Superior Court in regard to alleged misconduct by one of its officers, (*here*, an attorney,) is, by bringing up the *record proper* of such Court, by a *certiorari in the nature of a writ of error. Ex parte Biggs*, 202.

2. A *mandamus* in such case, would be improper. *Ibid.*

3. The party charged in such case, has no right to *appeal. Ibid.*

4. A Court has power, on the ground of self protection, outside of the common law and statutory doctrine of *contempt*, to disbar an attorney who has shown himself unfit to be one of its officers; and such unfitness may be caused not only by *moral delinquency*, but by *acts (here*, a publication,) *calculated and intended to injure the Court. Ibid.*

5. If an attorney who is also an editor of a newspaper, and who in his latter character writes an article in disparagement of the Court, be put under a rule by such Court, he may by answer raise the point whether a *prima facie* case has been made out against him and he be *called on* to make a disavowal, but where, *(as here)* he does not take that course, but *elects to disavow*, the case does not present the question, Whether an editorial written by one who is an attorney as well as an editor, falls under *general principles* governing cases of misconduct by attorneys of the Court. *Ibid.*

DISSENTS.

By Dick, J. in *Winslow v. Comm'rs*, 218; By Reade, J. in *Critcher v. Holloway*, 526, and *Kingsbury v. Gooch*, 529; and by Rodman, J. in *State v. Deal*, 270; *Kingsbury v. Gooch*, 529, *Chapman v. Wacaser*, 532, and *Crook v. Cowan*, 743.

DIVORCE.

1. The provision for a *prosecution bond* in divorce cases, (Rev. Code, c. 39, § 5,) applies only where the wife, by her *next friend*, is plaintiff. *State v. Lytle*, 255.

2. Where the wife is defendant, her costs are to be paid in advance (unless *indulged* by the officers,) by the husband, as his own are; and this will be enforced by order of Court. *Ibid.*

DOWER.

1. A creditor of the deceased had a right under the former practice, to come in and be made a party defendant, for the purpose of excepting to an admeasurement of dower in the course of a petition by the widow. *Moore, Ex parte*, 90.

2. *Arguendo:* This is so still, under the act regulating *Special proceedings. Ibid.*

3. In a petition for Dower, in the County Court, judgment was given that the petitioner was entitled, and an order made for a jury to allot it; upon the return of their report at the next term, a person who claimed to be true heir of the deceased, came in, and suggested that there had been no marriage between the latter and the petitioner; an issue was made up accordingly. and at an ensuing term it was tried, and a verdict given in accordance with the suggestion; upon the petitioner's appealing to the Superior Court, she moved that the report be confirmed; this the Judge declined to do, and ordered another issue to be tried, and petitioner appealed again; *Held:*

(a) That the alleged heir could not intervene to have the *judgment* for Dower set aside, as he was no party to the proceedings.

(b) That such intervention could not, under the circumstances, be supported as an application by one *aggrieved* by the particular admeasurement, to have it set aside. *Lowery v. Lowery*, 110.

4. When, for payment of a deceased husband's debts, it becomes necessary to resort to lands devised by him to his wife, she is remitted to her right of *dower*, which, as in other cases, is not subject to those debts during her life. *Avery, Ex parte*, 113.

5. A petition for dower may be *Ex parte*, in the names of the widow and the heirs, but if the widow be guardian of the heirs, and the estate be insolvent, the heirs should be made parties defendant, with a properly constituted guardian *ad litem;* and the creditors also are to be allowed to come in if they choose, and make themselves defendants. *Ibid.*

6. One who claims the land under a conveyance made by the deceased, has a right to intervene in proceedings for dower in such land, instituted by the widow against the heirs of the deceased. (Act of 1868-'69, c. 93, § 41.) *Carney v. Whitehurst*, 426.

7. Land having been devised charged with the payment of a sum of money to a minor, the devisee also being appointed guardian of the minor:

EQUITY.

1. A bill in equity asking that a deed should be surrendered by the defendant, and he be enjoined from committing certain trespasses upon the land included therein, upon the ground that such deed had never been delivered, cannot be maintained; the plaintiff has an adequate remedy at law, either by Detinue, or Trespass *quare clausum*. *Ragland v. Currin*, 355.

2. The principle upon which equity interferes to set aside verdicts, etc., in courts of law, and also former decrees in courts of equity, for surprise, etc., stated. *Kincade v. Conley*, 387.

3. That the details of the decree impeached are shown, upon a second hearing of the original cause, to have been correct, is not a result in conflict with the decree impeaching it. *Ibid.*

4. Where a seal was attached *by mistake and ignorance* to the name of a firm signed to a note given for value, the mistake was corrected in equity, and the plaintiff was allowed to recover as if there had been no seal. *Lyman v. Califer*, 572.

See Executors.

EQUITY PLEADING.

1. Where a complaint sought for a rescission of a sale of land, and an injunction, etc., upon the ground that the defendants had agreed to pay *Cash* upon receiving the deed, and to that end gave a *sight* draft, and that it had not been paid, and the drawers were insolvent; and the answer admitted those allegations, and sought to avoid them by other matter: *Held* that as there was an equity confessed, the injunction should be continued. *Carter v. Hoke*, 348.

2. In such case if some of the defendants file *a plea* that they purchased *for valuable consideration and without notice* from the parties who bought from the plaintiff; upon the motion to vacate the injunction, these allegations are also to be treated as matter of *avoidance; aliter*, if the defence had been made by an *answer, full and going into particulars*. *Ibid.*

3. (The reasons for this distinction stated and discussed.) *Ibid.*

EQUITY PRACTICE.

1. A cause in equity being before a court upon exceptions to a report made under an order for an account therein: *Held*, that it was erroneous for the Judge upon sustaining the exceptions to proceed to dismiss the bill. *Hays v. Hays*, 59.

2. A suit in equity begun in 1867 is to be governed in regard to procedure, by the laws then existing; *therefore* where a bill was filed to set aside a release given by a ward to his guardian, and for an account, etc.: *Held*, that the Court had no power, before making a decree to set aside the release, against the defendant's will, to make an order of reference, particularly an order of reference to hear, try and determine the issues in the cause. *Douglas v. Caldwell*, 372.

See Practice.

ESTOPPEL IN PAIS.

1. A false representation not acted upon by him to whom it is made, does not estop. *State v. Thomas*, 83.

See Executors, 20.

EVIDENCE.

EXECUTORS AND ADMINISTRATORS—*Continued.*

EXPERT.

1. A person, tendered as a witness to express an opinion whether the symptoms attending a diseased mule were recent or otherwise, upon preliminary examination, stated that he was a physician of eleven years standing, and that although he had no particular knowledge of the diseases of stock, yet from his books, observation and general knowledge of the diseases of the human family, he could tell whether certain symptoms indicate that the disease is recent or otherwise; and although he never saw a case of glanders (unless the one in question were such,) yet he was able to form an opinion whether the symptoms of the mule, indicated a disease of recent or of long standing: *Held*, that he was a competent witness for the purpose indicated. *Horton v. Green*, 64.

FENCES.

1. A *"pasture-field"* is not *"cleared ground under cultivation,"* within the meaning of the Statute, (Rev. Code, c. 48, § 1,) requiring planters to keep around such ground, a fence at least *five* feet high. *State v. Perry*, 305.

FIXTURES.

1. A whiskey still was hired for the season to parties who set it up, encased in masonry, upon the lands of one of them; during the season, it was sold by the owner to the plaintiff; shortly afterwards it was levied upon, and, after the close of the season, and whilst it was still encased as above, was sold, by one of the defendants as a constable, at the instance of the other (who became purchaser,) under a judgment against the former owner: *Held*,

(a) That the defendants were liable to the plaintiff in an action of *trover*.

(b) That the doctrine of *fixtures* had no application, under the circumstances.

See Forcible Trespass.

FORGERY.

1. In an indictment for forgery (upon a Statute which included *all bonds*,) the forged instrument was described as a "certain bond and writing obligatory, which was placed as a prosecution bond upon the process in a suit, etc., in which M. P. Lytle was plaintiff, and Mary L. Lytle, defendant, which said forged bond is as follows, that is to say, "We and each of us promise to pay the defendant in the within petition all such costs" etc.; and it appeared that such suit was for divorce, by husband against wife, and that the *bond* had been written upon a paper which contained the prisoner's affidavit for instituting the suit, which paper was attached to the petition (having the Judge's *fiat* endorsed) by being pasted to it at one corner: *Held*,

(a) That the description of the bond, as *placed upon the process*, although unnecessary, became matter of substance, and in this case was not made out;

(b) That the writing described as a bond (being given by husband to wife,) was binding on no one; so that it could not be the subject of forgery. *State v. Lytle*, 255.

FRAUD.

FRIVOLOUS ANSWER.

GAMING.

GRANT.

1. In a grant to one Blount, there was an exception of "13,735 acres of land, entered by persons, whose names are hereunto annexed;" among such names was that of "Gabriel Ragsdale, 100 acres;" it was shown that this 100 acres was afterwards surveyed, and granted to one Williams, under whom the plaintiff claimed: *Held*, that thereby the exception in the Blount grant, as regards the 100 acres, became as certain as if set out by metes and bounds. *Melton v. Monday*, 295.

2. An abstract of a grant, as follows: "Sampson Williams 300 acres, Anson, on Mountain Creek, beginning at a pine, etc., [bounding it.] May 24th 1773, (signed) Jo Martin," — shows with requisite certainty, that there is a grantor, Martin; a grantee, Williams; a thing granted, 300 acres; and that a grant was executed on the 24th of May 1773. *McLenan v. Chisholm*, 323.

3. Although, a party offering a grant in evidence, do not connect his own title with that of the grantee, still he may be interested in proving the title out of the State, *ex gr.* in order to shorten the period which ripens a color of title into a good title. *Ibid.*

GUARDIAN AND WARD.

1. In passing the accounts of a guardian, he cannot, except under rare circumstances, be allowed disbursements beyond the income of his ward. *Caffey v. McMichael*, 507.

2. Where a guardian had purchased a horse and buggy for his ward, and in so doing had gone greatly beyond his income, but the ward used them for some time after he became of age, and then sold them, and received the money for them, — he must be taken as having ratified the transaction. *Ibid.*

3. A guardian of an infant (some fifteen years of age,) obtained judgment in her favor in July 1861, against parties who were, and remained until the Surrender, amply solvent — by his direction no execution was issued upon such judgment during the war, and until his death, in March 1866; the administrator of the guardian commenced an action upon the judgment in October 1866; and before he obtained judgment therein, the defendants sold out their property, removed from the State, and were found to be insolvent: *Held*, that neither the guardian nor his administrator were chargeable with negligence in managing the debt due to the ward. *State etc. v. Robinson*, 698.

4. Guardians are not responsible for losses to their wards attributable to their not having resorted to new and extraordinary remedies, the force and effect of which are doubtful. *Ibid.*

See Dower, Exr's and Adm'rs.

HOLOGRAPH.

See Will.

HOMESTEAD.

1. Specific liens previously obtained (*as here*, by levy,) are not divested by the provision for a Homestead in the Constitution: *Therefore*, where a levy upon land was made in December 1867, and, upon a *Ven. Ex.*, issued in 1869, the Sheriff returned "no goods, chattels, lands or tenements, to be found in my County, over the Homestead." *Held*, that he was liable to be amerced for an insufficient return. *McKeithan v. Terry*, 25.

INDIANS.

INDICTMENT.

See Larceny.

INJUNCTION.

JUSTICES OF THE PEACE.

(a) *Civil Jurisdiction.*

1. The jurisdiction conferred upon Justices of the Peace by the Constitution, Art. IV, sec. 33, extends to all sums of two hundred dollars and under, *exclusive of interest. Hedgecock v. Davis*, 650.

2. Where questions of constitutional construction are doubtful, Courts will defer to a previous decision thereupon made by the Legislature. *Ibid.*

See Surety.

(b) *Criminal Jurisdiction.*

1. The act of 1868-'9, c. 178, sub-c. iv., giving to Justices of the Peace power to hear and determine criminal actions for certain petty offenses, and among them, "assaults, and assaults and batteries, where no deadly weapon was used, and no serious damage was done, and where the punishment imposed by law does not exceed fifty dollars fine, or one month's imprisonment," — is not unconstitutional. *State v. Johnson*, 581.

2. As that act confines the jurisdiction of the Justice to such offences as are committed within his township, it cannot be exercised in counties where townships have not been laid off. *Ibid.*

3. In such cases, the pleadings, must show affirmatively, everything necessary to confer the jurisdiction relied upon therein. *Ibid.*

4. Justices of the Peace have not *exclusive* jurisdiction of the offence of *receiving stolen goods under the value of five dollars;* but only jurisdiction *concurrent*, under certain circumstances, with that of the Superior Court. *State v. Perry*, 598.

See Jurisdiction.

LARCENY.

1. An indictment for stealing "fifty pounds of flour, of the value of sixpence," is good; and is sustained by proof that the party charged stole a *sack* of flour, although there was no proof of its weight, or of its value further than that the defendant had said that he gave five and a half dollars for it. *State v. Harris*, 127.

2. From the rule, that in indictments upon *statutes* it is safe to use the *very words* of the statute, are to be excepted cases in which a statute (in enumerating offences, charging intent, etc.,) uses the disjunctive *or:* In some such cases *and* is to be substituted for *or:* in others, doubts as to the proper terms are to be met by using several *counts;* and *or* is never used, unless in the statute it means *to wit*, or is surplusage. *State v. Harper*, 129.

3. *Therefore*, an indictment for larceny which charges the thing taken, to be the property of J. R. D. "*and another or others*," (in the words of Rev. Code, c. 35, § 19) is fatally defective, and no judgment can be given thereupon. *Ibid.*

4. One who borrows a horse with an intention, existing at the time, of stealing him, is guilty of larceny; and no change of mind after such taking will purge the offence. *State v. Scott*, 586.

5. A nugget of gold separated from the *vein* by *natural causes*, savors of the realty, and, so, is not a subject of larceny. *State v. Burt*, 619.

6. *Here*, the nugget was found upon a loose pile of rocks, and was taken and carried away at one continued act. *Ibid.*

MALICIOUS MISCHIEF.

1. A special verdict in an indictment for Malicious mischief which omits to find that the act was done *with malice towards the owner* of the property injured, is equivalent to an acquittal. *State v. Newby*, 23.

MALICIOUS PROSECUTION.

1. In an action for malicious prosecution by a States' warrant for larceny, it appeared, that the warrant had been a joint one, against the plaintiff and one *Tobe*, — that the preliminary oath made by the defendant was *to the contents of the warrant*, which contained the usual recital, — that the defendant was a man of more than ordinary intelligence, — that the warrant was drawn by his friend, who had come to the magistrate with him, and who afterwards served it, — that in the conversation with the magistrate preliminary to the taking out of the warrant, the defendant did not charge the plaintiff with stealing the article, but charged *Tobe*, his own servant, with stealing it, and the plaintiff with harboring *Tobe*, — that upon the trial of the warrant, some sharp words having been used by the plaintiff in regard to the charge, the defendant said that he did not charge *him* with stealing; and that the defendant, on the trial, assisted in conducting the examination of the witnesses: *Held*,

(a) That evidence going to show that at the time of taking out the State's warrant, the defendant had malice towards *Tobe*, was competent, as going to show the state of his mind at that time towards the plaintiff;

(b) That the Judge was warranted in instructing the jury That if they believed the evidence, the defendant had *knowingly* prosecuted the plaintiff for larceny;

(c) That he was warranted in declining to instruct them, That if they believed that the defendant did not mean by his affidavit to charge the plaintiff with *stealing*, he could not be liable;

(d) And that he was also warranted in declining to instruct them, That if the defendant stated *the facts* to the magistrate, such *facts* not constituting a criminal offence, and the magistrate issued the warrant upon such statement, the defendant would not be liable. *Thomas v. Norris*, 780.

MANDAMUS.

1. A creditor of a County, (by coupons upon County bonds issued in 1858,) applied for a *Mandamus* to compel the levy of taxes for the satisfaction of his debt: *Held*, that the remedy was a proper one. *Pegram v. Comm'rs of Cleveland*, 557.

2. *Quære*, whether a *Mandamus* can be *revived* in any case. *Carson v. Comm'rs of Cleveland*, 566.

See Municipal Corporations.

MARRIED WOMAN'S SEPARATE ESTATE.

See Husband and Wife.

MATERIAL ALTERATION OF CONTRACT.

See Usury.

MILITARY ORDERS.

1. There is nothing in either General Sickles' Order, No. 10, or in the Acts of 1865-'6, ch. 50, and 1866-'7, ch. 17, to prevent a decree for money made at the Superior Court of Chatham, Spring Term 1866, (3d Monday of March,) from becoming dormant before the 13th day of July 1868; *Therefore*, an execution which issued at the latter date upon such decree, is *irregular*, and should be set aside. *McIntyre v. Guthrie*, 104.

2. A bond executed April 25th 1866, although given in satisfaction of a previous bond executed December 1st 1860, constitutes *a cause of action arising subsequent to May 15th* 1865, within the meaning of *General Order, No.* 10, issued April 11th 1867; *therefore*, a return upon an execution by a sheriff to May Term 1867, — "Levied, etc.; no sale, in obedience to Order No. 10, from General Daniel E. Sickles," was not a due return. *Isler v. Kennedy*, 540.

See Public Law.

MILLS.

1. Where successive dams at a certain point upon a creek had thrown the water back upon the plaintiff's land to a certain extent for more than twenty years, and after that a new dam, no higher than the former dams but tighter than they, erected six feet lower down the creek filled up the bed of the stream with sand, and *sobbed* the plaintiff's land to a considerably greater extent than before, although it did not *pond* the water further back: *Held*, that the easement obtained by the twenty years' possession, upon the maxim *tantum prœscriptum quantum possessum*, did not protect the owner of the dam from liability on account of the new injury. *Powell v. Lash*, 456.

2. Proceedings to obtain damages for injuries to land caused by the erection of mills, are *Special Proceedings*, and the summons therein should be returned before the Clerk. *Sumner v. Miller*, 688.

MINES.

1. In a suit involving the title to *mining property*, a receiver is not to be appointed unless the parties in possession are insolvent, or are injuring the property by their management. *Carter v. Hoke*, 348.

MONEY PAID BY MISTAKE.

In a case where there was a question between the parties as to the kind of currency in which a contract for money was solvable, and upon taking an account, it appeared that the debtor had overpaid the debt: *Held*, that he could not recover the surplus from the creditor, as money paid *by mistake*. *Pearsall v. Mayers*, 549.

MORTGAGE.

1. *A* was assignee of a mortgage creditor, and at a sale by the mortgagee, made under a power in the deed, bought the land mortgaged; *B* had previously purchased the mortgagor's interest in the land, and then had let the land for a year to *C*, who was in possession: *Held*, that *A*, upon making demand for possession upon *C*, could recover from him rent due for the year of his tenancy. *Jones v. Hill*, 198.

2. *Also*, that *C* had a right to enquire, by an account in the case, whether the price given by *A* upon his purchase exceeded the amount due to him as

PRACTICE—*Continued.*

PROBATE COURT.

PROCESS.

PUBLIC LAW.

PUBLIC LAW—*Continued.*

3. Measures taken during that war by parties, whether States, counties or individuals, the object of which was to counteract plans set on foot by the United States for the suppression of the rebellion, were, and are, contrary to the public policy of that Government; and so, contracts arising out of them, cannot be enforced. *Leak v. Comm'rs of Richmond Co.*, 134.

4. *Therefore*, notes taken for money lent, in 1862, to a county to enable it to provide *salt* for its citizens, and thus avoid one of the penalties of *blockade*, are void. *Ibid.*

5. The present State and County authorities are under no obligation to fulfil contracts made by their predecessors during the rebellion, unless they come within the provisions of the Ordinance of 1865, (October 18th,) "Declaring what laws and ordinances are in force," etc., and that requires such as it validates to be "consistent with allegiance to the United States," which is not true of the transaction in question. *Ibid.*

6. The burden of proving that any act of the State authorities during the late rebellion which may be under debate, was "consistent with allegiance," is owing to general position of those authorities, upon the party who asserts it. *Ibid.*

7. Transactions like that under consideration fall under the provisions of the Ordinance of 1865, (Oct. 19th,) and the Constitution of 1868, (Art. viii, § 13,) *forbidding* the payment of obligations incurred in aid of the rebellion, directly or indirectly. *Ibid.*

8. Those prohibitions are merely declaratory of principles of the common law in regard to contracts, and therefore do not impair the obligation of the *contracts* referred to. *Ibid.*

9. The distinction between such acts of the State authorities during the recent war as are valid, and such as are not, turns upon the enquiry whether or not they were extraordinary, arising out of the condition of things, and intended to obstruct or modify some part of the policy of the United States in regard to the rebellion, or not. *Ibid.*

10. Military officers charged with a particular duty, may take private property for public use without making themselves trespassers, but in such cases, the necessity must be urgent, such as will not admit of delay, and where action upon the part of *civil* authority in providing for the want, will be too late. *Bryan v. Walker*, 141.

11. The burden of proving such exigency, in case of suit, devolves upon the defendants: *Ibid.*

12. *Therefore*, where all that the case showed, was, that a wagon and two mules of the plaintiff had been seized in January 1863, in Wilkes County, by the defendant commanding a detachment of Confederate troops, under the *parol* orders of a Brigadier General, for the transportation service of the detachment; and nothing appeared as to the exigency of the necessity (if any) for such service: *Held*, that the defendants had not made out a defense. *Ibid.*

13. The State "Amnesty Act" of 1866, does not include cases of *civil* remedy for private injuries; unless (sec. 4,) when the injury occurred under some *law*, or authority *purporting to be a law, of the State;* which the *parol orders* here could not pretend to be. *Ibid.*

14. *Quære* as to the power of the State to pass such an act in regard to civil remedies for injuries? *Ibid.*

15. Destruction of whiskey by a provost-marshal, under the authority of the Confederate States, in 1862, cannot be claimed as *the act of public*

PUBLIC LAW—*Continued.*

"SCALE"—*Continued.*

2. A bond for money for the hire of a slave for 1865, given January 2nd 1865, is subject to be *scaled* according to the value of the hire for the year in lawful money, and not according to the legislative table of the values of Confederate currency (acts of 1865-'66, ch. 39.) *Maxwell v. Hipp*, 98.

3. The presumption under the ordinance of 1865, that a note given for purchases at an administrator's sale in March 1864, payable at twelve months, is solvable in money of the value of Confederate currency, is not rebutted by evidence that at such sale the administrator gave notice that he would receive in payment only such currency as would pay the debts of his intestate, coupled with other evidence that the creditors would not receive Confederate currency, and that the estate was largely insolvent. In such case the plaintiff is entitled to recover the value of the articles sold. *Laws v. Rycroft*, 100.

4. Where a bond was given upon the 1st day of January 1863, for the hire of slaves for the year 1863: *Held*, that the plaintiff had a right to show to the jury the value of such slaves at that place and for that year, as a guide to them in making up a verdict. *Dancey v. Braswell*, 102.

5. In an action upon a bond in the usual form, given at an administrator's sale in January 1865, proof that at the sale proclamation was made that "Confederate notes will not be taken," rebuts the *presumption* made by the Ordinance of 1865 as to the currency in which notes, etc., are *solvable;* and the fact that on the same occasion, before sale made, the administrator, upon further enquiry by the bystanders, added "that if he had to collect the notes he would collect gold and silver, that if he could pay the notes over to the heirs, etc., *they* could make any arrangement they were willing to, as to payment," is immaterial. *Cherry v. Savage*, 103.

6. A question as to the value of certain cotton, the consideration of a note given at an administrator's sale in Greene County in 1863, is to be settled with reference to the *time and place* of its sale and delivery; and evidence as to what it was worth within the Federal lines, (whither it could not be transported but in violation of law,) or as to what it was sold for, is incompetent. *Moye v. Pope*, 543.

7. A note for money dated May 9th 1863, is liable to the operation of the *scale*, notwithstanding that it is payable in "good bankable currency." *Green v. Brown*, 553.

8. Where a note was given in 1862, in consideration of the loan of Confederate money, and in 1863 the payee endorsed it to the plaintiff in payment for a tract of land: *Held*, in a suit against the payee and the maker, that the *scale* to be applied was the value of Confederate money in 1862, and not that of the land afterwards purchased by the payee. *Summers v. McKay*, 555.

9. A bond dated April 3, 1865, payable at twelve months, "in current money," is presumed to be subject to the *scale* laws. *Howard v. Beatty*, 559.

10. In a case where land had been sold by an executor during 1864, no money having been paid by the purchaser, and subsequently the executor repurchased the land and agreed to pay the purchaser's debt on account of it; and thereupon, a year after the purchase (in April 1865,) he agreed with one of the heirs to pay her one-half of her share in Confederate money, and to give a note payable as above for the other half: *Held*, that this note was not liable to be *scaled* by proving the value of the land. *Ibid.*

11. *Also*, that there was evidence to warrant a jury that it was not to

magistrate, a like amount, — being for items in their account not allowed in the case in the Supreme Court; these latter judgments were docketed, and executions were taken out upon them and returned *nulla bona;* the plaintiffs then asked for an order to have the amount of the decree in favor of the defendant *applied* to their judgments. (C.C.P., § 264:) *Held*, that they were entitled to such relief. *Hogan v. Kirkland*, 250.

2. *Objections*, that the judgments were obtained *subsequently* to the decree, and, that the latter was rendered in *Equity* — as also, in a *Supreme* Court, are not material.

3. The *receiver* under *supplementary proceedings*, provided in C.C.P., § 270, must be appointed by the Judge, and not by the Clerk. *Parks v. Sprinkle*, 637.

4. In a race of diligence between creditors under such proceedings and appointment, if the personal property sought to be subjected be such as may be levied on and seized, *priority* is to be tested by precedence in the appointment of the receiver; in case a receiver were *applied* for earlier by one, but another obtained an earlier *appointment*, it seems that priority will be determined by the date of *application*. *Ibid.*

5. *Therefore*, where judgment had been obtained and docketed by the plaintiff in Wilkes Court against one Martin, and the latter upon examination said that one Shuford, a non-resident of the State, but at that time in Catawba County, was indebted to him, and a receiver was appointed by the Judge on the 27th of April 1870, and an order served upon Shuford to answer upon the 5th of May; *where, also*, the defendant, at same Court and term, likewise obtained and docketed a judgment against Martin: on the 28th of April, docketed it in Catawba County: on the 29th, obtained an order from the Clerk of Catawba Court for Shuford to answer, who answered on the same day, and immediately paid a part of his debt into the Clerk's office; the Clerk on the same day being notified of the appointment of plaintiff's receiver, and on the next day paying the money received by him to the defendant: *Held*, that this payment by the Clerk was in *contempt* of the Judge's order, and that the Judge should have compelled him to pay the amount again to the plaintiff's receiver, to be held subject to the Judge's future orders. *Ibid.*

See Execution.

SURETY.

1. The various solvent sureties given by a Clerk and Master upon the annual bonds of any one term of office, are liable to *contribution, inter se*, in a ratio determined by the aggregate of the penalties of the bonds signed by each. *Moore v. Bondinot*, 190.

2. Where the principal placed property in the hands of a surety, sufficient to satisfy the debt, and then left the State: *Held*, that a third person, also bound for the debt as surety, having been compelled to pay it, might recover its amount from the person who had received the property, *without making a previous demand. Parham v. Green*, 436.

3. Where a creditor, by a binding contract gives further time to the principal in a debt, this discharges the surety, "by matter in pais." Such discharge cannot be enforced by a Justice of the Peace, but by the Superior Court only: *Howerton v. Sprague*, 451.

4. *Therefore*, in a case in which the creditor had taken out a process against the principal and surety before a Justice of the Peace, and had ob-

SURETY—*Continued.*

TAXES.

TENANCY.

TENANTS IN COMMON.

TENDER.

1. There is a difference between the plea of *tender* in actions for *money*, and the like plea in actions for the non-delivery of *specific articles;* in the latter case no averment of *continued readiness*, or of *profert*, is necessary, — *because*, by the tender the articles became the property of the party to whom it is made, and if subsequently they be *converted* by him who made it, he is responsible for their value when converted. *Patton v. Hunt*, 163.

2. In case of *tender* of *specific articles*, under a contract to deliver them, they must be *separated* from others of the same sort, so as to be capable of identification, as upon a sale. *Ibid.*

TOWNSHIP TRUSTEES.

1. Where an Act of the General Assembly authorized the election, in Townships containing cities and towns, of a larger number of Justices than *two*, (Const., Art. VII, § 5,) all such justices are members of the Township Board of Trustees. *Conoley v. Harriss*, 662.

TROVER.

See Fixtures.

TRUSTS AND TRUSTEES.

1. In a contest between a trustee, under a deed made by the *holder* of a note, and a creditor, by attachment and garnishment of the *maker*, the lien of the former begins from the time at which the deed is delivered to the Register, and that of the latter from the time when the summons is *personally* served upon the maker. *Parker v. Scott*, 118.

2. *Therefore*, where the deed was delivered to the Register at 10 o'clock, A.M., Dec. 20th 1866, and actually registered January 28th 1867; and the summons for the garnishee was left at his residence at 8 o'clock, A.M., Dec. 20th 1866, but not actually received by him until the evening of that day: *Held* that the lien under the deed had priority. *Ibid.*

3. A deed in trust to pay debts, which reserves to the grantor's wife *dower* in the land conveyed is, so far, inoperative, but the invalidity of such reservation does not avoid the deed. *Carver v. Cocke*, 239.

4. Where such deed set forth that the grantor had a life estate in a certain fund of $8,500, which, upon his death, would go to his issue, and that he had made use of such fund, and therefore provided that the trustee should pay the $8,500 immediately to such issue, [making no abatement for the life estate.] *Held*, that as the deed furnished the means for correcting the mistake into which the grantor had fallen, the provision, in effect, amounted to no more than that the trustee should pay to such issue, *the value of their reversionary claim. Ibid.*

5. Nor is a provision for satisfying a creditor *in a case he should pay "liberally" for certain property*, invalid, in a case where the fund applicable to the grantor's debts is, in proportion, small, and such *liberal* bidding will turn to the benefit of the fund, and not of the grantor; *Therefore*, where, in such a case, the deed provided in the first place for the payment of two specified debts by a sale of property to the highest bidder for cash, and afterwards, (having referred to a third debt as one he wished to pay,) directed that the trustee "instead of selling the said mountain lands as hereinbefore pro-

(APPENDIX.)—*Continued.*

entertained by the Courts, is not to be dismissed by the plaintiff without an order of the Court first had and obtained. *McAden v. Jenkins*, 796.

By PEARSON, C.J., (the other Justices, p. 820, Concurring.)

1. A Court cannot review *Executive* action declaring a county to be in a state of Insurrection, under Art. XII, § 3, of the Constitution and the Act of 1869-'70, c. 27. *Moore, ex parte* (p. 807).

2. Under those provisions the Executive may *arrest* persons by military force. *Ibid* (808).

3. Those provisions do not suspend the privilege of the writ of Habeas Corpus, and, therefore, under that writ persons arrested must be surrendered, for examination, etc., to the civil authorities. *Ibid* (808), and *Ex parte Kerr* (819).

4. Where a military officer detaining persons arrested in counties declared to be in insurrection, as above, answered to a writ of Habeas Corpus, that he held them under the orders of the Governor, who had also ordered him not to obey the writ: *Held*, that such return was a *sufficient excuse*, under the act of 1868-'9, c. 1, § 15, and, therefore, that such officer was not liable to be *attached*. *Ibid* (809, 815).

5. The *attachment* warranted by that act is not upon the footing of punishment for a *contempt* of the Judge granting the writ, but on that of a substitute for the *fine* inflicted under the former Habeas Corpus act. *Ibid* (809).

6. Under the circumstances of an arrest and order by the Executive, such as above, it is improper to order that the enforcement of the writ by the Judiciary shall be committed to a sheriff of the county declared to be in insurrection; or by calling out the *posse comitatus* of such county; but, inasmuch as the whole power of the counties of the State is under the control of the Executive, the proper direction of further process is to the latter, — upon whose failure to give it effect, the power of the Judiciary is exhausted, farther responsibility therein remaining with the Executive. *Ibid* (810, 811), and *Ex parte Kerr* (818, 820).

7. Under the Habeas Corpus Act, a Judge has no power to order the arrest of the Governor of the State. *Ibid* (815).

1. By PEARSON, C.J. One who has petitioned for a writ of Habeas Corpus may withdraw his application whenever he chooses. *State v. Wiley*, (823).

2. Statement of the grounds that justify the holding to bail of parties charged with the commission of Murder. *Ibid*, (824) and *State v. Tarpley*, (826).

By DICK and SETTLE, JJ. The Chief Executive of the State is not liable to arrest for acts done by him in the discharge of what he may consider to be his Executive duties. *State v. Holden and others*, 829.

By BROOKS, J.

1. Judges of the Federal Courts have jurisdiction to issue writs of Habeas Corpus in cases where the petitioners are imprisoned by State officials *without due process of law*. *Ex parte Moore and others*, 832.

2. Such Judges may require *security of the peace* against persons threatening to repeat such imprisonment. *Ibid.*

(APPENDIX.)—*Continued.*

3. Where the officer who held the petitioners, previous to the return day of the Federal writs of Habeas Corpus returned the petitioners *before a State Judge, in accordance with State writs previously issued for the same cause* but which the State Judge had theretofore not been able to enforce, and had so declared himself to be: *Held*, that he was not liable to be attached by the Federal Judge for contempt in so doing. *Ibid.*