[*Annotations Include 163 N. C.*]

NORTH CAROLINA REPORTS

VOL. 67

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE TERM, 1872

W. M. SHIPP,
REPORTER

ANNOTATED BY
WALTER CLARK
(2ND ANNO. ED.)

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				" Equity	"	62	"

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AT JUNE TERM, 1872

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*ROBERT P. DICK, NATHANIEL BOYDEN.

ATTORNEY GENERAL AND REPORTER,
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CLERK OF THE SUPREME COURT,
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*Resigned 1 Dec., 1872.

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CASES REPORTED

CASES CITED

RULE

ADOPTED JUNE TERM, 1872.

APPLICANTS FOR LICENSE.

Applicants for license are expected to have read: For first course Blackstone's Commentaries, (2d book diligently), Coke or Cruise, Fearne, Saunders on Uses, and some work on Executors and Administrators.

Second course: 3rd Blackstone's Commentaries, Chitty & Stephens on Pleading, Adams Equity, and the Code of Civil Procedure.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

JUNE TERM, 1872

LOUIS FROELICH v. THE SOUTHERN EXPRESS COMPANY.

1. Where the complaint alleged that the plaintiff had delivered to the defendant, an Express Company, an article valued at less than two hundred dollars, and then averred the loss of it by negligence, and demanded a judgment for a sum over two hundred dollars, *it was held* that the claim was founded upon a contract for less than two hundred dollars, and that, therefore, the Superior Court had no jurisdiction of the case.
2. When the claim is founded on a contract for less than two hundred dollars, the Superior Court has no jurisdiction of it, though it may be a case in which the plaintiff might formerly have sued in tort, and though the damages may be uncertain.
3. When it appears upon the complaint that the claim is founded on a contract for less than two hundred dollars, an objection to the jurisdiction of the Superior Court may be taken in the Supreme Court, though it appears from the pleadings in the former Court that the objection was not intended to be taken in that Court.

ACTION tried at Fall Term, 1871, of DUPLIN, before *Russell, J.*

The plaintiff alleged in his complaint that he delivered to the agent of the defendant, for transportation to Hartford, Connecticut, one barrel of wine, valued at one hundred and sixty-four dollars, (2) to be paid for on delivery; that the defendant was a common carrier, and that it had failed to deliver the article as it was its duty to do, wherefore the plaintiff demanded judgment for $250 and costs of suit.

The defendant answered, and denied the allegation of the complaint.

On the trial the plaintiff obtained a verdict for $187.50 for which he had judgment, and the defendant appealed.

When the case was called for argument in the Supreme Court, the counsel for the defendant objected that the Superior Court had no

original jurisdiction of the case, and moved on that ground for a judgment against the plaintiff, and upon that question the case was decided.

Battle & Son, for the plaintiff.
Moore & Gatling, for the defendant.

PEARSON, C. J. The plaintiff is met at the outset by the objection. This action is founded on contract, and it is ordained by the Constitution, Art. IV, sec. 33, "The several Justices of the Peace shall have exclusive original jurisdiction, under such regulations as the General Assembly shall prescribe, of all civil actions founded on contract, wherein the sum demanded shall not exceed $200, and wherein the title to real estate shall not be in controversy." This action is founded on contract, and the amount in dispute (to-wit, $164 and interest) does not exceed $200.

To meet this objection, several positions were taken by the learned counsel for the plaintiff.

1. The "sum *demanded*" is $250.

This raises the question, Where it appears by the complaint that the "amount in dispute" is less than $200, can jurisdiction be conferred upon the Superior Court by a *demand* of more than that sum, or *vice versa?* Where it appears by the complaint that the amount in dispute is more than $200, can jurisdiction be conferred upon a Justice of the Peace, by a *demand* of less than that sum? This is a palpable attempt to evade the Constitution and, if allowed, the provisions of that instrument, in regard to the line of division between the jurisdiction of the Superior Court and the Courts of Justices of the Peace, will be nugatory, and will depend upon the option of the plaintiff. The question, as it seems to us, is too plain for discussion. Manifesty, "the sum demanded" is used in the sense of "the amount in dispute," on the assumption that plaintiffs will act fairly and only demand such an amount as they may reasonably expect to recover; when the contrary appears, it is the duty of the Courts *ex mero motu* to interfere and prevent an evasion of the Constitution. In olden times, when it was found that, by reason of the vast increase in commercial dealings, the Court of Common Pleas in England, to which was assigned by statute all actions founded on contracts, was oppressed with business, the fiction of *quo minus* in the Court of Exchequer and the contrivance of the *ac etiam* clause in the King's Bench were winked at and favored by the Courts, in order to divide the jurisdiction in regard to contracts, and to relieve the Court of Common Pleas of a part of a burden which was too heavy for it. But the condition of things here

(3)

is entirely different, and the Courts are not at liberty to wink at, or favor, and attempt to evade the *Constitution.*

2. The planitiff had his election, under the facts of this case, to declare in tort or in contract, and in support of the jurisdiction the Court will assume that the plaintiff declares in tort.

Under the old mode of procedure there were many instances where plaintiffs had an election to declare in contract or tort. *E. g.:* If one took my horse and sold him, I could waive the tort and sue for "money had and received for my use."

If one sold me a horse with warranty of soundness, I might declare on the contract or declare in tort for false warranty, (4) and join case for deceit, so that if I failed to prove the warranty I might recover on the count for deceit, by proof of the *scienter.*

If one collected money as my agent, I could bring case as for a tort, and his discharge in bankruptcy would not bar the action. *Williamson v. Dickens,* 27 N. C., 259.

This is one case of the many refinements and fictions that brought the noble science of pleading into disrepute and caused it to totter and fall.

Under the blow given to it by the Constitution of 1868, Art. IV, sec. 1, "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," etc.

So the plaintiff can take nothing by the fact that under the old mode of procedure he had his election to declare in tort or in contract. In one case the price agreed on for the barrel of wine was $164, and the wine was to be delivered on payment of that sum, "C. O. D.," had the defendant delivered the wine, received the money and failed to pay it over.

The plaintiff in an action founded on contract could have recovered $164 and interest. As the defendant failed to deliver the wine and receive the money, certainly the plaintiff can recover no more; and it can make no difference whether he declares in contract or in tort, the measure of damage is the agreed price of the wine and interest. As the distinction between declaring in tort or in contract is a refinement abolished by the Constitution, taking it in any point of view this is a civil action founded on contract.

3. The learned counsel insisted that the words, "under such regulations as the General Assembly shall prescribe," have an important bearing upon the construction of this article. We confess ourselves unable to see it. If the words had been under such *restrictions*

as the General Assembly may prescribe, and any restriction had been enacted, there would have been force in the position; but the word is "regulations," that is, such details in the mode of procedure as the General Assembly may prescribe. (5)

Accordingly, the General Assembly has, by the C. C. P., made certain regulations. Title XX. It is to be styled the Court of the Justice: manner of commencing actions in Justice's Court is prescribed; also jurisdiction and manner of proceeding, the pleading in these Courts, keeping dockets, jury trial, etc. In short, by the regulations prescribed much more importance is given to the Court of Justices of the Peace than used to be attached to a trial before a single Justice.

4. The only change intended to be made by the Constitution was to abolish the distinction between debts due on bonds, notes or liquidated accounts stated in writing and signed, etc., and debts due on parol agreements, or for goods, wares, etc., sold and delivered, or for work and labor done, or for specific articles, etc. (Rev. Code, ch. 62, sec. 6), and put both classes up to $200; that is, raise the jurisdiction of a single Justice up to $200, subject to the former limitations as to the nature of the contract.

A perusal of the Code of Civil Procedure, title xx, will satisfy any one that such was not the construction put upon the Constitution by the General Assembly which enacted the C. C. P., and in it prescribed regulations for the Court of Justices of the Peace. All of the machinery provided is intended for the exercise of a very extended jurisdiction. Legislative construction is not binding upon the Courts, but is entitled to much consideration.

Apart, however, from this legislative construction, the meaning of the Constitution is too plain to admit of any doubt: " * * * exclusive original jurisdiction of all civil actions founded on contract." The provision in respect to actions involving the title to real estate shows that the words are used in the broadest sense, and the criminal jurisdiction conferred on it shows that this new tribunal was to be a very different thing from that of a trial before a single Justice, under the Rev. Code. A further proof of the importance attached to "Courts of Justices of the Peace" is exhibited in the enumeration of the Courts in which the judicial power of the State is partitioned among the respective Courts. Art. IV, sec. 4. (6)

This new tribunal is erected to take a part of the jurisdiction of that venerable institution "the County Court," which was abolished. Its jurisdiction over wills, letters of administration, etc., is conferred upon the Judge of Probate, its jurisdiction in all civil actions founded in

contract where the amount in dispute does not exceed $200, except where title to real estate is involved, and its jurisdiction over all criminal matters where the punishment does not exceed a fine of $50 and imprisonment for one month, is conferred upon "the Court of Justices of the Peace." Its jurisdictions in actions not founded on contract where "the amount in dispute" exceeds the sum of $200, or where the title to real estate is involved, is conferred upon the Superior Court. This reminds one of the breaking up of the old institution of the *curia regis* and the partition of its powers between the Courts of Common Pleas, King's Bench, and Exchequer.

Referring again to the Code of Civil Procedure, we find that, while discarding the distinction between actions at law and suits in equity, and between the *forms* of actions, the whole subject is treated of under four classes, actions founded on contract, actions for the recovery of property real or personal, actions for injuries to and for the conversion or destruction of property, and actions for injuries to person and character. No one can doubt, in regard to the fact, that in our case the action is a civil action founded on contract, and falls under the first class. After giving to the subject the degree of consideration to which its importance entitled it, we are forced to the conclusion, that our case is, according to the meaning of the Constitution, within (7) the original and exclusive jurisdiction of the Court of Justices of the Peace.

5. The learned counsel was then forced to fall back upon his last and strongest position. By the declaration of rights, Constitution, Art. I, sec. 19, "In all controversies at law respecting property the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." His argument is —The Court should be slow in coming to the conclusion that it was the intention of the Constitution of 1868 to invade this sacred right, which is embodied in that very instrument—and in the second place, that this invasion, if one was intended, is unwarranted and in violation of a *higher law* than the Constitution, which attribute was claimed for "the declaration of rights."

The first branch of this proposition has been disposed of. In regard to the second, we are not able to see any principle upon which one part of the Constitution can be "a higher law" than the other parts of the same instrument. It is ours to take all of its parts together and declare the true meaning.

This article of the declaration of rights was before the Court in *Smith v. Campbell,* 10 N. C., 590, and it is held that it is confined in

its operation to controversies respecting property, and does not apply to contracts, at all events to contracts like those embraced by the several statutes giving jurisdiction to single Justices of the Peace.

This article was again brought before the Court in *R. R. v. Davis,* 19 N. C., 451, and it was held not to apply to proceedings for assessing the value of land, condemned for the use of a railroad or other public purpose. These cases, and particularly the reasoning on which the decisions are put, show that even as against the action of the General Assembly this article has not been allowed to have the sweeping effect claimed for it by the learned counsel. But it must be noted that we are not considering an act of the General Assembly, but the *Con-*
(8) *stitution itself;* and how one part of that instrument can be said to violate another part of it, we are at a loss to perceive. Had the Constitution ordained that trial by jury should be abolished, as antiquated and not "up to the progress of the age," this ancient mode of trial in controversies *at law* respecting property should have passed away, and the mode of trial *in equity,* to-wit, by the Court, or some other mode of trying facts, would have taken its place; so, as it seems to us, this section of the declaration of rights had no effect "to tie the hands" of the makers of the Constitution, and can only be allowed the effect of influencing, in some degree, the construction of other parts of the instrument.

We failed to perceive the force of the argument drawn from the fact, that from time immemorial "a jury" has been composed of twelve free-holders, and the C. C. P. makes the jury in a Justice's Court consist of but six. Lord Coke tells us that twelve was fixed on for the number of the petit jury, because Jacob had twelve sons, and Christ had twelve disciples: but he allows that on the grand assize the jury was composed of sixteen, in real actions to try title to land. So it seems there is no magic in the number *twelve* save the respect due to immemorial usage; and as the General Assembly, in prescribing regulations for the trial of matters of fact in the Justice's Court, deemed it wise to adopt the number six instead of twelve for a jury, the Courts have no power to control such legislation; for the power to prescribe regulations is expressly conferred by the Constitution.

The merits of the case turned upon the right of a common carrier to limit the liability imposed by public policy, by means of a special contract supported by a sufficient consideration. We are not at liberty to enter upon this very interesting question, as the case must go off on the jurisdiction.

There is error. Judgment reversed, and judgment for defendant, that he go without day and recover his costs.

PER CURIAM. Reversed.

Cited: Hutchison v. Roberts, post, 227; *Bullinger v. Marshall,* 70 N. C., 526; *Latham v. Rollins,* 72 N. C., 455; *McDonald v. Cannon,* 82 N. C., 247; *Hannah v. R. R.,* 87 N. C., 353; *Ashe v. Gray,* 88 N. C., 192; *Wiseman v. Withrow,* 90 N. C., 141; *Moor v. Nowell,* 94 N. C., 271; *Brantley v. Finch,* 97 N. C., 93; *Rogers v. Jenkins,* 98 N. C., 131; *McKimmon v. Morrison,* 104 N. C., 360; *S. v. Earnhart,* 107 N. C., 790; *Parker v. Express Co.,* 132 N. C., 129; *Brown v. Southerland,* 142 N. C., 227; *White v. Ely,* 145 N. C., 37; *Realty Co. v. Corpening,* 147 N. C., 614.

Dist.: Bowers v. R. R., 107 N. C., 723.

(9)

MICHAEL CRONLY v. FREDERICK HALL.

Where an agent of the War Department of the Confederate Government issued the following instrument: "Confederate States Depository, Wilmington, pay Messrs. Collie & Co., or order, twenty thousand dollars," which was endorsed by the payees to the defendant, who endorsed it to another person, by whom it was endorsed to the plaintiff, *it was held* (Rodman, J., dissenting), that the instrument was illegal; that such illegality was apparent upon its face, and extended to all the endorsements.

ACTION of assumpsit commenced before the adoption of the Code of Civil Procedure, and tried at January Term, 1872, of NEW HANOVER, before *Russell, J.*

The plaintiff declared as endorsee against the defendant, as endorser of an instrument, in the following words and figures:

AGENCY WAR DEPARTMENT,
Wilmington, 18 *January,* 1865.

Confederate States Depository, Wilmington, pay Messrs. Collie & Co., or order, twenty thousand dollars.

J. M. SEIXAS.

$20,000. *Agency War Dep't.*"

Pleas, general issue, illegality of consideration, and that the instrument was given in aid of the rebellion.

The instrument was endorsed by the payees, Collie & Co., to the defendant, and by the defendant to one Grady, and by Grady to the plaintiff.

On the trial, the handwriting of the drawer and of all the endorsers was proved; and it was also proved that Seixas, the drawer, was the agent of the Confederate States War Department at Wilmington, and that the plaintiff purchased the instrument from the last endorser, Grady, on 20 January, 1865, paying therefor the amount called for by it in Confederate currency.

There was evidence given tending to excuse the want of a
(10) demand and notice to the defendant, but his Honor, without considering that point, being of opinion that the instrument was upon its face illegal and void, and that the plaintiff could not, under any circumstances, recover upon the endorsement of the defendant, so instructed the jury, who accordingly returned a verdict for the defendant.

There was a rule for a new trial which was discharged, and a judgment given for the defendant, from which the plaintiff appealed.

Battle & Son, for the plaintiff.
(11) *M. London,* for the defendant.

BOYDEN, J. Whether the paper upon which the endorsements in this case were made, is a bill of exchange it is unnecessary for the Court to decide, as the instrument shows a trading with the war department of the so-called and now defunct Confederate government. The sole object and business of this department during its existence was to aid in carrying on war against the rightful government of the United States, and consequently all trading directly with that department was illegal and void, and no sale growing out of such trading could be maintained in the Courts of the rightful government by the party thus trading, no matter what the form of the instrument evidencing such illegal transaction. *Martin v. McMillan,* 63 N. C., 486; *Clemmons v. Hampton,* 64 N. C., 264; *Critcher v. Halloway, Ib.,* 526; *Kingsburg v. Flemming,* 66 N. C., 524, and *Baucum v. Smith, Ib.,* 437.

In our case the illegality appears upon the face of the instrument, and thereby every subsequent holder, whether by endorsement or otherwise, is effected with notice of this illegality, and can have no better or higher claim to maintain an action thereon in the Courts of the rightful government, than the original holder who made the illegal

trade with the war department. Had the Confederate Government maintained its dependence, no doubt the Courts of that government would have held this contract legal; but even in that case, a question might arise whether the endorsement by an individual of this contract of the government would render the endorser liable to the endorsee, or be so regarded as a mere mode of furnishing evidence of the person entitled to receive payment from the government, as in the case of the endorsement of one of our State bonds. Certainly those who have endorsed such bonds in our State have done so under the idea that they did not thereby make themselves personally liable as endorsers, to pay the bonds in case the State failed to do so, but these endorsements have been made as preserving evidence, to the government, of the party who was entitled to receive payment. (12)

No Error.

RODMAN, J., *dissenting:* The original bill of course was illegal and void. But as each endorsement is the drawing of a new bill, it seems to me that the endorsers have no connection with the original illegal contract, but may maintain actions between each other.

STATE v. EDWARD WILLIAMS AND MARY ANN AVERY.

1. Dying declarations are admissible only as to those things of which the declarant would have been competent to testify if sworn in the case; and if they be not the statement of a fact, but merely the expression of the opinion of the deceased, they are inadmissible.
2. Therefore, the deceased, who was shot at night in a house from the outside through an aperture in the logs, declared while *in extremis*, "It was E. W. who shot me, though I did not see him;" *Held*, that the declaration was inadmissible.
3. The decision of a Judge as to the admissibility of the declarations of a deceased person, made just before his death, comprises a decision both of *fact* and of *law*. *Of fact*, as to what were the declarations, and as to the circumstances under which they were made. *Of law*, as to whether the declarations were admissible alone or in connection with the circumstances. On the former, the Judge's decision is final. On the latter, it is subject to review.

MURDER, tried before *Watts, J.*, at Spring Term, 1872, of PITT.

The prisoners were indicted in several counts, Edward Williams for the murder of Silas Avery, and Mary Ann Avery for being accessory before the fact. (13)

It was in evidence that the deceased was shot after dark, in his

house, by some one standing outside, through an aperture between the logs of which the house was built. He was sitting by the fire, with his side near the aperture, and was shot in the side.

On the trial, the State proposed to give in evidence the dying declarations of the deceased. Upon examination of witnesses as to his condition at the time of the declarations, and the circumstances attending them, his Honor held that the deceased was *in extremis*, and the declarations were admissible as dying declarations. Thereupon a witness, Lucinda Wainright, was permitted to state the declarations of the deceased, to-wit: that he knew who shot him. "It was Edward Williams who shot me, though I did not see him." The witness further stated that, in reply to a question asked the deceased by her as to who shot him, he said, "I don't know what those poor creatures shot me for; it was Ed. Williams who shot me, but I did not see him." The counsel of the defendants excepted to the admission of the testimony. They contended that the declarations should be entirely excluded from the jury; but the Court ruled that they were admissible, under the circumstances, for what they were worth, and charged the jury to be careful in weighing these declarations, but to consider them in connection with the other testimony in the case, and give them what weight they were entitled to. Defendant's counsel again excepted.

Verdict of guilty. Rule for a new trial discharged. Judgment, and appeal by the defendants.

Attorney-General, Battle & Son, and *Dupre,* for the State.
Johnston & Nelson, for the defendants.

(14) RODMAN, J. The admission of dying declarations is an exception to the general rule of evidence, which requires that the witness should be sworn and subject to cross-examination. The solemnity of the occasion may reasonably be held to supply the place of an oath. But nothing can fully supply the absence of a cross-examination. In consequence of his absence, such declarations are often defective and obscure. Hence, several eminent Judges have felt it a duty to say that they should be received with much caution, and that the rule which authorizes their admission should not be extended beyond the reasons which justify it. (See note to *Rex v. Johns,* 2 Lead. Crim. Cases, 396; *Regina v. Hinds,* Bell C. C., 256; *Regina v. Jenkins,* Law Rep., 1 C. C.; 1 Phil. Ev., 292, and opinion of *Lord Denman* in Sussex Peerage Case, 11 Clark & Fin., 112.) And this is the more important as such declara-

tions, when received, have great, and sometimes undue weight with juries.

It is settled on authority, and is consistent with reason, that if the declarant would not have been permitted to testify had he survived, either because he was too young to comprehend the nature of an oath, or was disqualified by infamy, or imbecility of mind, his dying declarations are inadmissible. *Rex v. Pike,* 3 Car. and Payne, 598; *Regina v. Perkins,* 2 Moody C. C., 135; *Rex v. Drummond,* 1 Leach C. C., 337-38.

It is equally clear that such declarations are admissible only as to those things to which the declarant would have been competent to testify if sworn in the case. Consequently, if they be not the statement of fact, but merely the expression of the opinion of the deceased, they are inadmissible. And if so, merely hearsay, or irrelevant. 2 Lead. Cr. Cases, 404; *Rex v. Sellers,* Carrington Crim. Law, 233; *Oliver v. State,* 17 Alabama, 587; *Johnson v. State, Ib.,* 687.

It is contended, for the prisoners, that the declarations in this case were nothing more than the expression of an opinion or belief.

The case states that Lucinda Wainwright testified that the deceased said: "He knew who shot him. To which she replied that she did not know. Then deceased said, it was Edward Williams, (15) though I did not see him." Further, in reply to a question by witness as to who shot him, deceased said, "I don't know what those poor creatures shot me for; it was Ed. Williams who shot me, though I did not see him."

The case further states that the deceased was shot after dark, while sitting in his house at the fire-place, with his right side near an aperture between the logs of the outer wall, about three inches wide. The shooting was done through the aperture by some person standing on the outside of the house. The wounds were in the right wrist and side.

It was said for the State that every allegation of the identity of a person is necessarily the expression of an opinion only, because it is a conclusion drawn from a comparison of the appearance of the person at one time, with the recollection of his appearance at some other time. This is true; but the admission of such evidence is an exception to the general rule excluding opinions, founded on the necessity of the case. Best Ev., sec. 349.

But there must be some limit to the exception: a witness can not be allowed absolutely to substitute his judgment for that of the tribunal to whom the law has committed the decision of the fact. Best. Ev., sec. 344-5-6. We think the limit may be drawn without any difficulty, and consistently with the habitual practice of Courts. Whenever the opin-

ion of the witness upon such a question, or on one coming under the same rule, is the *direct* result of observation through his senses, the evidence is admitted. As, for example, when a witness has seen a person or object at several times, and expresses his opinion as to the identity of what he saw at one time with what he saw at another, as human language is inadequate to convey to the mind of another person fully and accurately the impression made upon the mind of the wit-
ness through his sense of sight, his opinion, as the result of
(16) that impression, is admitted, and is entitled to more or less
weight, according to the circumstances. And, although opinions, as derived, may sometimes be erroneous, yet they are not generally so, and when carefully weighed are sufficiently reliable for practical use in the ordinary affairs of life. The witness does not *unnecessarily* substitute his judgment for that of the tribunal.

But if the opinion of the witness is the result of a course of reasoning from collateral facts, it is inadmissible. As, for example, if at the time to which the question of identity applied he did not see or have the testimony of any sense as to the person in question, but believed it to have been him because he might have been there, and had a motive to have been there and to have done the act alleged. In such a case the tribunal is as competent to reason out the resultant opinion as the witness is; and by the theory of the law, it alone is competent to do so. To allow any influence to the opinion of the witness would be *unnecessarily* to substitute him to the function of the tribunal.

Now, to apply these views to the language of the deceased. Must his words reasonably be understood to express an opinion as to the identity of his assailant with the prisoner, as the direct result of observation through his senses, or any of them? The deceased accompanied each declaration that it was Williams who shot him, with the qualification, "but I did not see him." He appears to have had in his mind an idea of the distinction which I have been endeavoring to draw, and to have wished to exclude the conclusion that his opinion was anything more than one founded on an inference from facts and motives which he may have supposed to exist, but which even if they were in evidence on the trial (as to which the case is silent), do not affect the present question. The deceased excludes sight as a source of his opinion. A Court is not at liberty to conjecture, that he might have heard the prisoner and identified him in that way, especially as there is no suggestion of that sort in evidence.

We think that, whether we take the words of the deceased
(17) alone, or in connection with the circumstances of the assault,

they do not purport, and were not meant to state, the identity of Williams with the assailant, as a fact known through the senses, and that, consequently, they were inadmissible.

The learned counsel who represented the State cited *S. v. Arnold,* 35 N. C., 184, as in point. There is an obvious distinction between that case and this. In that, the deceased did not say that he did not see the prisoner, and it was possible that he did see him. The evidence in that case also suggested the possibility that his sense of hearing contributed to his identification of the prisoner. Moreover, in that case the exclamation of the deceased, being immediate upon the shooting was admissible as part of the *res gestae.* 1 *Greenl. Ev., sec.* 156; *Com. v. McPike,* 3 *Cushing,* 181; *S. v. Shelton,* 47 N. C., 360.

It was contended for the State that, as upon the face of the declarations of the deceased, it was possible that he might have identified the prisoner through hearing, the Judge ought to have have left them to be weighed by the jury and disregarded if worthless. But it is an inflexible rule that the Judge must decide all preliminary questions touching the competency of the evidence. The instances and authorities for this are so numerous and familiar that it is unnecessary to refer to them.

From this, however, it is contended that the decision of the Judge in this, as in analagous cases, comprised a decision both of facts and of law.

1. Of fact: as to what were the declarations of the deceased, and as to the circumstances under which they were made.

2. Of law: were the declarations admissible alone, or in connection with the circumstances?

On the first question the Judge's finding was final. On the second it was subject to review.

I will give a single illustration only of the doctrine here stated. The declarations of a deceased person, made in con- (18) templation of impending death, are admissible. It is settled that the Judge passes upon the preliminary question of their admissibility. It is equally well settled that in doing so he finds the circumstances under which they were made; and also whether, considering the circumstances, they were made in contemplation of impending death. This last is a question of law. *Regina v. Smith, Leigh & Cave,* C. C., 627; *Donnelly v. State,* 2 Dutcher, 601; *Starkie v. The People,* 17 Ill., 24-25; *Rex v. Welbourn,* 1 East., P. C., 358; *Rex v. Hucks,* 1 Stark., 523; 2 Crim. Case, 400; *S. v. Shipp, ubi sup.,* is also to that effect.

We think, therefore, that the Judge properly undertook to decide the question of admissibility; but that (for the reasons given) he decided it erroneously.

Reade, J. *Dubitante.*

PER CURIAM. *Venire de novo.*

Cited: S. c., 68 N. C., 60; *S. v. Brogden,* 111 N. C., 658; *S. v. Behrman,* 114 N. C., 803; *S. v. Jefferson,* 125 N. C., 715, 717.

JOHN D. SPICER v. R. F. FULGHUM AND OTHERS.

Where the plaintiff's counsel, before the jury was impaneled, requested that any juror in the box who was related to any one of the defendants by blood or marriage should retire, and no juror retired or replied; *Held,* that it was not error for the Judge to refuse to grant a new trial, because after verdict and judgment it was ascertained that a juror was connected with one of the defendants; it being a matter of discretion.

APPEAL from *Clarke, J.,* at January Special Term, 1872, of WAYNE.

This was instituted for the purpose of foreclosing a mortgage
(19) made to secure three promissory notes given by defendants Fulghum and Whitfield to Nancy B. Latham, also a defendant.

The notes were in the usual form of promissory notes, given 27 November, 1868, and payable, with interest, 1 March, 1869, 1 January, 1870, and 1 January, 1871, respectively. In July, 1870, the payee assigned them for value to one Morrisey as a commissioner, and Morrisey assigned them to the plaintiff for a valuable consideration.

At the trial, before the jury was impaneled, the plaintiff's counsel, in the presence of the Court, after reading over the names of the defendants, requested any juror in the box, related by blood or marriage to any of the defendants to retire from the box, and no juror retired or said anything. His Honor charged the jury, in substance, that if they found that the plaintiff knew that Morrisey had no right to transfer the note, or had reasonable grounds to believe Morrisey was guilty of a breach of trust in so doing, he was not entitled to recover, but that if he were an innocent purchaser he was entitled to recover. The plaintiff excepted. Verdict was rendered for the defendants, and after judgment the plaintiff moved for a new trial on the ground that he

had discovered, since the trial, that one of the jurors was connected by marriage with the defendant Nancy B. Latham. Upon being questioned the juror admitted there was some relationship between his wife and the said defendant; but he was unable to say what; and after explanation, His Honor said he could not make out the relationship, and that it was so remote that he would not have excluded the juror if it had been stated before the trial. He refused the motion, and the plaintiff appealed.

Faircloth, for the plaintiff.
Smith & Strong, for the defendants.

BOYDEN, J. There are but two questions made in the case. First, that his Honor erred in his ruling as to a challenge made on the part of the plaintiff in the following form, "if any juror (20) in this box is related to any one of the defendants, by blood or marriage, he is requested to retire from the jury box." No juror retired or offered to retire or made any response. His Honor certainly permitted this form of challenge (if it may be called one) and he made no objection to any juror's retiring or responding to the challenge. How then did his Honor err in this matter? He permitted the plaintiff to have his own way; and if anything injurious to the plaintiff resulted from this form of challenge, it was the fault of the plaintiff, and not of his Honor.

Challenges to jurors must be made, in apt time, and before the jurors are impaneled. It comes too late after verdict. *S. v. Perkins,* 66 N. C., 126. In that case, his Honor, the Chief Justice, says: "It was the misfortune of the defendant that neither he nor his counsel had been sufficiently on the alert to enable them to find out the fact in apt time to make it a cause of challenge, that one of the jurors was on the grand jury when the bill was found. That might have been a ground for his Honor, in the Court below, to grant a new trial, if he had any reason to suspect unfairness on the part of the prosecution." His Honor further remarks in that case: "After a defendant has taken his chances for an acquittal the purposes of justice are not subserved by listening too readily to objections that were not taken in apt time." In fact this, instead of being regarded as error in not allowing a challenge to a juror, must be for not allowing a new trial; and regarded in that light the above mentioned case is full authority for the ruling of his Honor, had it appeared that the juror was in fact incompetent, and that the challenge must have been allowed had it been taken "in apt

time." How much more then in this case was his Honor right in refusing a new trial, where the connection by marriage was so remote, that, in all probability, the juror had forgotten the connection, if he ever knew it, and where it was so remote that neither his Honor
(21) nor the plaintiff's counsel was able to compute the degree of relationship. At all events there is nothing appearing on the record, in regard to the juror, to authorize this Court to disturb the verdict of the jury.

As to the other point, that his Honor submitted a question of law to the jury instead of deciding it himself, the counsel is wholly mistaken in supposing that the question of the negotiability of the note was submitted to the jury; as his Honor, in his instructions upon this part of the case, assumed that the note was negotiable.

PER CURIAM. No Error.

Cited: S. v. Lambert, 93 N. C., 624; *S. v. DeGraff,* 113 N. C., 697; *S. v. Maultsby,* 130 N. C., 664; *Pharr v. R. R.,* 132 N. C., 423; *S. v. Lipscomb,* 134 N. C., 698; *S. v. Watkins,* 159 N. C., 487.

LOUIS H. HORNTHAL, Et al. v. SHERROD H. MCRAE.

Where a debtor, after filing his petition in bankruptcy, but before obtaining his discharge, promises, in consideration of the old debt, and of a new credit for the purchase of goods, to pay the old debt as well as the new, his subsequent discharge is no defense against his promise to pay such old debt.

APPEAL from *Watts, J.,* at Spring Term, 1872, of WASHINGTON.

The plaintiffs claimed $2,000, as being due on an account for goods sold and delivered before 1 June, 1868.

The defendant put in evidence his discharge in bankruptcy, granted by the United States District Court for the District of Albemarle, in North Carolina, discharging him from all debts contracted before 1 June, 1868.

The plaintiffs then offered to prove a promise by the defend-
(22) ant to pay the demand, made after filing his petition in bankruptcy; but the testimony was objected to by the defendant and ruled out by the Court.

The plaintiffs then offered to prove that after 1 June, 1868, the defendant agreed with plaintiffs that if they would sell him goods on credit, to the value of $500, he would pay for the goods, and the amount

due on the old account, to-wit, $2,000; that the sale of the $500 worth of goods was so made and subsequently paid for by the defendant, before the bringing of this action. This was objected to by the defendant and excluded by the Court.

There was a verdict and judgment for the defendant and the plaintiffs appealed.

Smith & Strong, for the plaintiffs.

No counsel for the defendant.

PEARSON, C. J. The question is—a debtor, after being adjudicated a bankrupt, but before the discharge, promises in consideration of the old debt, and in consideration of a new credit for the purchase of goods, to pay the old debt, the discharge which he expected to obtain, to the contrary notwithstanding—can the discharge be set up as a bar to a recovery on this new promise?

The law is so clearly expressed by Parke, Baron, in *Kirkpatrick v. Tattersall, Meeson & Welsby* (13 Exchequer), 770, that it is unnecessary to do more than to give a few extracts from the opinion.

"There is no plea alleging any illegality, nor does the contract (23) appear on the face of it to be illegal. Consequently the only question is, whether, assuming the contract not to be tainted with any illegality, it is valid."

"There can be no question, that a debt, though barred by a certificate, is a sufficient consideration for a promise to pay it. But it is contended that if the promise be made before the certificate is obtained the same rule does not apply. We are all of opinion, that there is no distinction in this respect between a promise made before the certificate and one made after it, both are equally binding, though the only consideration be the old debt. But then the promise must be one which binds the bankrupt *personally* to pay, notwithstanding his certificate," etc.

"The only distinction between a promise before and after the certificate is, that in the former it may be more doubtful, whether the debtor meant to engage to pay, notwithstanding his discharge under the bankruptcy; but it is clear, that if he did the promise is equally binding."

For error in excluding evidence of a new promise, there must be a

PER CURIAM. *Venire de novo.*

Cited: Fraley v. Kelly, post, 80; *Henly v. Lanier,* 75 N. C., 174; *Kelly v. Farmer,* 78 N. C., 341; *Fraley v. Kelly,* 79 N. C., 349; *Fraley v. Kelly,* 88 N. C., 229.

(24)

STATE v. ISAAC HOWARD.

Laws 1868-'69, ch. 18, creates two offences: 1st, Hunting on the Sabbath with a dog. 2d. Being found off one's premises having a shot-gun, rifle or pistol. Therefore, a conviction is sustainable under an indictment charging the defendant with being "found off his premises on the Sabbath day, having with him a shot-gun, contrary to the form of the statute," etc.

INDICTMENT at Spring Term, 1872, of LENOIR, under Laws 1868-'69, ch. 18, in the following words:

"The jurors of the State upon their oath present that Isaac Howard, late of the County aforesaid, on 1 January, 1870, with force and arms, at and in the County aforesaid, was found off of his premises on the Sabbath day, having with him a shot-gun, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

The jury returned a *special verdict,* "That the defendant was carrying his gun off of his premises on Sunday, but it is not proved that he was hunting; whereupon, if the Court shall be of opinion that the defendant is guilty, then the jury say he is guilty as charged in the indictment, otherwise that he is not guilty."

His Honor *Clarke, J.,* adjudged the defendant *not guilty,* and the Solicitor appealed.

Attorney-General, Battle & Son, and *Dupre,* for the State.

No counsel for the defendant.

RODMAN, J. The charge against the defendant is that he was "found off of his premises on the Sabbath day, having with him a shot-gun, contrary to the statute," etc.

The jury found a special verdict, to-wit: "That defendant was carrying his gun off of his premises on Sunday, but it is not proved
(25) that he was hunting." On this the Court adjudged the defendant not guilty.

Laws 1868-'69, ch. 18, creates two distinct offences: 1. Hunting on the Sabbath day with a dog or dogs. 2. Being found off of one's premises on the Sabbath, having a shot-gun, rifle or pistol.

The indictment follows the words of the Act creating the latter offence. The words have a plain and obvious meaning as they stand. It is not necessary to interpolate so as to make them read, "Being found hunting off of one's premises," in order to make them intel-

ligible, and to do so would change the whole meaning of the sentence, and frustrate what appears to be the legislative policy. Courts have no right to do that.

Judgment must be

PER CURIAM: Reversed.

STATE v. NEEDHAM PURDIE AND NATHAN PURDIE.

It is still necessary, in an indictment for felony, in this State, to charge the act constituting the crime to have been done "feloniously," and that word cannot be supplied by any equivalent.

INDICTMENT for burning a barn containing grain, tried at Spring Term, 1872, of BLADEN, before *Russell, J.*

The indictment charged that the defendants, "on 23 July, 1871, with force and arms, at and in the county of Bladen aforesaid, *unlawfully and willfully* did set fire to and burn a barn, the property of" etc., "the same at the time of the burning thereof having grain in it," etc.

Verdict of guilty. Motion in arrest of judgment by defendants, because the burning was not charged to have been done (26) *feloniously*. Motion allowed and appeal by the Solicitor.

Attorney-General, Battle & Son, and *Dupre,* for State.

No counsel for defendants.

BOYDEN, J. There is no error. This case is governed by *S. v. Jesse,* 19 N. C., 297.

In that case Chief Justice Ruffin says that the office of the term *feloniously* is to describe the offence. It denotes, at the instant of the doing of an act, the disposition of the accused in doing it, which constitutes the guilty will that renders the person criminal. It is therefore one of the constituents of the offense. The Chief Justice further says, "it is necessary for another purpose, which is distinctly and immediately to apprise the Court of the degree of punishment that may be inflicted and demanded, and thus to regulate the mode of trial." And the books of authority lay it down that this word *feloniously* can not be supplied by any periphrasis or word equivalent. The decision in the case of *Jesse* was since our acts curing formal defects in indictments.

PER CURIAM. Affirmed.

Cited: S. v. Rucker, 68 N. C., 212; *S. v. Skidmore,* 109 N. C., 797; *S. v. Caldwell,* 112 N. C., 855; *S. v. Bunting,* 118 N. C., 1200; *S. v. Mallett,* 125 N. C., 724; *S. v. Holmes,* 153 N. C., 608.

(27)

W. B. WRIGHT and P. H. WRIGHT, HIS WIFE, v. DUNCAN McCORMICK.

1. Whereas a petition for partition of land, the tract was described by metes and bounds, and title was claimed under a patent to J. M., which was referred to as an exhibit, but the date of which was incorrectly stated, and the answer of the defendant admitted, that he claimed title to a tract of land of similar courses and distances with that described in the petition, patented to J. M., Nov. 6, 1784, and alleged that if the identity of the land was ascertained by survey, then he was a tenant in common with the petitioner, otherwise, not: *Held,* that while it would have been more regular to require the plaintiff to amend his petition by giving the true date of the grant, and allow the defendant to amend his answer, it was not error to permit the plaintiffs to produce the grant as an exhibit at the hearing, without such amendment, and order the partition.
2. In case of ambiguity and uncertainty in pleading, the words are to be taken most unfavorably to the party using them.

PETITION for partition of land filed in the County Court of CUMBERLAND in 1867, and transferred to the Superior Court after the adoption of the present Constitution, and heard before *Buxton, J.,* at Spring Term, 1872.

The statements in the pleadings upon which the case turned are sufficiently given in the opinion of the Court.

Strange, for the plaintiffs.
B. & T. C. Fuller, for the defendant.

RODMAN, J. This case should never have come to this Court; but having come here, it is our duty to decide it.

The plaintiffs in their petition allege that they own an undivided half of a certain piece of land which was granted to John Matthews, 6 November, 1805, and they set forth the boundaries, and beg leave to refer to the original grant as an exhibit; that the defendant claims the other undivided half, and they pray process, etc., and a partition.

(28) The defendant answers, that he claims title to a tract of land, the courses and distances of which are similar to those set forth in the petition, which was patented by John Matthews, 6 November, 1784, and if it is ascertained by survey and actual loca-

tion that the land is the same with that conveyed to him, then he is a tenant in common with the petitioner; otherwise he is not.

The case came up for hearing upon the pleadings, and the Judge allowed the plaintiff to produce, as the exhibit referred to in his petition, a grant to Matthews dated 6 November, 1784. We think the Judge was right in allowing this; but he ought at the same time to have required the petitioner to amend his petition, by inserting the true date of his grant. This amendment being made, the defendant also should have been allowed to amend his answer; or, if he refused to do so, the plaintiff might have demurred to it for uncertainty. Neither of these were done. The defendant contends that the Judge erred, in understanding his answer to admit that he was a tenant in common with the plaintiff, and that is the inquiry before us. It is a rule of construction, of which no pleader has a right to complain, that all uncertainties and ambiguities in his pleadings shall be taken in the sense most unfavorable to him; for he has at all times the power, and it is his duty to make them plain. And as, if the uncertainty occurs by accident or oversight, he can cure it by amendment when it is pointed out, a failure to amend shows that the uncertainty is of purpose, and designed to mislead his adversary; and no party can be allowed to profit by such an artifice.

The petition substantially and with sufficient clearness described the land; the error was in a false recital of the date of the grant. It can scarcely be true that the defendant was in any uncertainty as to what land was really meant. If he was, it was within his power to call for a further description, which the Court would have required the plaintiff to furnish. As he failed to do this, the certainty of the land must be assumed to have been known to him, and it was his duty (29) either to disclaim the title or to allege that he was sole seized, or admit the tenancy in common. Certainly he does neither of the two first. And he does the last not plainly and directly, but if it is ascertained by a survey that the land is the same with what he claims; thus apparently trying to put on the petitioner the sole expense of the survey and location of the land, which properly belonged to both. We think the Judge was right in his construction of the answer, and in disappointing the attempt to impose an unequal burden upon the plaintiffs.

PER CURIAM. Affirmed.

Cited: Fidelity Co. v. Jordan, 134 N. C., 244.

DUNCAN McFADYEN v. W. D. HARRINGTON.

The declarations of a supposed partner, in the absence of the other, are not admissible against the latter until the partnership has been proved *aliunde*.

ACTION on the Case commenced in 1858, in the County Court of MOORE, carried by appeal to the Superior Court, and tried before *Buxton, J.*, at Spring Term, 1872.

The suit was brought for the recovery of the value of a lot of cotton delivered to the defendant, by the plaintiff, to be ginned and carried to Fayetteville and sold. The plaintiff alleged that the defendant had sold and failed to account for the cotton. One ground of objection to the plaintiff's recovery was that the cotton was not the sole property of the plaintiff, but belonged to plaintiff and one O. S. Yarborough, as partners, and Yarborough ought to have been joined as party plaintiff. The plaintiff testified that the cotton was his own, that
(30) Yarborough had had an interest in it, but he had settled with Yarborough for the latter's share, before the cotton was delivered to the plaintiff. The defendant then offered, as a witness, his son, who testified that he heard the plaintiff say, before the last picking of that crop of cotton, that he and Yarborough were in company together, and were to divide expenses and the crop. The defendant next offered to prove, by this witness, declarations made by Yarborough, in the absence of the plaintiff, as to the partnership between Yarborough and the plaintiff. The testimony was objected to and ruled out. Defendant excepted.

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

McDonald, for the plaintiff.
Battle & Son and *Howze,* for the defendant.

BOYDEN, J. Two questions only are raised in this case:

First, that his Honor rejected competent evidence. The plaintiff had testified that he was the sole owner of the cotton at the time he delivered it to the defendant, that no one else had any interest in it. He further stated that O. S. Yarborough had had an interest in the cotton, but that before the delivery to the defendant, plaintiff had settled with Yarborough for his share of the cotton, and that he was then sole owner.

Defendant insisted, that inasmuch as the plaintiff and Yarborough had made the crop together upon shares, they were partners, and although

the plaintiff had purchased Yarborough's interest in the crop, and paid him for the same, and that although the defendant made the agreement with the plaintiff alone, as the plaintiff and Yarborough had made the cotton as partners, and although the partnership was at an end before the sale, still the defendant was entitled to notice of the dissolution of the partnership, and that before he received the cotton of the plaintiff, and *that* even although he had never heard of the partnership until after the trade. (31)

These positions were regarded by the Court as new, and no authority or reason was given for them by the counsel who pressed them with much earnestness, and the Court, being unaware of any authority or reason in the law of partnership for these positions, hold the decision of his Honor correct.

The defendant then called his son James, who testified that, before the last picking of the cotton, he heard the plaintiff say, that he and Yarborough were in company together, and were to divide the expenses and the crop.

The defendant then offered to prove by this witness declarations made by Yarborough in the absence of the plaintiff, as to Yarborough and the plaintiff being partners. To this evidence the plaintiff objected, and it was rejected by the Court. In this there was no error. For if the fact thus proposed to be proved was competent evidence for any purpose, the witness Yarborough, who knew the facts, should have been called to prove them. They could not be proved in the manner proposed. There was no error in rejecting this evidence.

PER CURIAM. No Error.

Cited: Henry v. Willard, 73 N. C., 43.

(32)

HENRY JARMAN v. RICHARD W. WARD.

In actions to recover the possession of personal property, the plaintiff may not, if he please, make the affidavit and give the undertaking required for the immediate delivery of the property to him. If he do not, his judgment, if he succeeds, is for the possession of the property, or for its value, and damages for detention, as in the old action of *detinue*.

ACTION heard upon demurrer to the complaint, before *Clarke, J.*, at Spring Term, 1872, of ONSLOW. His Honor sustained the demurer and the plaintiff appealed.

The facts and substance of the pleadings are sufficiently stated in the opinion of the Court.

Hubbard & Haughton, for the plaintiff.
No counsel for the defendant.

PEARSON, C. J. This is an action to recover the possession of personal property, and damages for the detention.

The complaint alleges an *executed* contract for the sale of two steers, and a cow and calf, by force of which the ownership was vested in the plaintiff. The plaintiff does not make the affidavit or give the undertaking as required by C. C. P., secs. 177, 179. To this the defendant demurs, and for ground of 177 demurrer specifies: "The action is for claim and delivery of personal property, and the plaintiff has not complied with C. C. P., secs. 177, 178, 179 (ch. 11, p. 63)."

This presents the question: Is the affidavit and undertaking required to be filed in all actions to recover the possession of personal property; or may the plaintiff, if he chooses, allow the property to remain in the possession of the defendant, *pending the action,* and thus avoid the necessity of making the affidavit or of giving the *under-*
(33) *taking,* which latter requisite plaintiffs may not in all cases be able to comply with?

We think it clear, by an examination of C. C. P., that, in this action, if the plaintiff is content to let the property continue in the possession of the defendant *pending the action,* he is not required to make the affidavit or give the undertaking required by secs. 177, 178, 179. It is then, in effect, the old action of *detinue,* and the judgment set out in sec. 251, C. C. P.: "In an action to recover the possession of personal property, judgment for plaintiff may be for the possession, or for the value of the property (in case a delivery can not be had) and damages for the detention," etc.

It is only in cases when the plaintiff seeks to have the property delivered to him *instanter* and to have the possession *pending the action,* as in the old action of *replevin,* that the affidavit and undertaking are required.

This is obvious by looking at C. C. P., title IX, "Of provisional remedies in civil actions," ch. 1, Arrest and Bail, ch. 2, Claim and Delivery of Personal Property. This *provisional* remedy presupposes an original remedy, in which the provisional remedy may or may not be applied for.

This general view of the subject does not seem to have suggested it-

self to his Honor, or to the counsel, nor was C. C. P., sec. 251, adverted to.

The demurrer is overruled, and there should be judgment that the plaintiff recover the two steers and the cow and calf, (which are described with great certainty in the complaint), together with damages for the detention and costs, and in case the property, or any part of it, can not be had, then that he recover damages by way of valuation in addition to damages for the detention.

The case is remanded, to the end that the amount of damages may be enquired of, and final judgment be entered in the Superior Court; unless the defendant be allowed to amend his pleadings, by withdrawing the demurrer and putting in an answer. *Love v. Com'rs,* 64 N. C., 706, *Mervin v. Ballard,* 66 N. C., 398. (34)

Defendant to pay costs in this Court, and judgment on the undertaking for the appeal.

PER CURIAM. Reversed.

Cited: Blakely v. Patrick, post, 42; *Hooper v. Miller,* 76 N. C., 404; *Jones v. Ward,* 77 N. C., 338; *Wilson v. Hughes,* 94 N. C., 186; *Smithdeal v. Wilkerson,* 100 N. C., 55; *Kiser v. Blanton,* 123 N. C., 404; *Oil Co. v. Grocery Co.,* 136 N. C., 355.

ASA EUBANKS v. ALSEY MITCHELL.

1. Where the plaintiff, in an action to recover the possession of land, alleged that the defendant held a bond for title under a former owner now dead, and had made payments in part for the land; that said former owner had devised the land to a daughter who conveyed to the plaintiff; the defendant answered that by payments in money and in property and services, which were to be taken as money, he had paid in full for the land; and plaintiff replied that the alleged payments were not payments but items in an account which were barred by the Statute of Limitations: *Held,* that the proper issue was one for a jury, viz: whether the defendant paid his vendor in full or partially, and if partially, how much.
2. Where in such case a reference was made, and the referee reported that the defendant had made partial payments exceeding his indebtedness for the land, and exceptions were filed and sustained, on the ground that the items allowed were barred by the statute, *held* that there was a misconception of the issue, or the issue made was immaterial.
3. Pleadings on both sides being defective, cause remanded without costs to either party.

APPEAL from *Tourgee, J.,* at Spring Term, 1872, of CHATHAM.

The substance of the pleadings upon which the case turns is set forth in the opinion of the Court. The *reply* referred to in the opinion is in these words:

"The plaintiff replies, and says to the counterclaim of de-
(35) fendant, on account of various amounts due by John Trollinger, deceased, as set forth in his answer, that he has no knowledge or information sufficient to believe, and he does not believe, that counterclaim to be true, and that as regards all items thereof, to which the same is applicable, he pleads to be allowed the benefit of the statute of limitations," etc.

His Honor sustained certain exceptions filed by the plaintiff to the report of a referee, and the defendant appealed.

Phillips & Merrimon, for the plaintiff.
J. H. Headon and *Fowle,* for the defendant.

RODMAN, J. In order that this opinion may be intelligible, it will be necessary briefly to state the substance of the pleadings.

The plaintiff alleges: A title in fee to himself in a piece of land in possession of and claimed by the defendant; that in 1845 the land was owned by John Trollinger, who gave the defendant a bond to make him a title on payment of a certain sum with interest; that Trollinger died in 1867 or 1868, having by his will devised the land to his daughter Barbara, wife of Albright, who, on 14 January, 1871, conveyed the same to the plaintiff for value; that defendant has possessed the land ever since 1845 and has made some payments. He demands judgment for the possession of the land, and damage for the detention.

Defendant answers: Admits that he claims under a title bond from Trollinger (which he sets out); says that he made various payments on the debt for the land; that he acted as agent for Trollinger upon an understanding that the value of his services should be credited as payments on the land; that he also paid taxes for Trollinger upon other lands, and delivered to him a quantity of cotton and other property to go as payments on the land, in all to an amount greater than
(36) his indebtedness.

The plaintiff replies, in effect, as we conceive, that the alleged payments were not payments, but only items in an account against Trollinger, and that they were barred by the statute of limitations.

We conceive that, at least for the present purpose, we must understand the replication to mean as above expressed. For if we understand it to allege that the *payments* were barred by the statute of limita-

tions, it would be absurd, as a payment extinguishes the debt *pro tanto,* and of course the statute can have no application.

Certainly the answer alleges a payment; and not a set-off to a debt not sued on. To understand the replication as applicable to a set-off would be to condemn it as a departure and irrelevant. Thus construing the replication, it will be seen that the issue is, whether the defendant had paid the debt to Trollinger in full, and thereby entitled himself to a conveyance of the legal title, or had paid it in part, in which case he would be entitled to some relief, according to the circumstances, the nature of which it is not now material to inquire into.

If the alleged payments were not made and accepted, or acknowledged as such, but were only items in an unsettled account against Trollinger, not connected with the land debt by any agreement or course of dealing between the parties, expressly proved, or to be inferred from the circumstances, then it is of no concern to the plaintiff whether they are barred by the statute of limitations or not; as in such case the defendant's remedy, if any, would be an action against the executors of Trollinger.

It must be remembered that this is not an action to recover the price of the land, or any other debt to Trollinger, but to recover the land itself, upon an issue in which the plaintiff denies that defendant has any equitable interest whatever.

The issue thus understood was for a jury; and we think it doubtful whether his Honor had power under C. C. P., sec. 245 (37) to direct a reference without the written consent of the parties. That section authorizes a compulsory reference: 1. "Where the trial of an issue of fact shall require the examination of a long *account* on either side," etc. Here the answer set up numerous partial payments at various dates, making in all full payment. We doubt if a list of such payments can be deemed an account within the meaning of the Code; more especially as a part of the issue with regard to each item is, not only was the service performed, or the property delivered, but was this performance or delivery made and accepted, or afterwards acknowledged, expressly or by fair inference, as a payment on the debt for the land.

But it is not necessary to decide this point, and we express no opinion.

The referee reported that the defendant at various times made partial payments to an amount exceeding his indebtedness to Trollinger. The plaintiff excepted to the report, on the ground that the items allowed were stale and barred by the statute of limitations; and his Honor sustained the exception.

We think that both the counsel for the plaintiff and his Honor misconceived the issue, probably by reason of the inartificial and badly drawn pleadings; or, if the issue must be construed as being on the statute of limitations, it is an immaterial one, and can not affect the judgment. The issue we conceive to be, whether the defendant *paid* Trollinger in full or partially, and if partially how much.

The case must be remanded in order that the issue may be found in some proper way. We suggest to the parties the propriety of amending their pleadings so as to make them clearer. Perhaps also in the present state of the parties, in case it shall be found that the defendant has paid in part only and not in full, there may be a difficulty in giving a judgment which will do complete justice in the case, C. C. P., (38) 561-'62. As the misconception of the issue seems to have been common to both parties, and the pleadings of neither are without fault, neither will recover costs in this Court.

Judgment reversed and case remanded.

PER CURIAM. Reversed.

W. F. LEWIS, Ex'r of K. H. LEWIS, v. G. W. JOHNSTON, Adm'r of JAS. S. CLARK.

Where the plea of "fully administered" is found for the defendant and a judgment *quando* rendered for the plaintiff, the defendant is entitled to judgment against the plaintiff for his costs.

ACTION of debt, brought in 1866, and tried at Fall Term, 1871, of PITT, before *Moore, J.*

The defendant's pleas were *general issue* and *fully administered.* The plaintiff admitted the latter plea and the former was found in his favor.

His Honor thereupon rendered a judgment *quando* against the defendant as administrator, and a judgment for plaintiff's costs against him *de bonis propiis,* and the defendant appealed.

No counsel for the plaintiff.

Johnston & Nelson and *Smith & Strong,* for the defendant.

BOYDEN, J. The question attempted to be raised in this case is not an open question.

The decision and the practice have been uniform ever since the case of *Welborn v. Gordon,* 5 N. C., 502, decided in 1800, (39) where it is said that, whenever an administrator established the

plea fully administered, he is entitled to judgment and execution for his costs against the plaintiff individually.

Again, in *Battle v. Rorke,* 12 N. C., 228, decided in 1827, the question was fully considered and the same decision made. In that case the pleas were *non assumpsit,* payment, and set off, *plene administravit.*

And in that case Chief Justice Taylor says: "The case depends upon the construction of the act of 1777, concerning costs, and the principles of pleading as applicable to the particular defence relied upon by the administrator. The act provides that in all cases whatsoever the party in whose favor judgment shall be given shall be entitled to full costs, unless where it is, or may be, otherwise directed by statute. Was judgment given in favor of the defendant in the original action? No rule of pleading is better settled, at common law, than if the plaintiff joins issue upon the plea of *plene administravit,* and it is found against him, the judgment is that he takes nothing by his bill. And it is only where he confesses the plea to be true that the plaintiff is entitled to judgment *quando.*" The same doctrine is announced by Chief Justice Ruffin, in *Terry v. Vest,* 33 N. C., 65, and the practice in this particular has been uniform for more than half a century.

There is error. Judgment reversed, and judgment here that the defendant recover his costs in the Court below, and in this Court.

PER CURIAM. Reversed.

Cited: Lewis v. Johnston, 69 N. C., 392.

L. W. BLAKELY, Assignee in Bankruptcy of S. T. JONES & CO., v. JOHN PATRICK, Adm'r. of S. T. STILLEY.

1. To maintain an action to recover the possession of personal property, whether resort is had to the provisional remedy of the Code of Procedure or not, the plaintiff must show title or a right to the present possession of the property sued for, which must be specific and be identified by a sufficient description.
2. A mortgage by a buggy-maker of "ten new buggies," without delivery of possession, he having more than ten on hand at the time, was ineffectual to pass title to any particular buggies or to any interest in the buggies on hand; and the mortgagee cannot maintain an action for the recovery of ten new buggies in the possession of the mortgagor, or his personal representative. A *fortiori* is this the case, if such buggies were not the same that were on hand at the date of the mortgage.

APPEAL from *Clarke, J.,* at Spring Term, 1872, of GREENE.

The action was commenced in January, 1869, by S. T. Jones and H. T. Bennett, under the name of S. T. Jones & Co., as plaintiffs, to recover possession of "ten new buggies" from the defendant as administrator of S. T. Stilley, deceased; and they having complied with the provisions of Tit. IX, ch. 2, of C. C. P., *nine* new buggies found in the defendant's possession were delivered to them by the sheriff. The plaintiffs became bankrupts, and S. M. Blakely, having been appointed their assignee, was made party plaintiff as such. He claimed title under a mortgage, executed by Stilley to S. T. Jones & Co., in July, 1867, which purported to convey, with other personal property, "ten new buggies," to secure certain notes which were payable 1 January, 1868; and the mortgage was offered in evidence. The complaint goes on to state that

(41) Stilley was a manufacturer of buggies, dependent upon his trade for support, and the property conveyed in the mortgage was left with him to enable him to prosecute his business, that he died in November, 1867, and the defendant, soon thereafter being appointed his administrator, "took into his possession the entire personal estate of the said S. T. Stilley, amongst which were the ten new buggies mentioned in said mortgage."

The defendant's answer, admitting the other allegations of the complaint, alleges that all the buggies on hand at the execution of the mortgage (more than ten in number) had been sold by Stilley, and that the buggies claimed by the plaintiffs were made afterwards and not embraced in the mortgage. It denied that title to any particular buggies passed under the mortgage. Debts of higher dignity than the plaintiff's were also set up as a defense. It was in evidence on the trial that the mortgage was executed in New Bern, and that the plaintiff at the time had fifteen new buggies in his shop in Greene County, where he lived.

His Honor in his charge told the jury that the action was "an action for damages for the conversion of ten new buggies by the defendant," that under the mortgage he could claim ten buggies and no more, that Stilley became the trustee or stake-holder of Jones & Co., the mortgagee, and that the defendant was liable for the value of such of the buggies as went into his possession, with interest from 1 January, 1868. The defendant's counsel asked his Honor in writing for this instruction: "If the jury believe there were more than ten new buggies in the lot in Stilley's possession at the time the mortgage was made, and the ten were not separated by Stilley and Jones from the rest of the lot, then the plaintiffs can not recover."

His Honor refused to give the instruction.

The jury returned a "verdict finding all issues in favor of the plaintiffs, and assessed his damages at $127.25." The Court gave judgment accordingly and the defendant appealed.

Battle & Son, for the plaintiff.
Smith & Strong, for the defendant. (42)

PEARSON, C. J. This is an action to recover the possession of personal property, to wit, ten new buggies—and damages for the detention. It appears by the *record proper* that the provisional remedy was resorted to. Under it the sheriff seized nine new buggies that were of the estate of the intestate of defendant, and delivered them to the plaintiff. The judgment is that the plaintiff retain possession of the said property and also recover $127.25 for damages and costs.

This reference to the *record proper* is made to prevent a confusion of ideas, that might be caused by the circumstance, that in the statement of the case his Honor says, in charging the jury: "This is an action for damages, for the *conversion of the ten new buggies by the defendant.*" An action to recover the possession of personal property, where the provisional remedy is not resorted to, is in effect the old action of *detinue,* and where it is resorted to the action is in effect the old action of *replevin. Jarman v. Ward, ante* 32.

In either case, to maintain the action, the plaintiff must show title or a right to the present possession of the thing which is the subject of the action, and the thing sued for must be specific, and be identified by a sufficient description. *O'Neal v. Baker,* 47 N. C., 168; *Jones v. Morris,* 29 N. C., 370.

The defendant's counsel asked his Honor, in writing, for this instruction, "if the jury believe there were more than ten new buggies in the lot in Stilley's possession at the time the mortgage was made, and *the ten* were not separated by Stilley and Jones from the rest of the lot, then the plaintiff can not recover," which was refused. There is error. *Waldo v. Belcher,* 33 N. C., 609. That case is decisive of the question. It was fully argued by counsel on both sides, and, after due consideration, an opinion was filed, which is sustained by the reason of the thing and by the authorities cited. We do not feel called on to review it. In our case the complaint sets out that Stilley was a manufacturer of buggies, and "the property was left with him, to enable him to (43) prosecute his business," leaving it to be inferred that the buggies on hand at the date of the mortgage were disposed of by Stilley, in the course of his business, and he, from time to time, made other buggies

and put them in the lot, in the place of such as he had sold. The answer distinctly avers, that the buggies on hand at the date of the mortgage were sold, and the buggies now claimed have been made since the mortgage.

This fact seems not to have been adverted to on the trial, and yet it has a direct tendency to show that the present action is entirely outside of the mark, and "hits at" a set of buggies different from those on hand, which it is supposed the parties attempted to convey at the date of the mortgage.

The legal effect of the mortgage, in this instance, was not to pass the title to ten new buggies as an executed contract or sale, but *if it has any effect at all,* it is to create an *executory contract,* or an agreement to sell and deliver ten new buggies, for a breach of which contract damages may be recovered. We qualify the proposition, for here there was no price paid, and the only consideration for the contract was to secure debts, that is, a promise to secure the performance of another promise. But whether an act be brought on the latter promise, or on the first promise, to-wit, the "two notes," the defendant, who is the administrator of the debtor, can avail himself of the want of assets, as he has done in this case, and the plaintiff can not lay hands on ten buggies that happened to be on hand at the death of the debtor, but must be content to take his chances with the other creditors, according to the course of administration.

In considering the question it was suggested, may not the mortgage deed be allowed to have the effect of making Jones a tenant in common with Stilley in the lot of fifteen new buggies, so as to give him three undivided fifth parts, and bring it within *Powell v. Hill,* 64 N. C., 169?

(44) The reply is, that view, even if tenable, will not aid the plaintiff to maintain this action; for it is held in *Powell v. Hill* that the remedy is not by a civil action to recover the possession, but by a special proceeding before the Judge of Probate for partition.

But a more decisive reply is: In *Powell v. Hill* the relation of tenants in common was created by the agreement, according to which the plaintiff was to work on the farm and to have a certain part of the crop for his labor (say one-third part), and the crop being made and housed, it is held that he was a tenant in common, entitled to have his part on partition. So it may be admitted that if Stilley had agreed to let Jones have an undivided part of the lot of new buggies (say two fifth parts), the relation of tenants in common would have been created. But that is a very different matter from an agreement to let Jones have *ten* of the lot of fifteen new buggies, without specifying or setting apart the

identical ten that he was to have. In the former case no delivery, either actual or constructive, was required to establish the relation of tenants in common. Indeed, the idea of delivering or setting apart ten of the number would be inconsistent with the relation by which he was to be entitled to two-fifths part of the undivided whole; whereas, in the latter case, the very purpose was that ten of the number should be the *sole property* of Jones. To vest the title or ownership in any particular buggies, it was necessary to set them apart, so as to make a constructive delivery, and effect an executed contract; in the absence of such identification, the agreement, as we have seen, was executory only.

Suppose Jones to be entitled as tenant in common to two-fifths part, and some one or two of the buggies had been destroyed—the loss would fall upon both of the tenants in common, and Jones would only have the two-fifths part of what was left; but suppose Jones to be entitled to ten new buggies of the lot of fifteen, under the executory agreement, and some one or two of these had been destroyed—the loss would fall on Stilley, and Jones would call for ten new buggies. Note the (45) diversity.

PER CURIAM. *Venire de novo.*

Cited: Pemberton v. McRae, 75 N. C., 501; *Jones v. Robinson,* 78 N. C., 400; *Dunkart v. Rinehart,* 89 N. C., 357; *Atkinson v. Graves,* 91 N. C., 102; *Spivey v. Grant,* 96 N. C., 223; *S. v Garris,* 98 N. C., 737; *McDaniel v. Allen,* 99 N. C., 138; *Carpenter v. Medford, Ib.,* 500; *Mizzell v. Ruffin,* 113 N. C., 23; *Driller v. Worth,* 117 N. C., 522; *Holman v. Whitaker,* 119 N. C., 114; *Moose v. Brady,* 125 N. C., 38; *Chemical Co. v. McNair,* 139 N. C., 330; *Pfeifer v. Israel,* 161 N. C., 430; *Milling Co. v. Stevenson, Ib.,* 512.

Dist.: Boone v. Darden, 109 N. C., 77; *Lupton v. Lupton,* 117 N. C., 31; *Pitts v. Curtis,* 152 N. C., 616.

W. H. BROGDEN v. J. C. PRIVETT.

Under sec. 14, ch. 117, of the acts of 1868-'69, giving a remedy by attachment to enforce a laborer's lien in certain cases, an affidavit that the defendant *has removed and is removing and disposing of the cotton crop without regard to the lien,* is sufficient to justify the issuing of the warrant.

MOTION to vacate attachment in the Superior Court of WAYNE, heard before *Clarke, J.*, 2 December, 1870.

The plaintiff commenced his action in October, 1870, on a money demand, for work and labor done on the defendant's farm, and filed his complaint claiming a lien on the land and crop of the defendant, and demanding an enforcement of the lien; and he filed an affidavit for an attachment under sec. 14, ch. 117, of the acts of 1868-'69. The affidavit, after setting forth the debt, etc., and a description of the farm, alleged "that the said defendant has removed and is removing and disposing of the cotton crop raised on said farm the present year (1870) without regard to the lien the plaintiff claims on said cotton crop and farm, and without paying the plaintiff for his labor and services on said farm."

The clerk thereupon issued a warrant of attachment, which the defendant, upon notice, moved to vacate. His Honor granted an order vacating the attachment, and the plaintiff appealed.

(46) *S. M. Isler,* for the plaintiff.
Faircloth, for the defendant.

READE, J. The only question is as to the sufficiency of the affidavit for suing out the attachment. Laws 1868-'69, ch. 117, secures to a laborer a lien on the crop which he labors to make, and also upon the land, etc., upon which the crop is made; and forbids the employer "to remove the crop," etc., "without the permission, or, with intent to defraud the laborer of his lien." And it gives the laborer a remedy by attachment when such removal is attempted. The affidavit for the attachment in this case sets forth that the defendant "has removed and is removing and disposing of the cotton crop," etc., "without regard to the lien," etc. There is no allegation that the removal is "with the intent to defraud the laborer," and, therefore, in view of the fact that the usual way for a farmer to raise money to pay his laborers is by selling his crop, it ought not to be presumed, but must be averred, that the removal is with a fraudulent intent. It is insisted, however, that the words of the statute are in the alternative, "without his permission, or, with intent to defraud." That is true; but still it is not necessary for us to decide whether "or" ought not to be construed *and,* because the affidavit does not use either alternative in the language of the statute; but substitutes his own language, "without regard to the lien," etc. We are not informed why the plaintiff evaded the language of the statute; and we are of opinion that to favor his *experiment* would be an inconvenient and dangerous construction of the statute.

PER CURIAM. Affirmed.

(47)

BENJAMIN RUSH and M. A. RUSH v. HALCYON STEAMBOAT COMPANY.

1. A defendant who has confessed judgment has no right of appeal from such judgment; but where an appeal was allowed in such case by a justice of the Peace, and the plaintiff failed to move to dismiss the appeal in the Superior Court, the Supreme Court may pass by the irregularities and, regarding the proceedings as in the nature of a writ of false judgment, consider the errors assigned upon the record.
2. All intendments are taken most strongly against a party alleging error on the record; therefore, where a defendant confessed judgment before a Justice on a note given to the plaintiff, as administrator, for the *rent of a house*, and then appealed and objected in the Superior Court that the plaintiff had no right of action; *held*, on appeal to the Supreme Court, the record showing nothing to the contrary, that it must be presumed that the plaintiff's intestate had an estate for years, and not an inheritable estate in the premises.

APPEAL from a Justice, tried before *Buxton, J.*, at Spring Term, 1872, of CUMBERLAND.

The action was for the recovery of $190 and interest, due by note given 1 January, 1869, by one R. M. Orrell, an agent of the defendant, to the plaintiffs "as administrators of Benj. Rush, deceased," for "rents of wharf and warehouse until 1 January, 1870." The defendant, by said Orrell, confessed judgment for the amount of the note and then appealed to the Superior Court.

The papers and statement of the case, as sent up by the Justice under orders from the Superior Court, show that the summons ran in the name of the plaintiffs "as administrators of Benj. Rush," and that the complaint set forth that the defendant promised to pay them the sum of $190, with interest from 1 January, 1870, for the use of certain wharves and warehouses during 1869.

In the Superior Court the defendant "moved in arrest of judgment," because it appears from the complaint, 1st, that the plaintiffs (48) are not the real parties in interest; 2d, the plaintiffs have no right to maintain the action; 3d, that no license from the heirs-at-law of the intestate Rush to prosecute the action is alleged.

The motion in arrest was allowed by his Honor, and the plaintiffs appealed.

Hinsdale, for the plaintiffs.
B. & T. C. Fuller, for the defendants.

DICK, J. At common law an unsuccessful party to an action had no right of appeal. If there was error in the proceedings and such

error was apparent upon the writ of error; and if the action was in a Court not of record, a writ of false judgment would lie. For a wrong verdict upon issues of fact there was no remedy which could be obtained as matter of right, but the Judge in his discretion could grant a new trial.

In this State the right of appeal is regulated by statute, and is allowed to a party to an action, or other legal proceeding, who is dissatisfied with any judicial order or determination involving a matter of law or legal inference, or any judgment rendered by a Court upon a verdict. C. C. P., sec. 299. The purpose of an appeal is to submit to the decision of a Superior Court a cause which has been tried in an inferior tribunal. Its object is to review the whole case and secure a just judgment upon the merits. It would be trifling with the administration of justice to allow an appeal to a defendant who voluntarily confesses a judgment, and thereby admits that both the law and the facts are on the side of the plaintiff in the action. As the plaintiffs in this case did not move in the Court below to dismiss the appeal which was improvidently granted we will pass by all irregularities and consider the proceedings as in the nature of a writ of false judgment, which has brought
(49) the papers into Court, and the complaining party has assigned his errors. *Swain v. Smith,* 65 N. C., 211. We must enquire, whether the errors assigned are apparent upon the face of the record, and are sufficient to justify the reversal of the judgment complained of. It is insisted that the plaintiffs are administrators, and have no right to recover the money demanded in the complaint, as the claim arises on a contract for the rent of lands belonging to the estate of their intestate. In the summons the plaintiffs are styled administrators, but in the complaint they do not claim the money as administrators, and it does not appear that the leased premises belonged to the estate of an intestate. The words "Administrator of the estate of Benj. Rush," which appear in the caption of the complaint, may be rejected as surplusage, as they are not necessary to sustain any allegation or demand of the plaintiffs contained in the complaint.

In such proceedings we can only notice error apparent upon the face of the record, and all intendments are to be taken most strongly against the party alleging error, and in favor of the correctness of the judgment sought to be reversed; and especially ought this rule to apply where the judgment is upon confession.

If the wharves and warehouses rented by the plaintiffs belonged to the estate of their intestate, it does not appear that he was entitled to an inheritable estate, which descended upon his heirs at law. If the

estate was a term of years, it passed to his administrators, and they are entitled to the rents as assets, and can properly recover them in this action. As the law is well settled in the cases referred to by the counsel of the defendant, that administrators can not control the estates of inheritance of their intestates, we can reasonably presume that the plaintiffs in this case only exercised their legal rights, and that the premises rented by them belonged to their intestate for a term of years. As we can not see from the record that this action was improperly instituted, the judgment of the Superior Court (50) is reversed, and the judgment of the justice is affirmed and must be entered as a judgment of this Court.

PER CURIAM. Reversed.

Cited: S. c., 68 N. C., 72; *Lee v. Lee*, 74 N. C., 71; *White v. Clark*, 82 N. C., 11; *Mason v. Pelletier, Ib.* 44; *S. v. Griffis*, 117 N. C., 712.

A. STOKES & CO. v. W. H. HOWERTON.

When the terms of the condition of a mortgage relate to future liabilities only; *Held*, that a stipulation reciting that it was understood "that S. (the mortagee) shall not become surety for H., (the mortagor) for more than $1,200, including claims heretofore signed by said S," and directions to "sell and pay off all liabilities for which said S. may be liable for him," (the said H.,) do not operate to extend the security to past liabilities.

Case agreed, upon questions arising in proceedings supplementary to execution, in ROWAN, heard before *Cloud, J.*, at Chambers, April, 1872.

The plaintiffs having obtained judgment against the defendant for $200 and interest, before a Justice of the Peace, had it docketed in the Superior Court of Rowan, and execution issued thereon. The execution being returned unsatisfied, upon affidavit that John I. Shaver had money in his hands belonging to the defendant, said Shaver was examined in relation to such indebtedness. It was agreed that Shaver's liability depended upon whether a note executed by the defendant, with Shaver as surety, to one Moore, was secured by the terms of a mortgage from the defendant to Shaver, which is set out in the opinion of the Court. The note to Moore was executed before the date of the mortgage. Shaver, having sold the mortgaged property, applied the proceeds to the defendant's indebtedness to him, and claims for (51) which he was liable for the defendant, including the note to Moore.

It was agreed, that if his Honor should be of opinion that said note to Moore was secured by the mortgage, the proceedings should be dismissed, otherwise judgment should be rendered for the plaintiffs.

His Honor being of opinion that said note was secured, gave judgment against the plaintiffs, and they appealed.

Bailey and *Fowle,* for plaintiffs.
Blackmer & McCorkle, contra.

READE, J. The question is, whether the mortgage secures the mortgagee as to the liability already incurred, or whether it only secures him in liabilities thereafter to be incurred.

The condition of the mortgage is as follows:

"This indenture, made this, 3 July, 1871, by and between W. H. Howerton, of Salisbury, N. C., of the first part, and John I. Shaver, of the same place, of the other part, witnesseth: That the said party of the first part, in consideration of one dollar paid to him by the party of the second part, has bargained and sold, and does hereby bargain, sell and convey unto the said party of the second part, his executors, administrators and assigns, all his present stock of groceries, provisions, liquors, confectioneries, and all and every other article of stock now on hand, or which from time to time may be added thereto. The condition of the above deed is such, that whereas the said party of the second part has agreed to stay any execution and stand security for him on judgments which may be taken against the said party of the first part: Now, therefore, if the said party of the first part shall well and truly indemnify and save harmless the said party of the second part from loss or liability by reason of his staying executions for him, then the foregoing deed is to be void, otherwise to remain in full force.

"And the said party of the second part covenants, to and with
(52) the said party of the first part, that he may proceed and conduct the business he is now employed in, and sell goods as he has been accustomed to do, and generally to buy, sell and barter as if this deed had not been made, until a breach of the condition aforesaid shall have been committed. And it is understood and agreed to as a part of this conveyance, that the said Shaver shall not become surety for said Howerton for more than twelve hundred dollars, including claims heretofore signed by said Shaver, and if he shall become surety on any note or notes for said Howerton, they shall stand on the same footing as judgment stayed. And at any time when the said Shaver shall see fit to do so, for any reason that is satisfactory to him, he may take

possession of the entire stock of goods, advertise the same for twenty days, and sell a sufficiency thereof for cash to pay off all liabilities for which the said Shaver may be liable for him, together with all costs and charges of executing this trust. And the balance of goods and money he shall pay over to the said Howerton or his order.

In witness whereof, the said parties of the first and second parts have hereunto set their hands and seals, the date first above written.

W. H. HOWERTON, [SEAL.]
JOHN I. SHAVER." [SEAL.]

The scope, and indeed the very terms of the condition are as to *future* liabilities only.

It is insisted that the stipulation, "and it is understood and agreed to as a part of this conveyance that the said Shaver shall not become surety for said Howerton for more than $1,200, including claims heretofore signed by said Shaver," etc., is intended to *secure* "claims heretofore signed." But that does not seem to us to be the proper construction—it only limits the amount which Shaver undertakes to become security for, *i. e.*, $1,200, with what he was already bound for. And "same footing" means that if he signs notes as well as "stays judgments," the notes and judgments shall stand on the same footing. (53)

The direction to "sell and pay off all liabilities for which said Shaver may be liable for him," taken by itself would embrace the liability incurred before the date of the mortgage; but the whole instrument must be construed together, and "all liabilities" must be construed to mean all *such* liabilities as before mentioned.

It may be that, although the prior liability is not secured in the mortgage, yet after the mortgagee sold the property and had in his hands more than enough to satisfy the mortgage, he would be entitled to retain to secure his liability outside the mortgage; but the case agreed on does not present that point.

There is error. This will be certified to the end that there may be judgment for the plaintiff according to the case agreed.

PER CURIAM. Reversed.

CANNON, STOKELY & Co. v. H. H. ROBINSON and ELIZABETH NIXON, Exr's of N. N. NIXON.

Where land was devised by a testator to his executors, in trust for his widow and certain of his issue during the life of the widow, and then over to such issue, with directions to cultivate the land and keep an account of produce, sales and outlays, and after supporting the widow and children divide the surplus; *Held*, that the land and produce are chargeable, as a trust fund, for liabilities incurred by one of the executors in cultivating the land, and can be subjected by a civil action.

APPEAL from *Russell, J.*, at January Special Term, 1872, of NEW HANOVER.

The defendants were sued as executors and trustees under the will of Nicholas N. Nixon, for the amount of certain loans and the price of goods, bought by the defendant Robinson for the purpose of culti-
(54) vating land belonging to the estate of the testator. The provisions of the will of the testator in relation to said land are set forth in the opinion of the Court.

It was insisted for the defendants that the estate of the testator was not liable, but that the liability was a personal one of the defendant Robinson. His Honor charged the jury that the estate of the testator was liable, upon the evidence, and that the plaintiffs were entitled to a judgment against the defendants as executors and trustees.

Verdict and judgment for the plaintiffs and appeal by the defendants.

M. London for the plaintiffs.
Strange for the defendants.

READE, J. By the terms of the will certain lands are devised to the defendants, who are also executors, in trust for the widow and certain of the children of the testator, during the life of the widow, and then over to these same children, with directions to the executors to cultivate the lands and keep an account of the produce and sales and of the outlays, and if, after supporting the widow and said children, there should be a surplus, such surplus should be divided among them. This gave to the defendants the power to purchase necessaries for conducting the farming operations. And liabilities incurred by them for that purpose became a charge upon the trust fund, the land and produce.

Under the old system before The Code, the remedy to subject the trust fund was in equity; but now it is by a civil action, as this is.

It cannot be maintained, therefore, as was contended by the defend-

ant, that the estate of the testator is not liable for the outlay, but that the defendant Robinson is liable out of his individual estate. The estate of the testator is liable; but still it is not to be understood that the general estate is liable, but only the trust fund aforesaid. (55)

PER CURIAM. No error.

Dist: Rountree v. Dixon, 105 N. C., 355.

STATE v. THOMAS JOHNSON.

1. In an indictment for rape, charging that the assault was violent and felonious, and that the ravishing was *felonious* and *against the will* of the prosecutrix, is sufficient.
2. The name of a person ravished was charged in the indictment as *Susan* while her real name was *Susannah*, though she was generally called Susan; *Held* to be no ground of objection.
3. Evidence of the name of a prisoner as given by him when brought before the examining magistrate is admissible, though it do not appear whether the examination was reduced to writing or not.
4. Upon a criminal trial, it is proper to ask a witness to look around the Court room and point out the person who committed the offense.
5. Where the record shows that, after the jury returned a verdict of guilty in a capital trial, the prisoner moved for a new trial, etc., it was not absolutely essential that the Judge, before pronouncing sentence, should ask the prisoner, in the usual formula, whether he had anything to say why sentence of death should not be pronounced against him.

RAPE, tried before *Cloud, J.*, at Spring Term, 1872, of DAVIDSON.

The indictment charged that the prisoner, a colored man, "on 16 September, 1871, with force and arms, at and in the county aforesaid, in and upon one Susan Thompson, in the peace of God and the State then and there being, violently and feloniously did make an assault, and her, the said Susan Thompson, against the will of her, the said Susan Thompson, then and there feloniously did ravish and carnally (56) know," etc.

The evidence was that Susannah was the christian name of the prosecutrix, though she was called Susan and Susy, but mostly Susan. A witness stated, in reply to a question by the Solicitor, that the prisoner when brought before the examining magistrate was asked his name and gave it as Thomas Johnson. There was no evidence that the examination before the justice was not reduced to writing, and the prisoner's counsel objected to the evidence.

The prisoner was seated within the bar, on the bench used as a pris-

oner's dock. The prosecutrix, on her examination, was asked to look around the room and see if she could point out the man who committed the rape upon her. She did so and pointed to the prisoner, saying, "That is the black rascal." This evidence was objected to.

The jury returned a verdict of guilty. A motion for a new trial was made and the rule discharged. His Honor thereupon proceeded to pronounce sentence upon him, without asking whether he had anything further to say, why sentence of death should not be pronounced against him. The prisoner appealed.

Attorney-General, Battle & Son, and *Dupre* for the State.
Bailey for the defendant.

READE, J. In the arugment here, there were several objections taken to the sufficiency of the record, which have been obviated by the return of a more perfect record upon certiorari. There still remains to be considered the following objections made by the prisoner:

1. The indictment does not charge that the prisoner did *forcibly* and feloniously ravish; but only that he did "feloniously ravish," omitting the word *forcibly.*

There is no doubt that the indictment must charge the act to
(57) be done forcibly; although that particular word need not be used.

Any equivalent word will answer—especially since our statute, which forbids the staying of judgment or proceedings in criminal cases, on account of any "informality or refinement, if, in the bill, sufficient appear to enable the Court to proceed to judgment." Rev. Code, ch. 35, sec. 14. It is always best, however, to observe established forms; and any unnecessary departure, or experiment, is decidedly reprehensible. It makes the administration of justice uncertain, tedious and expensive. The indictment does charge that the assault was "violent," but this is not repeated, when it comes to charge the act of ravishing. And the authorities are, that, although ravishing would seem to imply force, yet it is necessary to charge force expressly, in some appropriate language. In our case the indictment charges, that the assault was violent and felonious, and that the ravishing was felonious and *"against her will."* This is sufficient under our statute, *supra.*

2. The indictment charges the name of the woman ravished as "Susan." The evidence was that her name was "Susannah," but that she was called indifferently, Susan, Susy, but most people called her *"Susan."* There is no force in this objection. It would seem that Susan was the name by which she was *generally* known. At any rate, *idem sonans.*

3. Declarations which the prisoner made as to his name, Thomas Johnson, when he was before the magistrate, not in writing.

This objection is taken upon the ground that it does not appear that the examination was not in writing, and it is presumed to be that it was, and, therefore, the writing would be the better evidence. A sufficient answer is, that it does not appear that his declarations were a part of his examination at all. They are to be taken, therefore, as outside of his examination, and as being voluntary.

4. The prosecutrix was asked by the Solicitor to look around the courtroom and see if she could see the man who committed (58) the rape on her, and having done so, she pointed to the prisoner and said, "That is the black rascal." It was insisted, that this was to make the prisoner furnish evidence against himself; that he had the right to be there and "confront his accusers," and that, for the State to take advantage of his presence to have him pointed out and identified, placed him in the dilemma of either abandoning his constitutional right of being present, or of affording the means of his conviction by its exercise.

The objection is specious, nothing more. It is true that the State will not, either directly or indirectly, compel the prisoner to furnish evidence against himself; but it is equally true that the State will not allow the prisoner to deprive the State of evidence to which it is entitled. One of the first things which the State has to do, is to have the prisoner *identified* as the person charged, and as the person who committed the offense. Not merely one of that *name,* but the very person present. What would it avail for the witness to say, John Smith did it, unless the witness can point out which John Smith is meant? In many cases the *only* way, and in every case the *best* way to identify a person is to have him present and pointed out. This is a right which the State claims, not only to enable it to punish the *right* man, but, what is regarded of at least equal importance, to avoid punishing the *wrong* man. In support of his objection the prisoner relied upon *S. v. Jacobs,* 50 N. C., 259, in which it was decided that the defendant could not be compelled to exhibit himself to the jury, "that they might see whether he was in the prohibited degree of color." But that case is not like this. There, he was compelled to exhibit himself to the jury, that the "jury might determine, by inspection, his quality and condition—his blood or race." That was a matter to be proved by the oath of witnesses who knew the facts, or, it may be, by experts. And although the defendant could not be compelled to exhibit himself to the jury, yet it would be competent for witnesses, who knew (59)

him, to speak of his color and of any facts within their knowledge, and to point to him as being the identical person of whom they were speaking.

The rule is, that the prisoner is entitled to be present at his trial, and at every stage of the trial, that he may hear all that is charged against him, and to confront his accusers and make his defence. And the State has the right to *have* him present, both for the purposes of identification and to receive punishment if found guilty.

5. Another objection is, that after verdict, and before judgment, the prisoner was not asked, if he had anything further to say why sentence of death should not be pronounced.

There is, in capital trials, much that is formal, and intended only to make them impressive and solemn; but even these purposes are useful, and such ceremonies ought not to be neglected. It is, however, not a matter of formality, but of necessity, that the prisoner should be informed that his case is not closed by the verdict of the jury against him, and that he may still urge any reason he may have why he should not suffer death. And until it appears that he has been so informed, we can not allow that he shall be punished. If it appears, in this case, that the prisoner has not been informed of his rights, the effect would not be to discharge the prisoner, because there stands the verdict of guilty against him; but it would be to arrest the judgment, until he is informed of his rights. So that, if the objection were well founded in fact, the effect would be, that we would certify the case back again, together with our opinion, to the end that the prisoner might be asked, whether he has anything further to say why sentence of death should not be pronounced against him. But we are constrained to say, that we do not think the objection well founded in fact. There is no mere formula in which the prisoner should be informed of his rights; it is sufficient that it appears that he was informed that the verdict did not conclude him from urging anything he might think necessary.

(60) The record shows, that after verdict, the prisoner did move for a new trial, and for a *venire de novo,* and that the Court considered his motions and overruled them. So that it not only appears that the prisoner was *informed* that he might move, but he *did* move, such reasons as he had. It is true that it does not appear that he made any motion in arrest of judgment, or that he was informed that he might do so; nor has it ever been the custom to inform the prisoner *what* he might do, but only that he would be heard in whatever he had to say. So, it would seem, that, after the prisoner has been heard in all that he has to say, it would be mere ceremony to ask him if he had anything fur-

ther to say. It is also to be considered, that the prisoner has had, in this Court, the benefit of everything that could be said in arrest of judgment, as if he had said it below. When the prisoner shall be again brought to the bar in the Court below, anything further he may have to say may be heard; for instance, a pardon.

PER CURIAM. No Error.

Cited: S. v. Garrett, 71 N. C., 87; *S. v. Scott,* 72 N. C., 463; *S. v. Hare,* 95 N. C., 683; *S. v. Collins,* 115 N. C., 720; *S. v. Peak,* 130 N. C., 713, 717; *S. v. Marsh,* 132 N. C., 1002, 1004.

STATE v. JOHN LEDFORD.

To constitute larceny, the felonious taking must be done fraudulently and secretly, so as not only to deprive the owner of his property but also to leave him without knowledge of the taker.

LARCENY, tried before *Tourgee, J.,* at Spring Term, 1872, of GUILFORD.

The defendant was charged with stealing certain pieces of fractional currency of the United States, the property of one J. C. Rees, from a drawer in a bar-room, in Greensboro, kept by one Chad- (61) wick.

The evidence was, that Rees had counted the money in the drawer on the morning of the day of the alleged theft; that in the afternoon Chadwick left the bar-room for a few minutes, and the defendant, two colored men, and perhaps others, remained in the room. While Chadwick was absent the defendant went to the drawer, pulled it out, and took something from it, which he put in his pocket. One witness testified that he saw defendants take something from the drawer, and afterwards the defendant showed him some fractional currency, and said Rees told him to *try Chadwick.*

His Honor charged the jury that, to constitute larceny, as to the taking, all that was necessary was to prove that the defendant took the property with the intent to remove it out of the possession of the owner; and that the owner of the property, or his agent, being absent, the carrying away was secret, though done in the presence of a hundred persons. Defendant excepted.

Verdict guilty. Rule for new trial discharged. Judgment and appeal by defendant.

Attorney-General, Battle & Son, and *Dupre,* for the State.
No counsel for the defendant.

BOYDEN, J. We think his Honor was mistaken in his charge to the jury under the circumstances of this case. It was proved on the part of the State that the fractional currency was taken from the drawer of the prosecutor, in the presence of some three persons, and one of the witnesses testified that he saw the defendant open the drawer and take out something, he did not know what, and that defendant afterwards showed him some small bills and said Rees had told him to *try* Chadwick.

With the foregoing evidence his Honor instructed the jury that to constitute larceny, as to the taking, all that was necessary was
(62) to prove that the defendant took the property with intent to remove it out of the possession of the owner. And his Honor further informed the jury that the owner of the property, or his agent, being absent, the carrying away was secret, though done in the presence of a hundred witnesses. This Court, at the present term, has decided that in an indictment for larceny "the word *feloniously* is a necessary part of the description of the offence, as it denotes, at the instant of the doing of the *act,* the disposition of the accused in doing it, which constitutes the guilty will, that renders the person criminal." But his Honor, instead of instructing the jury that the property must be taken feloniously, that is, fraudulently and secretly, so as not only to deprive the owner of the property, but also of the knowledge of the taker, tells the jury, "That to constitute larceny as to the taking, that all that was necessary was to prove that the defendant took the property with intent to remove it out of the possession of the owner"; in other words, that the merest civil trespass may constitute the crime of larceny. In this case, inasmuch as the State had proved that the defendant had said that Rees, the owner of the property, had told him to *try* Chadwick, who was the keeper of the bar, the defendant was entitled to have the question distinctly submitted to the jury, whether he took the money, feloniously or to *try* Chadwick. If the latter, that then he was not guilty.

PER CURIAM. *Venire de novo.*

Cited: S. v. Coy, 119 N. C., 903; *S. v. Foy,* 131 N. C., 805.

(63)

ISAAC J. YOUNG v. RICHARD D. LATHROP.

Where a fraudulent grantee of land conveyed it to a *bona fide* purchaser for value without notice of the fraud, after a creditor of the fraudulent grantor had obtained a judgment against him, but before the land was sold under an execution issued on such judgment and tested of the term where it was obtained, *it was held* (Boyden, J., dissenting), that by force of the proviso obtained in the 4th section of the 50th ch. of the Rev. Code (13th Eliz., ch. 5, sec. 6), the title of the *bona fide* purchaser from the fraudulent grantee was to be preferred to that of the purchaser under the execution of the creditor of the fraudulent grantor.

EJECTMENT and for mesne profits in GRANVILLE. The answer denied the ownership of the plaintiff and claimed that the title as well as the possession was in the defendant. The case was referred to the Hon. William H. Battle, as a referee, to decide upon the issues of facts and law made by the pleading. At the August Term, 1871, the referee made his report finding the following facts:

1. That on 27 November, 1865, one William H. Hughes was the owner in fee simple of the land, with the improvements thereon, mentioned in the pleadings, and being in possession of the same conveyed it by a deed proper in point of form to his brother Thomas C. Hughes and his heirs; that the consideration recited therein was the sum of $5,000, alleged to have been paid by the said grantee to the said grantor; (64) that at the time of the execution of the said deed the said grantor was indebted to various creditors, in amounts much larger than the value of his property, and that he was utterly insolvent; that no part of the said consideration of $5,000 was paid, or was intended to be paid by the said grantee to the said grantor, and that the said deed was executed solely for the purpose of saving the land therein mentioned for the benefit of the grantor's family, at the expense of his creditors, by preventing its being applied to the payment of their debts; that this deed was duly proved and registered.

2. That at the June Term, 1866, of the Circuit Court of the United States for the fourth Circuit in the District of North Carolina, H. B. Loney & Co., citizens and residents of the city of Baltimore and State of Maryland, obtained a judgment against the said William H. Hughes, a citizen and resident of the State of North Carolina, for the sum of $1,960.12, due 28 December, 1865, subject to a credit of $100, paid 28 January, 1866, and for costs, also for three per cent additional damages on the principal sum, which said judgment was obtained on a bill of exchange drawn at Baltimore on 28 October, 1865, and payable sixty days after date and accepted by the said William H. Hughes.

3. That upon the said judgment a writ of *fieri facias* was duly issued from the said Court on 18 July, 1866, tested of the said June Term, 1866, and returnable to the ensuing November Term thereof, which said writ was returned by the Marshal of the United States for the District of North Carolina, to whom it had been directed, with an endorsement that on 9 November, 1866, it was levied upon the land mentioned in the present pleadings; and thereupon a writ of *venditioni exponas* was issued from the said Court on 29 December, 1866, directed to the said Marshal, and commanding him to sell the said land, which said writ was made returnable to the June Term of the said Court 1867,
(65) that by virtue of the said writ, the said Marshal duly exposed the said land for sale at auction, when it was bid off by Joseph B. Batchelor, Esq., for the sum of $16, of which a due return was made by the said Marshal; that this sale was made 6 May, 1867, the said Batchelor bidding for his clients the plaintiffs in the judgment, and that with their consent, he, on 20 January, 1869, transferred in writing his bid to the present plaintiff, Isaac J. Young, to whom the said Marshal, on the said 20 January, 1869, executed a deed which was afterwards duly proved and registered.

4. That on 24 October, 1866, the said Thomas C. Hughes, the grantee, as hereinbefore stated, of the said William H. Hughes, by a deed duly executed, reciting a consideration of $7,000, conveyed to the defendant, Richard D. Lathrop, of the city and State of New York, and his heirs, the same land, which deed was duly stamped, proved and registered; and on the same day the said William H. Hughes executed to the said Richard D. Lathrop and his heirs a quit claim deed for the same land, which has not been either stamped and proved or registered. That at the time when the said deeds were executed, the firm of Lathrop, Luddington & Co., of which the said Richard D. Lathrop was a member, had claims against the said William H. Hughes amounting to $9,998, for which the said Thomas C. Hughes, and also George B. Hughes and George Badger Harris, were bond as sureties; and the said deed from the said Thomas C. Hughes to the said Richard H. Lathrop was given in part payment of the said claims, with the interest due thereon. Whether the said deed from Thomas C. Hughes to Richard D. Lathrop was executed *bona fide*, and without any notice, to the grantee, of the judgment against the said William H. Hughes in the Federal Court as hereinbefore mentioned, and also without notice of the alleged fraudulent conveyance from William H. Hughes to his brother Thomas C.
(66) Hughes, hereinbefore mentioned; and also whether the said deed was intended to be absolute or only a mortgage, are matters

in which the testimony is conflicting. * * * After a careful consideration of all the testimony I find the facts to be, that the defendant was a *bona fide* purchaser of the land in question for a valuable consideration, without notice of the aforesaid judgment in the Federal Court, and of the fraud in the execution of the said deed from William C. Hughes to his brother Thomas C. Hughes. I further find that the deed from Thomas C. Hughes to the defendant, Lathrop, was an absolute one to him and his heirs, and was not, nor was it intended to be, a mortgage.

5. That the evidence of debt which formed the consideration of the deed of the said Thomas C. Hughes to the defendant, were founded on a legal consideration, and were sufficient for the purposes of the said conveyance from the said Thomas C. Hughes to the defendant, providing the said Thomas C. Hughes had, as against the creditors of the said William H. Hughes, the right to make the conveyance, I find, as conclusions of law:

1. That the deed from the said William H. Hughes to the said Thomas C. Hughes, mentioned in my finding of the facts, was and is a fraud upon the creditors of the said grantor, and is, therefore, null and void as to them.

2. That the land mentioned in the said deed of conveyance, notwithstanding the formal execution of the same, remained, as to the creditors of the said William H. Hughes, his property, and that the writ of *fieri facias* which was issued on the judgment of F. B. Loney & Co., obtained at the June Term, 1866, of the Circuit Court of the United States for the District of North Carolina, which said writ was tested of the said term and was levied on the said land, was a lien on the same from the date of its teste, and the purchaser of the said land at the sale made by the Marshall, under the *venditioni exponas* issued from the November term of the said Court, obtained thereby a good title to the same.

3. That the attorney of the plaintiffs, in the said judgment, who bid off the land for them, had the right, with their consent (67) to transfer his bid to the plaintiff in the present action, and the deed from the Marshal to him gives him a good title to the said land. And I therefore direct judgment to be entered for the plaintiff.

1. That he recover the land mentioned in the pleadings.

I direct further:

2. That judgment be entered for the plaintiff, that he recover, as damages for the detention of the said land, at the rate of $200 *per annum* during the time of such detention, making the sum of $850.

WILLIAM H. BATTLE, *Referee.*

Upon the return of this report, the defendant, by M. V. Lanier, Esq., his attorney, filed the following exceptions, to-wit:

The defendant excepts to the report of the referee, returned to the present term of the Court, for error in his conclusions of law upon the facts found by him as set forth in his report, in the following particulars, to-wit:

1. That the said referee concludes that, notwithstanding the deed from William H. Hughes to Thomas C. Hughes, the land remained the property of William H. Hughes as to the creditors of the latter, whereas he ought to have concluded that said deed was good as between the said parties, and voidable by and as to the creditors of the said William H. Hughes, and that as to said Richard D. Lathrop, the *bona fide* purchaser for value without notice, said deed was good as against the creditors of said William H. Hughes.

2. That the said referee concludes that the writ of *fieri facias* of Loney & Co. was a lien on the land from the date of its teste, whereas he ought to have concluded that the same was not a lien as against the said purchaser from Thomas C. Hughes, or, if a lien, it did not affect the said Richard D. Lathrop, purchasing as aforesaid.

3. That the said referee further concludes that the purchaser of
(68) the said land, at the sale by the Marshal, in said report mentioned, obtained a good title thereby to the said land, whereas he ought to have concluded that the said purchaser did not thereby get a good title as against the said R. D. Lathrop.

4. That the said referee further concludes that the attorney of the plaintiff in the judgment had the right to transfer his bid to the plaintiff in the present action, and that the deed from the Mashal to him gives him a good title, whereas he ought to have concluded that the said attorney had no such right at the time when the said transfer was made, and the said transfer was void, and that the deed of the said Marshal did not give the present plaintiff a good title.

5. That the said referee ought to have concluded, that in law, upon the facts stated in his said report, the said R. D. Lathrop, by his deed from the said Thomas C. Hughes, obtained a good title to the said land, and that the plaintiff in the present action is not entitled to recover.

Wherefore, and for divers other errors in law appearing in said report, the said defendant doth except to the same, and moves the Court to review said report and modify the same in respect of the error aforesaid, and to give judgment thereupon in favor of the defendant.

M. V. LANIER, *Atto. for Def't.*

Upon hearing and consideration of the exceptions to the report of the referee, his Honor, Judge Watts, overruled them, and then, upon the motion of the plaintiff's counsel, confirmed the said report and gave judgment, as therein directed, for the plaintiff, from which the defendant prayed and obtained an appeal to the Supreme Court.

W. H. Young and *Batchelor,* for the plaintiff.
Lanier, for the defendant.

PEARSON, C. J. The point is this. A debtor makes a voluntary deed of land for the benefit of himself, with an intent to defraud his creditors. Afterwards a creditor takes out execution upon a (69) judgment against the debtor for a pre-existing debt and puts it into the hands of the Marshal. Afterwards the fraudulent grantee, for a valuable consideration and a full price, makes a *bona fide* sale, and executes a deed to the defendant for the land, the defendant having no notice of the fraud and covin between the debtor and the grantee.

This sale and deed were *subsequent to the teste* of the *execution.* Afterwards the Marshal sells under the execution, and the plaintiff becomes the purchaser and takes the deed of the Marshal. Which has the title? the defendant who was the first to purchase and take a deed from the grantee, or the plaintiff who purchased under an execution the teste of which was prior to the defendant's purchase?

It is settled, without any conflict of the authorities, that a purchaser of a fraudulent donee, *bona fide* and for a valuable consideration at a full price, without notice of the fraud, acquires a good title under 27 Eliz., against a subsequent purchaser of the donor, *bona fide* and for valuable consideration at a full price.

It is also settled, but after some conflict of the authorities, that a purchaser of a fraudulent donee, *bona fide,* and for a valuable consideration at a full price, without notice of the fraud, acquires a good title under 13 Eliz., against creditors, and purchasers under their execution for a debt existing at the time of the fraudulent conveyance, at a sale subsequent to the sale of the fraudulent donee. For both of the purchasers are *bona fide* for valuable consideration, and the one to whom the first sale was made is preferred, under the maxim—*"prior est in tempore, portior est in jure."* Roberts on Fraudulent Conveyances, 392, 462, and the cases there cited. *Anderson v. Roberts,* 18 Johnson, 515; *Brace v. Smith,* 2 Mason 252. The *dictum* of Ruffin, Judge, in *Hoke v. Henderson,* 14 N. C., 12, is put on the ground of unfairness to the creditors of the fraudulent donor. He gives no weight to the *proviso* (70)

in favor of *bona fide* purchasers, and after setting out the argument on the side of the creditors, waives a discussion, "because the point is not presented by the facts of the case, for the land was sold under the execution against the donor, before the sale on the side of the fraudulent donee."

This question is put at rest by Rev. Code, ch. 50, secs. 1, 2 and 4; for the proviso (which will be again referred to), applies to sec. 1 which is 13 Eliz., and also to sec. 2, which is 27 Eliz. Whatever may be said about fairness or unfairness towards *creditors,* the Legislative will gives preference to a *bona fide purchaser, for valuable consideration at full price and without notice of the fraud and covin.* In our case the plaintiff says he is taken out of the operation of this maxim, by the effect of the teste of the execution under which he claims title; for the execution relates back to the teste, and gives to the creditor a *lien* on the property of the debtor, which lien is prior in point of time to the sale of the fraudulent donee to the defendant.

The case turns upon this point. No direct authority was cited. In *Brace v. Smith,* sup., at p. 279, Justice Story, after denying the distinction, between the operation of the 27 Eliz. and the 13 Eliz., in respect to *bona fide* purchases for valuable consideration without notice, says, "I have searched with some diligence to ascertain if that distiction has been recognized in any adjudged case or in any elementary treatise in England. Hitherto my researches have been unsuccessful. In *Wilson v. Womal,* Godbolt 161, however, Lord Chief Justice Coke, than whom no man was probably better acquainted with the statute in its true construction, lays down a doctrine that in terms denies the distinction. He says that, "If lessee for years assign one his term by fraud to defeat the execution (upon a judgment against him), and the assignee assigneth the same unto another *bona fide,* that in the hands of the second assignee *it is not liable to execution."*

Godbolt's reports are not in our library, and we are not able
(71) to see certainly, from this extract, that the execution bore teste before the *bona fide* assignment; but we infer the execution was in the hands of the sheriff, from the words "assign one his term by fraud to defeat the execution (upon a judgment against him)." If so, this is a direct authority for the position that a *bona fide* sale of the fraudulent donee, although after the teste of the execution, passes a good title to the purchaser against the creditor, and a purchaser at a sale under the execution subsequently made.

Let us see how the question stands, "on the reason of the thing." A *lien* does not vest the title in the creditor, but leaves it in the debtor until

a levy and seizure in respect to personal property, and until the sale under the execution in respect to land. This is settled. *Frost v. Etheridge,* 12 N. C., 30.

The effect of a lien is merely to tie up the land in the hands of the debtor, so that he can not, either by a voluntary conveyance or by a conveyance for valuable consideration, deprive the creditor of his right to have the land sold for the satisfaction of the execution. So, the lien created by *a lis pendens* does not divest the title, but merely ties up the property until the determination of the suit. In our case, before the teste of the execution, the debtor had passed the land to the donee, and although the conveyance was fraudulent, still it effectually passed the title and was valid as between the donor and donee. So, when the execution issued it had nothing to operate on, for the debtor had nothing and the *lien* created by the teste could not take effect as to him, and it could not take effect on the land in the hands of the donee, except by force of the 13th Eliz., which makes the conveyance void as to creditors. If the donee had retained the land until it was sold under the execution, as the property of the donor in respect to his creditors, the purchaser would have acquired a good title. But the donee did not retain the land, but sold it to the defendant, who was a *bona fide* purchaser for valuable consideration, at a full price, and without notice of such fraud, before it was sold under the execution; and the defendant insists (72) that he is protected by the proviso in the statute, 13 Eliz., which has the effect to make the first section inoperative, and to render the original conveyence valid as against creditors in favor of such *bona fide* purchaser, and if so the creditor could acquire no lien, for the debtor had parted with the land, and in respect to the *bona fide* purchaser the conveyance was valid, both in regard to the debtor and his creditor. In other words, if the purchaser comes within the proviso, that takes from the creditor all benefit which he would otherwise have had under the first section.

The proviso is in these words (sec. 4, ch. 50, Rev. Code): "Nothing contained in the foregoing sections shall be construed to impeach or make void any conveyance of any lands *bona fide* made upon and for good consideration to any person not having notice of such fraud."

It it settled that good consideration means valuable consideration, or a fair price. We can see nothing to take the conveyance to the defendant out of the operation of this proviso, or any principle upon which it can be impeached or made void in the face of these express terms. The proviso can only be made operative by giving to it the scope and effect of purging the original conveyance of the fraud with

which it was tainted, by allowing the *bona fides* and the full valuable consideration of the second conveyance to supply the want of these qualities in the first, so as to perfect the title of the *bona fide* purchaser, by carrying it back to the donor and claiming the title from him, and thus prevent the title of the first purchaser from being "impeached and made void." When the plaintiff says, "My title goes back to the teste of the execution under which I claim," the defendant replies, "My title goes back to the original conveyance made by the debtor which is purged of the fraud of which I had no notice;" and when the plaintiff says,

(73) "The first section makes all conveyances made in fraud void as to creditors," the defendant replies, "The 4th section makes my title good, and declares that nothing contained in the first section shall be construed 'to impeach or make void my title.'"

It was said on the argument, "This effect given to the proviso will defeat the object of the act, which was to protect creditors," for debtors will make fraudulent deeds on purpose to enable donees to sell and defeat creditors. That may be so; but the object of the proviso evidently is to protect *bona fide* purchasers, and when the question is, shall the creditor lose his debt or the *bona fide* purchaser his money, the proviso gives the preference to the purchaser. The result is, that the first *bona fide* purchaser, whether under the donee or under the exception against the donor, acquires the title.

The judgment below is reversed upon the facts found by the referee.

BOYDEN, J., (*dissentiente.*) I feel compelled to enter my dissent from the opinion of the Court delivered in this case, as I regard it as law, (and I think it is the general opinion of the profession,) that so long as the title to the land continues in the fraudulent grantee, it is, so far as the creditors of the fraudulent grantor are concerned to all intents and purposes, to be regarded as his land; and when a creditor, attempted to be defrauded, obtains a judgment against the fraudulent grantor and places his execution in the hands of the sheriff or marshal of the proper county or district, the land thus fraudulently granted is as much bound by the teste of said execution as if no such fraudulent conveyance had ever been made; and that all persons claiming through or under the fraudulent grantee, subsequent to the test of such execution, are as much bound by the judgment and execution as they would be, if the conveyance was directly from the fraudulent grantor himself. If this were not so, then it would be in vain ever to attempt to defeat the conveyance of a fraudulent grantor; as all the fraudulent grantee would have to do, to defeat the honest creditor and to consummate his

iniquity, would be to find out some one who, in point of fact, was (74) ignorant of the fraud, and sell and convey to him.

I can not so regard the law, as it would render the statute of frauds almost nugatory. I will not attempt to elaborate the matter, but it may not be improper to remark, that when this case was argued at the last term, Justice Dick, who was then on the bench, fully concurred with me.

PER CURIAM. Judgment for defendant.

Cited: Davis v. Council, 92 N. C., 731; *Stevenson v. Felton,* 99 N. C., 60; *Branch v. Griffin, Ib.,* 182; *Sanders v. Lee,* 101 N. C., 7; *Odom v. Riddick,* 104 N. C., 521; *Arrington v. Arrington,* 114 N. C., 167; *Cox v. Wall,* 132 N. C., 735.

B. M. ISLER v. L. J. MOORE, D. B. EVERITT, H. B. HORN and others.

A plaintiff having indulged one execution in his favor, there is no presumption that this indulgence extended to subsequent executions.

Under the old practice, a purchaser at a sale under a junior execution acquired a good title as against a subsequent purchaser under a senior execution. *A fortiori,* is this so, as against a purchaser under execution of equal *teste?*

EJECTMENT tried before *Clarke, J.,* at January Special Term, 1872, of WAYNE.

Both parties claimed as purchasers at sheriff's sales under executions against D. B. Everitt.

The executions through which the defendant claimed (as owner and tenants were *ven. expos.* The judgments on which they were based were confessed by Everitt at November Term, 1866, of Wayne County Court. Executions issued thereon to February Term, 1867, were levied on the land in controversy, and returned "Indulged (75) by plaintiff." *Ven. expos.* issued to May Term were returned without endorsement by the sheriff. *Alias ven. expos.* were issued 10 June, 1867, returnable to August Term, and the land was sold by the sheriff of Wayne, 19 August.

The execution through which the plaintiff claimed was a *ven. ex.* in her favor, issued 1 June, 1867, and upon affidavit (that the sheriff of Wayne was connected with the defendants in the execution and refused to do his duty), placed in the hands of the sheriff of Greene. He also sold on 19 August. The plaintiff's judgment against D. B. Everitt and

others was obtained at February Term, 1867, of Wayne County Court, and the execution issued thereon was returned with a levy upon the said land, and an endorsement that no sale was made in obedience to Gen. Sickles' Order, No. 10.

The jury, upon issues submitted to them, found substantially the above facts, and that the sheriff of Wayne sold before the sheriff of Greene, both sales being within the prescribed hours for such sales.

Judgment was rendered for the defendants, and the plaintiff appealed.

Isler, for the plaintiff.
Faircloth, for the defendant.

BOYDEN, J. In this case several questions were discussed by the counsel who argued the case, which the Court holds are entitled to no weight in the proper decision of the cause, and for that reason they will not be referred to in this opinion.

It was insisted on the argument by the plaintiff's counsel, that the parties who received the first judgments were guilty of a fraud upon the rights of the plaintiff, by indulging their executions, returnable to the same term of the Court at which this plaintiff obtained her
(76) judgment. And it was further gravely urged by plaintiff's counsel that having indulged the first execution it must be taken that this indulgence still continued, notwithstanding *alias* executions had been issued, and an actual sale made under these second executions, and the money paid by the purchaser, and the sale completed by a deed of the sheriff to the purchaser. No authority was cited for this new and extraordinary position.

It must be remarked that the question in this case is not as to the effect of a sale first made under a junior execution and thereafter a sale made under a senior execution; but the question is, as to the title acquired by the purchaser at the *first sale* made under an execution of equal if not a senior teste, as against a subsequent, purchaser under an execution of the same, or of a subsequent teste.

It was decided as far back as 1794, after a very full discussion, in *Bell v. Hill,* 2 N. C., 72, that even a purchaser at a sale under a junior execution acquired a good title, as against a subsequent purchaser under an execution of a senior teste, and the law as then announced has been followed in our State ever since. See the cases of *Ricks v. Blount,* 15 N. C., 128; *Jones v. Judkins,* 20 N. C., 445, and *Perry v. Morris,* 65 N. C., 221. This being the law in the case of the purchaser at a sale under

an execution of junior teste, how can it be insisted that in the case of an execution of a senior or of the same teste, the first purchaser does not acquire the title as against the subsequent purchaser. Two reasons were urged by the plaintiff's counsel: First, that before mentioned, that the plaintiffs in the senior executions had indulged their first executions, and that the law presumed that the same indulgence still continued, notwithstanding what had been under their *alias* executions; Secondly, that the indulgence given the defendant, as to the first executions had the effect to postpone their executions and to give the execution of the present plaintiff priority over the other executions, and as the sale in both cases was made within the sale hours on (77) the same day and near the same time, the plaintiff not only acquired the better title, but she was also entitled to all the money raised at such sale.

No authority was cited for these positions, and we think they are in direct conflict with the law as settled by numerous decisions in our own Courts. What reason can be given for holding, that an execution, which is either of even or of senior teste to that of the plaintiff, should not have quite as much effect, in passing the title, as one of junior teste? And on the other hand, what reason or common sense could there be for holding that, because a plaintiff had indulged one execution the law presumed that this indulgence still continued, notwithstanding an *alias* execution had issued, and an actual sale had been made under this execution?

PER CURIAM. No Error.

(78)

JESSE E. FRALEY v. JAMES A. KELLY.

1. Where, in an action upon a bond, the defendant pleaded his discharge in the adjudication of Bankruptcy; *Held*, that evidence of a promise made after the adjudication, but before the discharge, was admissible.
2. Under our present system of practice, though it is more regular, where suit is brought to recover a debt which would be barred by Bankruptcy but for a subsequent promise to pay, to set forth the new promise in the complaint, yet it will suffice to set up such promise in the *reply* to an answer alleging Bankruptcy.
3. In case of a debt barred by a certificate of Bankruptcy, nothing less than a distinct, unequivocal promise to pay, on the part of the defendant, notwithstanding his discharge, will support an action upon the new promise.

APPEAL from *Cloud, J.*, at Spring Term, 1872, of DAVIE.

The action was brought on a note for $251.88, due 12 March, 1867,

and the defendant relied, for his defense, on a *discharge* in bankruptcy, granted 17 February, 1870. The plaintiff *replied,* alleging several promises to pay the debt after the defendant was adjudicated a bankrupt, some made before and some after his discharge. The plaintiff offered to introduce evidence of an express promise to pay the note, between the time of the defendant's adjudication and that of his discharge as a bankrupt. Upon objection by the defendant, the evidence was excluded and the plaintiff excepted.

The plaintiff then offered evidence, in substance, as follows: In the fall of 1870, the defendant offered to sell the plaintiff a mule. The plaintiff replied, "I hold your note and, if we can agree upon the price of the mule, I will credit the note with the price;" and the defendant assented. Plaintiff and defendant agreed to meet the next day, when the price was to be fixed. Defendant failed to go to the place of
(79) meeting, but the plaintiff was there, with the note and a bridle, and remained all day. It was also in evidence that, about 1 August, 1870, the defendant said to the plaintiff: "Won't you take a good mule towards the debt?" The plaintiff replied, "The money is what I want;" and the defendant then said, "You must wait for your money." In October, 1870, upon the plaintiff applying to the defendant again for payment of the note, the latter said, "I don't intend to pay you; you have been talking about suing me and have consulted a lawyer." The plaintiff then asked him whether that was the only reason he would not pay him, and he replied that it was.

His Honor thereupon intimated an opinion that the plaintiff could not recover, and he submitted to a nonsuit and appealed.

Fowle and *Bailey,* for the plaintiff.
Clement, for the defendant.

BOYDEN, J. In this case there are two questions made upon the ruling of his Honor.

The first, for the rejection of evidence offered on the part of plaintiff, that the defendant, after the filing of his petition, and after being adjudicated a bankrupt, but previous to his discharge, made an express promise to pay the plaintiff's debt. This evidence was objected to by the defendant, and was rejected by the Court. This question has been fully discussed in the Court of Exchequer, in *Kirkpatrick v. Tattershall,* 13 Exch., 770 (Meeson and Welsby), and the unanimous opinion of the Court was delivered by Parke, Baron, that such a promise was binding, and that there was no difference whether made before or after the bank-

rupt's discharge. In that case, as in this, there was no plea alleging any irregularity, and the only question was, whether, assuming the contract not to be tainted with any illegality, it was valid. The Court say: "There can be no question that a debt, though barred by a certificate, is a sufficient consideration for a new promise to pay. This is a proposition which is established by many cases. It is equally (80) clear, and indeed admitted, that, if the promise is made after the certificate has been obtained, it is binding though there be no other consideration than the old debt; but, it is contended that, if the promise be made before the certificate is obtained, the same rule does not apply; that the old debt is not sufficient, and that to make the promise binding there must be some new consideration for it. And whether the promise be made before or after the certificate, it is agreed it must be distinct and unequivocal, and must be in writing. We are all of opinion that there is no distinction in this respect between the case of a promise made before the certificate and one made after it. Both are equally binding, though the only consideration be the old debt. But, then, the promise must be one which binds the bankrupt *personally* to pay, notwithstanding his certificate. It must be a promise that *he* and not his estate, would pay; for the mere acknowledgement of a debt, though implying a promise to pay, would amount to no more than an account stated, and though in writing, would be a promise which the certificate would bar. The only distinction between a promise before and after the certificate is, that in the former it may be more doubtful whether the debtor meant to engage to pay, notwithstanding his discharge under the bankruptcy; if it is clear that he did, the promise is equally binding. A promise, also before the certificate, is more open to the suspicion that it is tainted with illegality, and void for that reason; but in this case that objection does not arise." So, in our case there is no allegation that there was any illegality in the promise.

This Court, at the present term, in *Hornthal v. McRae,* ante 21, has decided this question in accordance with the authority above cited. So that it must be declared that his Honor erred in rejecting the evidence offered. The counsel for the defendant insisted that, although his Honor might have been in error in rejecting this evidence, and that the plaintiff would have been entitled to a new trial had he brought his action on the new promise, yet, inasmuch as he had declared upon (81) the bond, the original cause of action, and not upon the new promise, the rejection of this evidence could work no injury to the plaintiff, as his action upon the old promise could not be sustained. This view of the case, we think would be correct, had the action been under

our old system of pleading. The authorities upon this point are conflicting, but we hold, upon a review of the cases, that both from reason and the analogies of the law the better opinion is, that the action can only be sustained upon the new promise. Certainly the right to sue upon the original cause of action was discharged by the certificate in bankruptcy, and to the plea of his discharge the plaintiff replies the new promise, thereby admitting that the original cause of action was gone, and alleging the new promise as the foundation of the action, and that the moral obligation to pay the debt still subsisted, notwithstanding the discharge, and was a sufficient consideration for the new promise. But although the plaintiff had brought his action upon the old promise, yet, when, to the plea of discharge, the plaintiff replied the new promise, this opened the whole question, and was like a new assignment, and, under our present system of pleading, equivalent to adding a second cause of action upon the new promise, which entitled the defendant to deny this second cause of action, and also, in a case where the promise was before the discharge, to allege that the new promise was in fraud of the other creditors, as having been given to prevent the creditors from opposing his discharge. Certainly, under our present liberal system of pleading, if the case is not to be regarded in the manner above suggested, the plaintiff would be allowed to amend, by adding a second cause of action upon the new promise, and the defendant to amend his answer, by denying the new promise and alleging fraud.

After the rejection of the evidence of the express promise, the plaintiff offered evidence to the following effect. That after the de-
(82) fendant had obtained his discharge, he offered to sell the plaintiff a mule, to which the plaintiff replied, "I hold your note, and if we can agree upon the price of the mule, I will credit the note with the price," to which proposition the defendant assented; that the plaintiff and defendant agreed to meet the next day, when the price of the mule was to be fixed; that the defendant did not go to the place agreed on, but the plaintiff did, with the note and a bridle, and remained there all day. The plaintiff also offered evidence that about 1 August, 1870, the defendant said to the plaintiff, "Won't you take a good mule towards the debt?" Plaintiff replied, "The money is what I want," and defendant then said, "You must wait for your money."

His Honor, upon this testimony, intimated an opinion that plaintiff had not made out his case, and, in deference to this intimation, he submitted to a nonsuit. We think his Honor was right in the opinion intimated. It was said on the argument, that less evidence was necessary

to revive a debt discharged by a decree in bankruptcy than would be required of a debt barred by the statute of limitations, as the law stood before such promises were required to be in writing. No direct authority was cited for this opinion. This Court does not sanction that doctrine, but holds that it will require a full, express, and unequivocal promise to pay, and one that binds the bankrupt *personally* to pay, notwithstanding his certificate. As Baron Parke says, in the case cited, it must be a promise that *he,* and not his estate, would pay; for the mere acknowledgment of a debt, though implying a promise to pay, would amount to no more than an account stated, and, though in writing, would be a promise which the certificate would bar. So that we hold that, in case of a debt barred by a certificate in bankruptcy, nothing short of a distinct and unequivocal promise by the defendant to pay, notwithstanding his discharge, will support an action upon a new promise.

Per Curiam. *Venire de novo.*

Cited: Henly v. Lanier, 75 N. C., 174; *Kull v. Farmer,* 78 N. C., 341; *Fraley v. Kelly,* 79 N. C., 348; *Riggs v. Roberts,* 85 N. C., 155; *Shaw v. Burney,* 86 N. C., 333; *Fraley v. Kelly,* 88 N. C., 227.

(83)

WM. McCOMBS, Guardian, v. W. F. GRIFFITH and J. N. ALEXANDER.

A note given in October, 1863, to a distributee upon settlement of an estate, for an amount due in good money, is not subject to the scale of depreciation.

Action on a promissory note for $659.66, given 20 October, 1863, tried before *Henry, J.,* at January Special Term, 1872, of Mecklenburg.

The evidence was that the note was given for a distributive share due the plaintiff's ward in the estate of —— Reid, of which the defendant Alexander was administrator; that in 1860 Alexander sold the property of his intestate, and the defendant Griffith bought to the amount of $1,375, for which he gave his note; that upon the settlement of the estate in October, 1863, the balance due on Griffith's note being about the sum due the plaintiff's ward, Griffith's note was surrendered to him, and he and Alexander executed the note in question to the plaintiff.

The defendants contended that the note was liable to the scale of de-

preciation, but his Honor charged otherwise, and a verdict was returned and judgment rendered for the face of the note and interest, whereupon the defendants appealed.

Guion and *Wilson,* for the plaintiff.
Dowd, for the defendants.

READE, J. We agree with his Honor that the note sued on is not subject to the legislative scale. The presumption that it was given for Confederate currency is rebutted by the evidence that it was given for other consideration, *i. e.,* the distributive share of the plaintiff's ward in the estate of his father, which he had the right to demand in good money.

PER CURIAM. No Error.

Cited: Johnson v. Miller, 76 N. C., 441.

(84)

DANIEL B. ROBINSON v. WILLIS J. WILLOUGHBY.

1. Where a complaint demanded judgment for the possession of land under a deed absolute on its face, which was subsequently decided upon appeal to this Court to be a mortgage, and a *venire de novo* on that ground was ordered; *Held,* that the Superior Court had power (under C. C. P., sec. 132) when the case came on for trial again, to allow an amendment of the complaint, so as to demand judgment for a foreclosure of the mortgage.
2. When the Superior Court has power to amend, the question of costs is entirely in its discretion.

MOTION to amend complaint heard before *Buxton, J.,* at Spring Term, 1872, of UNION.

The opinion of the Court contains a sufficient statement of the points involved.

The defendant insisted that his Honor had no power to grant leave to amend; and that if leave were granted, terms must be imposed. His Honor allowed the motion without costs, and the defendant appealed.

J. H. Wilson, for the plaintiff.
Battle & Son, for the defendant.

BOYDEN, J. This is the same case that was before the Court at June Term, 1871, 65 N. C. R., 520, in which it was decided that the deed

from Christenbury, under whom both parties claimed title, was a mortgage, and not an absolute sale, as claimed by the plaintiff; and upon that ground, a new trial was granted. When the case came on for trial again, in the Court below, the plaintiff moved for leave to amend, by changing his action for the recovery of the land into one for the foreclosure of the mortgage. The motion was allowed, and the defendant appealed from this decision of his Honor, insisting that his Honor had not the power to allow this amendment. We think his Honor, under sec. 132, C. C. P., not only possessed the discretionary (85) power to allow this amendment, but that it was a fit case for the exercise of the power. The plaintiff had instituted his action believing, that the transaction attending the execution of his deed, taken altogether, constituted a sale, with an agreement for a resale, and his Honor on the trial below so decided; but this Court reversed the decision of his Honor, and declared that, looking at the whole transaction, it constituted a mortgage, and not a sale with an agreement for a re-sale.

The object of the action, in its original form, was to ascertain the plaintiff's rights growing out of the transaction attending the execution of the deed, and this is the very object to be ascertained in the action as amended.

This Court, in *Bullard v. Johnson,* 65 N. C., 436, has already, substantially, decided the question raised in this case. In that case, his Honor, the Chief Justice, in delivering the opinion of the Court, says, speaking of sec. 132, C. C. P., "This provision and numerous others, of the C. C. P., show that its purpose is to prevent actions from being defeated on grounds that do not affect the merits of the controversy, whenever it can be done by amendment, the prevailing idea being to settle controversies by one action, and thereby prevent the loss of the labor and money expended in that action, and the necessity for incurring like labor and expense in a second." This Court regards these provisions of the Code among the most important it contains, and we are inclined to give them their full operation, by a liberal construction; so as to let one action settle all the questions growing out of the same transaction, whenever it can be done.

The question of the payment of costs was for his Honor below, and is not the subject of review in this Court.

PER CURIAM. Affirmed.

Cited: S. c., 70 N. C., 358; *Wall v. Fairley, Ib.,* 537; *Ely v. Early,* 94 N. C., 6; *Martin v. McNeely,* 101 N. C., 638.

(86)

ELI W. SANDERS v. HENRY JARMAN.

1. The rule that an endorser, on default of the maker of a note, becomes liable for the amount of the note, is not of universal application to notes endorsed during the late war; but the contract of endorsement in such cases is affected by the legislation relating to the *scale of depreciation*, etc.
2. Where a note for $1,200, given in September, 1863, for property worth $300, was endorsed shortly thereafter by the payee, in consideration of property of the value of $1,200, and since the war the endorsee discharged the maker, in writing, upon payment of $310; *Held*, that the effect of the release was not to discharge the endorser, but he is still liable for the difference, upon an implied contract in the endorsement that, if the maker failed to do so, he would pay the endorser the value of what he received for the note.

ACTION of debt, commenced in 1866, and heard before *Clarke, J.*, at Fall Term, 1871, of CARTERET, upon a *case agreed*.

The defendant was sued as endorser of a note for $1,200, given to him 7 September, 1863, by one Hill King, and payable one day after date. The consideration of the note was a pair of mules sold by Jarman to King, worth about $300. The defendant was indebted to the plaintiff in the sum of $600, due by note given before the war, and in the latter part of 1863 offered to pay the debt in Confederate money. Sanders, the plaintiff, refused to take Confederate money, but agreed to make an exchange of notes; and thereupon the defendant endorsed to him the note for $1,200, given by King, and took in exchange his note to Sanders for $600, and other notes, given before the war, to the amount of $1,200. Sanders demanded payment of the note so endorsed to him, of King, and upon being informed what the consideration of the note was, accepted $310 from him, credited the amount on the note, and executed a covenant to him that he should not be held further responsible
(87) on the same. This was done 3 November, 1866. The defendant relied upon the release to King as a discharge to himself. It was agreed that, if his Honor should be of opinion with the defendant, a judgment of nonsuit should be rendered against the plaintiff, otherwise he should give judgment in favor of the plaintiff, for the balance of principal and interest, deducting the credit of $310.

His Honor gave judgment against the plaintiff and he appealed.

Green, for the plaintiff.
Haughton, for the defendant.

PEARSON, C. J. We should concur with his Honor in the conclusion

at which he arrived, if the case was governed by the rules of law, applicable to bills of exchange and promissory notes; but we are of opinion that the legislation called for by the condition of the country after the war, has the effect to make "the rules of law" inapplicable to the case, and it must be governed by rules of justice and equity, as set out in the several statutes in reference to the scale and the value of the consideration of the contract.

The endorser of a promissory note makes a conditional contract, that he will pay the note, provided it is not paid by the maker, and notice is given in reasonable time; (the demand on the maker and notice is not necessary by statute in regard to promissory notes.)

Suppose a note for $1,200, in consideration of Confederate money, to be given in 1862—it is endorsed in 1863, in consideration of Confederate notes, the holder will recover of the maker by the scale of 1862; but if he sues the endorser he will recover by the scale of 1863, on the ground that the contract of the endorser was made in 1863, and he should, in justice, only pay the value of the Confederate notes received by him. This violates the rule by which an endorser, on default of the maker, becomes liable for the amount of the note; but it is a clear inference or corollary from the legislation in regard to (88) debts contracted during the war.

So, in our case. The contract of Jarman, construed in reference to this legislation, was that, unless the maker paid the amount of the note, he (Jarman) would pay the value of the consideration received by him, which, it seems, was a $600 note of Jarman, given in 1860, or 1861, and some other notes and Confederate money, to make out the balance.

The maker, when called on, paid $310, the value of two mules, for which the note was given; that let him off, and, according to the ordinary rules of law, it also discharged the endorser. Such would have been the legal effect, had the maker paid the amount of the note in good money; for it was a condition of the contract of endorsement, that the endorser was not liable, *provided* the face of the note was paid in good money; but that is out of the question. The maker falls back upon his right to pay only $310, the value of the mules. This does not discharge the endorser, for the face of the note has not been paid; so he is bound by his contract of endorsement to pay $1,200; but then he may, in his turn, claim the right to pay only the value of the consideration which was received by him, to-wit, the $600 note, etc. In *Summers v. McKay,* 64 N. C., 555, the action was against the maker jointly with the endorser. The main purpose was to fix the liability of the maker, and it did not occur, either to the Court or to the counsel, that, under the

legislation in reference to debts contracted during the war, the liability of the endorser was not the same as that of the maker, and that the endorser could insist that his liability was to be measured by the scale at the date of the endorsement, which was the date of his contract, or by the value of the consideration received by him.

There is error. Judgment for balance, $1,116, as by case agreed.

PER CURIAM. Judgment reversed.

Cited: Bryan v. Harrison, 71 N. C., 480.

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(89)

STATE to the use of CATHARINE STUBBLEFIELD v. GEORGE WOODRUFF.

1. Where, in the trial of an issue of Bastardy, the mother of the child was put upon the stand, having the child in her arms, and the Solicitor called the attention of the jury to the child's features, and afterwards in his address to the jury commented upon its appearance, etc., all without objection by the defendant; *Held,* that objection to the Solicitor's course came too late after verdict; and it was not error for the Judge to charge that the jury might take the appearance of the child into consideration, and give it whatever weight they thought it entitled to.
2. It has long been the practice in this State in Bastardy cases to exhibit the child to the jury, and this Court sees no objection to the practice.

ISSUE of Bastardy tried before *Clarke, J.,* at Spring Term, 1871, of NORTHAMPTION.

On the trial one Joseph Barham was introduced by the defendant to sustain the character of another witness. He stated he knew the general character of the witness, and it was good. He was then asked, Would you believe the witness on oath? The Solicitor objected, and his Honor ruled out the question, but permitted the witness to be asked, if from his knowledge of the general character of the witness he would believe him on oath. Defendant excepted.

The mother of the bastard child was examined as a witness. She held the child in her arms and the Solicitor called the attention of the jury to its features. Nothing was then said about any resemblance of the child to the defendant, but in his address to the jury the Solicitor called attention to its features and commented upon its appearance, the child still being before the jury.

His Honor, in his charge, told the jury they might take into con-

sideration the appearance of the child, and give it whatever weight they thought it entitled to. (90)

Verdict and judgment for the State and appeal by the defendant.

Attorney-General, Battle & Son, and *Dupre,* for the State.
Peebles & Peebles, for the defendant.

BOYDEN, J. There are two objections made on the record. But the first, as to the testimony of the witness Joseph Barham, has been properly abandoned by the counsel for the defendant.

The remaining question, as to the right of the planitiff to exhibit the alleged bastard child and to call the attention of the jury to the child's features, was argued with much earnestness, and the right, thus to exhibit the child before the jury, strenuously denied.

The first answer to this is, that no objection on the trial was taken to this course of the Solicitor by the defendant; but apparently, as we take it, he was willing to this course, and that perhaps for the reason, that the defendant and his counsel believed, that this exhibition of the child might tend to satisfy the jury, that the defendant was not the father of the child. But no matter what was his reason for not objecting to this course, at the time, it was certainly too late to do so after the verdict of the jury.

The defendant further objects, that the Solicitor while addressing the jury, called their attention to the child, which was (91) still before the jury, and commented at length on its appearance, etc.

It is a sufficient answer to this objection that all this was done, for anything we can see on the record, with the full approbation of the defendant.

The further and last objection is, that his Honor told the jury that they could take into consideration the appearance of the child and give it whatever weight they thought it entitled to.

We see no error in this part of his Honor's charge, but it seems to have been highly proper, so to have instructed the jury, after this evidence had been put before the jury without objection.

This disposes of the case, but as *Outlaw v. Hurdle,* 46 N. C., 150, and *S. v. Jacobs,* 50 N. C., 259, have been earnestly pressed upon our attention, as authorities to show error in this case, we deem it proper to distinguish those cases from the present. The case of *Outlaw v. Hurdle* was, whether it was competent to prove the hand-writing of the testator, by submitting for inspection to the jury letters written by the

testator, for the purpose of enabling them, by comparison, to determine whether the paper writing propounded was in truth the will of the supposed testator. This evidence was properly rejected, for the reason, *first,* that it is a well established principle, that before any witness can testify as to the handwriting, he must prove that he has had proper opportunities to learn the character of the handwriting, and in fact, he has become so well acquainted with the character of the writing as to form an opinion of its genuineness. No one is permitted to testify as to handwriting by merely having seen a few genuine specimens of the handwriting, because the law holds that competent knowledge of handwriting, to enable a person to testify, can not be thus acquired.

But when the question is as to the identity of a party, or his resemblance to other persons, the law has very properly adopted a
(92) very different rule of common sense and common observation, and it allows all persons to testify to such identity or to such resemblance, who have had an opportunity of seeing the persons, if but for an instant. As it does not require an expert to discover such identity or resemblance, the illiterate and inexperienced as well as the intelligent and skillful, even a child of tender years, may testify as to such matters, especially as to the identity of a person. Then why should not the jury be permitted (when they have the opportunity) to see for themselves and draw their own conclusions from their observation, as well as to hear witnesses depose as to their observation made in the same way? It certainly has been the practice to admit such evidence, on the trial of such cases, both in the County and Superior Courts, for more than forty years, without objection, and this Court is not disposed to change a rule of evidence so long and so universally acquiesced in, and founded, as we think, in reason and common observation.

The case of *S. v. Jacobs* has been argued as an authority, to show error in this case, as if the Court had ordered the defendant to stand up and exhibit himself before the jury, as was done in Jacob's case. But the record shows no such thing, and, therefore, the argument founded on that supposition fails.

There is no error. This will be certified.

PER CURIAM. Judgment affirmed.

Cited: Warlick v. White, 76 N. C., 179; *S. v. Britt,* 78 N. C., 442; *S. v. Horton,* 100 N. C., 448; *S. v. Warren,* 124 N. C., 810; *Hopkins v. Hopkins,* 132 N. C., 28; *S. v. Carmon,* 145 N. C., 486; *Martin v. Knight,* 147 N. C., 578.

(93)

B. M. ISLER v. HARRIET M. DEWEY, Guardian, etc., and others.

1. Where a deed of trust was attacked for fraud, and the trustor was offered as a witness, to prove that there was an agreement between him and the trustee, that the latter should hold the property conveyed until the trustor should be able to pay the debts secured from other sources; *Held*, that the evidence should be permitted to go to the jury for what it was worth.
2. In such case, the trustee *having died* and the property having been conveyed by a substituted trustee to the defendants, the trustor is not excluded by sec. 343, C. C. P., from being a witness for the plaintiff, who also claimed title through him.

Sec. 343 of The Code (in relation to the examination of parties as witness) analyzed.

ACTION, for the recovery of 1,500 acres of land, tried before *Clarke, J.*, at January (Special) Term, 1872, of WAYNE.

The opinion of the Court contains a sufficient statement of the case.

S. M. Isler, for the plaintiff.
Smith & Strong, for the defendants.

RODMAN, J. The land in controversy belonged to one Smith. The plaintiff was a creditor of Smith, by bond, dated April, 1866, upon which a judgment was recovered at February Term, 1867 (being 18 February), of Wayne County Court. Execution issued, under which the land was sold and the plaintiff became the purchaser.

The defendants defended under a deed executed by Smith to Richard Washington, on 12 February, 1867, in trust, to secure certain debts, with a power to sell in the event of non-payment. Washington died in a few weeks after the date of the deed, without having sold. By decree of the Court of Equity for Wayne, Morrisey was sub- (94) stituted as trustee.

Certain issues were submitted to a jury, whose finding it is not necessary, particularly, to notice. The Judge properly regarded it as a finding for the defendants, and gave judgment accordingly.

The plaintiff contended that the deed to Washington was fraudulent and void in law, as to the creditors of Smith, and requested the Judge to charge:

1. That because defendants had not read in evidence any deed to them, plaintiff was entitled to recover.

This was properly refused. Every plaintiff in ejectment must recover on the strength of his own title.

2. That the deed to Washington was fraudulent on its face.

We think this, also, was properly refused.

3. If not fraudulent on its face, the fact that Smith owed a debt not secured in the deed, and that the deed was made just a few days before the plaintiff's judgment was recovered, and that it conveyed all Smith's tangible property, he owning other property; and that the proceeds of the property, after paying the secured debts, was to be paid to him or his executors, raised a presumption of fraud which was not rebutted by the evidence for the defendants.

The circumstances relied on may possibly have been fit to go to the jury to be considered in making up their verdict on the question of fraud, and the plaintiff had the benefit of them in that way. But the Judge had no right to express any opinion as to their weight, compared with the evidence for the defendants.

4. That the deed was fraudulent because the nominal consideration of one dollar, recited as paid, was not, in fact, paid.

This was properly refused. None of these propositions can be maintained, and they do not need any discussion in this Court.

The only exception of the plaintiff that requires notice relates
(95) to the exclusion of the testimony of Smith. The plaintiff proposed to prove by him, "that the understanding and agreement between him and Washington, at the time the deed was executed, was that Washington should hold the land and other property therein conveyed, for Smith, until he should be able to pay the debts from other sources."

The offer raised two questions:

1. Whether the proposed evidence tended to prove the deed fraudulent.

2. Whether, considering the nature of the evidence and Washington's subsequent death, Smith was a competent witness.

As to the first question:

In a question of fraud, considerable latitude is allowed in the evidence. Without considering critically the terms in which the proposed evidence is stated, and without at all estimating what weight it ought to have had, if allowed, we think it ought to have been allowed to go to the jury, with proper observations from the Judge to pass for what it might be worth.

As to the second question:

The answer to that depends on the meaning of section 343 C. C. P. If we break that section into paragraphs and abbreviate it by omitting all that is not material to the question, it reads as follows:

1. Parties may be examined as witnesses:

2. *Provided,* That no party, nor any person who, previous to his examination, has had an interest which may be affected by the event of the action, nor any assignor of any thing in controversy in the action.

3. Shall be examined in regard to any transaction or communication between such witness and a person at the time of such examination deceased, etc.,

4. As a witness, against a party *then prosecuting or defending the action as assignee of such deceased person.* (96)

In this case, Smith certainly comes under the literal words of the description in paragraph 2, above. But if we were compelled to put a construction on these words, we should be inclined to hold that it was intended to embrace only persons who, at the time of examination, still retained some interest in the event of the action. Any other construction would make a statute, professedly for the removal of the incompetency of witnesses, the means of introducing new incompetencies, unknown to the common law and opposed to its principles. Moreover, it is a rule of construction, that an exception to a grant must be of a part of the thing granted. Here the first paragraph admits parties generally, and it would seem incongruous to except from its operation persons not parties, and having no existing interest. But it is not necessary to decide this question, and we express no opinion on it.

We think the defendants do not come within the description in paragraph 4. They are not defending the action as assignees of Washington. It will suffice for them to show a title outstanding in Washington or his heirs, or any one else, without connecting themselves with it.

We think that Smith was not incompetent as a witness and the judgment must be reversed.

PER CURIAM. *Venire de novo.*

Cited: S. C., 71 N. C., 14; *Molyneux v. Huey,* 81 N. C., 110; *Isler v. Dewey,* 75 N. C., 466; *Perry v. Jackson,* 84 N. C., 234.

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(97)

STATE, on relation of W. R. COX, Solicitor, v. NICHOLAS PEEBLES, EDMUND JACOBS and others.

1. When a reference is made to a Commissioner to state an account and report to a certain term of a Court, and the report is made to that term, if exceptions be not filed at the same term, the report should be confirmed and judgment given, upon motion; and if the motion be not made at that time, it is a matter of discretion with the Court whether to allow exceptions to be filed at a subsequent term.

2. If the Commissioner fails to file the evidence with his report, the objection can only be taken by exceptions to the report.
3. A judgment upon the report of a Commissioner, in an action on a guradian bond is like a decree in a suit in equity, and may be conditional in its form, if the circumstances of the case require it.
4. In an action upon a guardian bond brought in the name of the State, upon the relation of the Solicitor of the District, it is too late to object in this Court, that it should have been brought in the name of the wards; and when the complaint in such action shows it is really in the name of such wards against the guardian and the sureties on his bond, there is no ground of objection to the form.

ACTION on a guardian bond, heard before *Moore, J.*, at Spring Term, 1872, of NORTHAMPTON.

The action was brought in the name of W. R. Cox, Solicitor, etc., against the defendant Peebles, as guardian of one Millard F. Peebles, and the sureties on his bond, for the recovery of such sum as might be ascertained to be due the ward, and for the appointment of a receiver. The complaint set out the appointment of the guardian, the execution and condition of the bond, etc. Answer was filed, and at Spring Term, 1871, it was referred to the clerk to state an account and report to the next term. At Fall Term, 1871, a report was filed, setting forth that the balance due the ward was $15,337.28, against which the guardian claimed as credits certain bonds taken by him as guardian, and $2,860, one-third of an amount he invested in land 10 December, 1867,
(98) for this and two other wards, to save a debt due them by bond.

At Spring Term, 1872, the counsel of the defendants offered to file exceptions to the report, one of which was that evidence taken was not filed with it. The plaintiff's counsel objected to the filing of the exceptions and asked that the report be confirmed. His Honor excluded the exceptions and confirmed the report, and gave judgment accordingly for the said balance of $15,337.28, to be credited with the said bonds in the hands of the guardian, which were ordered to be turned over to the ward; also, that the receiver or guardian of the said Millard F. Peebles should, whenever the said N. Peebles and his wife, make and deliver to him a title to a one-third interest in value of the land mentioned in the report, give credit on the judgment for $2,860, with compound interest to 20 November, 1871.

The defendants thereupon appealed.

Barnes and *R. B. Peebles,* for the plaintiff.
Smith & Strong and *Conigland,* for the defendants.

BOYDEN, J. This case comes before this Court from a decision of

his Honor below, upon his refusal to allow exceptions to the report of the commissioner to be filed at the term of the Court subsequent to that at which the report was made. In the argument, it was said by the counsel for the defendant, that the record did not show that the report was filed at the November Term, 1871. This is a mistake, as the record does show this distinctly, as it states that the case was referred to the Commissioner at Spring Term, 1871, with direction to report to the Fall Term of the Court, and the Commissioner makes report at the Fall Term, and states that he makes it in obedience to the order of the Court which directed him to take the account and to report to that term.

It is the well settled rule that exceptions to such reports must be made, as a matter of right, at the Court to which the report is made, and after that it is a matter of discretion with the Court (99) whether such exceptions will be allowed or not. Indeed, upon motion to that effect, the plaintiffs in such cases are entitled, at the term to which the report is made, not only to have the report confirmed, but likewise to have judgment at the same term.

It was urged by the defendants, that as there was no evidence reported, that was error. This is a mistake, and an objection on that account must be taken by exception; and this seems to have been well understood by the defendants, as that was one of the exceptions proposed to be filed. Much liberality has usually been shown to parties by the Court, in allowing them to except at a term subsequent to that at which the report was made, and his Honor, had he seen fit, might have allowed the defendants to file their exceptions as proposed, but, for reasons satisfactory to him, he declined, and his decision, being a matter of discretion, is not the subject of review by this Court.

It is insisted here that the judgment is erroneous, for the reason that it is conditional, and, therefore, it should be set aside. It will be recollected that this case is to be regarded and governed by the same rules, with respect to this report and the judgment thereon, as if it was a suit in equity. It is a little remarkable that the defendants should complain of this part of the judgment, as it relieves them from the immediate payments of some three thousand dollars for which the plaintiffs would otherwise have then been entitled to an absolute judgment against all the defendants. This very credit allowed is especially asked for in the answer of the defendants. How can it be pretended that the sureties are entitled to these credits, unless upon the terms mentioned in the judgment?

It is further insisted, on the part of defendants, that the action is improperly brought.

This is a civil action under the C. C. P., which is governed by different rules from those under our former system. In the caption it is (100) stated to be upon the relation of Wm. R. Cox, Solicitor, when it is insisted it should have been in the name of the wards. No objection was taken in the answer, or upon the rendition of the judgment, as to the form of the action. Had it been then taken, his Honor would have allowed an amendment, had he deemed it necessary. So, that it will be seen, that this objection comes too late, should we hold the suit improperly instituted.

But the Court is of opinion that the action is properly brought, as the complaint shows that, notwithstanding the caption, it is really in the name of the wards against their late guardian and his sureties, on the guardian bond.

PER CURIAM. Affirmed.

Cited: *S. c.*, 82 N. C., 334; *University v. Lassiter,* 83 N. C., 42; *Comrs. v. Magnin,* 85 N. C., 117; *Long v. Logan,* 86 N. C., 537; *Mfg. Co. v. Williamston,* 100 N. C., 86; *Warrenton v. Arrington,* 101 N. C., 112; *McNeill v. Hodges,* 105 N. C., 53; *Brooks v. Holton,* 136 N. C., 307.

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(101)

BARTLETT JOHNSTON v. THE BOARD OF COMMISSIONERS OF CLEVELAND.

1. Where a *mandamus* was issued, commanding the Board of Commissioners of a county to levy a tax sufficient to pay the plaintiff's claim against the county, and a rule was afterwards served upon them to show cause why they should not be attached for disobedience to the order; *Held* that an answer to the rule, that they had levied a sufficient tax, and placed the lists in the hands of the Sheriff, was responsive and sufficient, and the rule ought to be discharged.
2. The Justices of a county having failed, for many years, to levy a tax to pay the interest on bonds issued by the county to aid in building a railroad, the Board of Commissioners should not be required at the suit of creditors to raise in one year, *by taxation*, the whole amount of interest in arrear; but in the case of *mandamus* ordering them to levy a tax and pay the interest, it was a prudent exercise of a discretion to raise part by taxation, and issue county bonds in order to raise the remainder.
3. *Semble* that proceedings by *mandamus* against the Commissioners of a county should be instituted in the Superior Court of their own county.

JOHNSTON *v.* COMMISSIONERS.

RULE to attach for disobedience to peremptory *mandamus,* heard before *Logan, J.,* at Spring Term, 1872, of MECKLENBURG.

The proceedings were commenced by summons returnable to Spring Term, 1870, of said Court; when a sworn complaint was filed, alleging that the plaintiff was the holder of 148 coupons, of $3.50 each, of certain bonds issued by the county of Cleveland, under the provisions of any act of Assembly, ratified 2 February, 1857, entitled an "Act to alter and amend the Charter of the Wilmington, Charlotte & Rutherford Railroad Company," that the Justices of the county and their sucessors, the Board of Commissioners of the county, had hitherto failed to levy a tax, as required by said act, to pay the coupons of the bonds; and judgment was asked that *mandamus* issue to the defendants requiring them to levy a tax to pay the interest coupons on the bonds issued under said act, and out of the tax collected to pay the plaintiff's (102) coupons, etc. Notice of application for a *mandamus* was issued, returnable with the summons.

The case was continued until July Special Term, 1871, when after hearing before *Moore, J.,* a peremptory *mandamus* was issued, returnable to Fall Term, 1871, commanding the defendants to levy a tax to pay the interest coupons due on the bonds issued under said act, and out of the proceeds to pay the plaintiff's demand. Upon the return of the writ the defendants filed their answer, stating that they had levied a tax on the persons and property in the county to pay the plaintiff's coupons and costs, and that in order to discharge the further indebtedness of the county due on account of the coupons for said bonds already matured, they were issuing new coupon bonds of the county, bearing eight per cent interest, etc. Thereupon, an order was made for notice to issue to the defendants to show cause why they should not be attached for disobedience to the *mandamus.* Upon return of the notice the defendants answered, saying that they had done everything in their power to obey the *mandamus,* that they had laid the tax on 6 November, 1871, and placed the lists in the hands of the sheriff, with orders to collect as speedily as possible, to-wit, on or before 10 May, 1872, the time by which he ought to collect according to the general law of the land: and that he had had time to collect, but had failed to do so without their consent or procurement, etc.

His Honor discharged the rule, and the plaintiff appealed.

Jones & Johnston, for the plaintiffs.
Bynum, for the defendants.

PEARSON, C. J. There is no error in the order by which the rule is discharged. We concur with his Honor in the opinion that the answer to the rule was responsive and sufficient.

We are inclined to the opinion that the rule was improvidently
(103) granted in the first instance. It seems to have proceeded upon the ground that the return to the writ of *mandamus* was "frivolous" and *not fit to be noticed.* Otherwise, the rule would have been, to show cause why a more full and perfect return should not be made, the first return being considered insufficient and not fully responsive. Instead of this the rule is, that the defendants show cause why they should not be attached for disobedience of the mandate, etc., treating the return to the writ of *mandamus* as a nullity.

We are not required to express an opinion upon this subject, but we are at liberty to say that, in our opinion, the return is both responsive and sufficient, and that the Commissioners seem to have done all that could have been expected under the circumstances. The *Justices of the Peace of the county* had failed to levy and collect an *annual* tax, to keep down the interest of the bonds, as it was their duty to do. When the defendants, "the Board of Commissioners," succeeded to the office and duties of the Justices of the Peace in this regard, and found a very large amount of interest in arrear, was it the duty of the Board of Commissioners to levy and collect a tax in one year, sufficient to pay off the accumulated interest for some fifteen years? or did they have a discretion to endeavor to break the force of this burden upon the tax-payers of the county, by issuing county bonds to raise a part of the amount called for, and levying a tax for the residue? We think the Board of Commissioners had this discretion, and it seems to have been exercised in a discreet manner.

Should the plaintiff be under the necessity of taking other proceedings in order to get his money, it may be well to submit to his counsel this question, Must not a writ of *mandamus* to "the Board of Commissioners of a County" be made returnable to the Superior Court of that County? The propriety of this, in a general point of view, will occur to every one. Are the Commissioners of Cleveland to be required to
(104) make return to writs of *mandamus* in all and every county of the State, wherever a holder of one of the coupons of a county bond happens to reside? C. C. P., sec. 67, seems to apply. "Against a public officer," for an act done by him by virtue of his office, the proceeding shall be in the county where the act is done. More particularly should this be so, in the writs of *quo warranto* and *mandamus,* where an official act of usurpation, or a failure to do some act which the duties of

the office require, constitute the charge, and in effect amounts to a criminal action, or an action to subject the party to pains and penalties.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: Jones v. Com'rs, 69 N. C., 415; *Edwards v. Com'rs,* 70 N. C., 572; *Cromartie v. Com'rs,* 85 N. C., 217; *Jones v. Statesville,* 97 N. C., 88; *Jones v. Com'rs,* 137 N. C., 599; *Com'rs v. Webb,* 148 N. C., 123.

PHILEMON HOLLAND v. DAVID CLARK.

When an agent, without authority to execute a bond for his principal, hired slaves for the principal, and gave bond signed by him as agent, with security; *Held,* that, according to the practice before the adoption of the C. C. P., *assumpsit* would lie against the principal, while *debt* or *covenant* would lie against the surety on the bond.

ASSUMPSIT, brought before the adoption of the Code of Civil Procedure, and tried at Spring Term, 1872, of CRAVEN.

The plaintiff declared on an oral promise, to pay $525 for the hire of certain negro slaves for the year 1861. He introduced one P. W. Yarrell, for the purpose of proving that he, the said Yarrell, as agent of the defendant, with authority to do so, hired the said negroes for said year, agreeing to pay for them the said sum. TThe witness, (105) in reply to the defendant's counsel, admitted that the contract was reduced to writing; and the following paper writings, produced by the plaintiff's counsel, were identified as embodying the contract:

"Twelve months after date we promise to pay Philemon Holland, or order, three hundred and ninety-three dollars and seventy-five cents, for the hire of my negro men, Brister, Lewis and James, and furnish them with good clothing, shoes, hat and blanket, and work them for the present year, for value received.

"Witness our hands and seals, 1 Jan, 1861.

P. W. YARRELL,
Agent for David Clark. (Seal.)
C. B. WOOD. (Seal.)

The other paper writing was of the same form and tenor, except that it was for the payment of $131.25 for the hire of negro man George.

The witness, Yarrell, further stated that he delivered the said bonds to plaintiff. The plaintiff then proposed to show some parol agreement

concerning the hiring of the slaves, but upon objection by the defendant, the evidence was ruled incompetent by the Court.

His Honor intimated an opinion that assumpsit would not lie, as there were specialties for the same subject matter, unless there had been notice of a rescission of the contract, or a surrender of the specialties, or a release; and the plaintiff thereupon submitted to a judgment of non-suit and appealed.

No counsel for the plaintiff.
Haughton, for the defendant.

BOYDEN, J. The defendant's counsel lays down the doctrine too broad, when he attempts to maintain the position that, if the plaintiff has a remedy by an action of covenant against one person, he can not (106) sue in assumpsit another person for the same claim. It has been repeatedly decided in this Court, that where one partner signs his own name and affixes his seal, and then signs the name of his copartner, and affixes a seal to his name, having no authority under seal thus to sign, the party with whom this contract is made may sue, in debt or covenant, the partner who in person made the contract, and that he cannot sue the other partner upon contract under seal, but that he may sue him in assumpsit. See the cases *Fronebarger v. Henry,* 51 N. C., 548; *Fisher v. Pender,* 52 N. C., 483, and cases there cited. So, in our case, the plaintiff might sue the surety who signed the instrument and affixed his seal, in covenant, but he could not bring covenant against the defendant Clark, for the reason that the agent Yarrell had no authority under seal from Clark to sign such an instrument; but the agent having authority to hire the said slaves, and the defendant having received the slaves, and having had the benefit of their services for the year, the plaintiff may maintain assumpsit for that service and would be entitled to recover the sum agreed upon for their hire.

The learned counsel was also mistaken, in the doctrine of merger as applied to this case.

Had the defendant Clark signed and sealed the instrument sued on, then although a parol contract, for the hire of the slaves, had been made previous to the execution of the covenant, and the covenant thereafter executed embodying the same contract, then the parol contract would be merged in the higher security. But in our case Clark had not signed the covenant, and therefore there is no ground for the doctrine of merger.

The law in such a case as the present has been too long and too well

settled to be now open for discussion. See the opinion of Chief Justice Ruffin in *Fronebarger v. Henry,* 51 N. C., 548, and also the case of *Osborne v. Manufacturing Co.,* 50 N. C., 117.

It is well settled that, in our case, the plaintiff might have brought debt or covenant against Wood, the surety who had signed and sealed the bond; and that Yarrell could not be sued upon the (107) bond, but that assumpsit might be maintained against Clark, and a release to Yarrell or Wood was wholly unnecessary to enable the plaintiff thus to sue.

PER CURIAM. *Venire de novo.*

Cited: Boyd v. Turpin, 94 N. C., 139; *Burwell v. Linthicum,* 100 N. C., 149.

ELBERT FELTON v. GEORGE W. HALES.

1. In case of bailment, the owner of the property has no right of action against the bailee until the termination of the bailment; but, after the termination of the bailment, the owner can recover without a demand for possession.
2. When a bailee denies the title of the owner, and sets up a title in himself, no demand for possession is necessary; and the defendant is precluded from objecting the want of demand, where, in his *answer,* he alleges property in himself.

CIVIL ACTION for the recovery of a saw mill, under the provisions of the Code for Claim and Delivery of personal property, tried before *Russell, J.,* at Spring Term, 1872, of WILSON.

The opinion of the Court contains a statement of the case.

Faircloth, for the plaintiff.
Smith & Strong, for the defendant.

BOYDEN, J. This is a case of claim and delivery. "The witness testified, that after the plaintiff had put the mill in possession of the defendant, it was agreed that defendant should have it till January. Some said until January, and others the first day of January. That the plaintiff demanded it of the defendant in December; and (108) on 1 January the summons in this action issued. The defendant's counsel prayed the Court to instruct the jury that, as there was no demand after the plaintiff (Felton's) right to possession accrued, plaintiff could not recover." The Court told the jury that the plaintiff

must have had the right of possession at the time of the commencement of the action, and if the bailment had not terminated then, that he could not recover. But if they found, from the evidence, that by the contract between the parties the bailment was at an end, no demand was necessary, especially if they found that the defendant was, after the termination of the bailment, and at the commencement of the suit, holding it adversely and claiming it as "his own."

We see no error in this charge against the defendant. We think it at least quite as favorable as the testimony warranted. The question as to the termination of the bailment, whether it terminated on the first moment of the first day of January, or on the last moment of the last day, thereby giving the defendant until the close of that day, was fairly submitted to the jury. This Court thinks that, inasmuch as the defendant, in his answer, set up title to the mill and claimed it as his absolute property, no demand was necessary. *Cui bona,* make a demand.

When a tenant has attorned to a stranger, or done some other act disclaiming to hold as tenant to the landlord, a notice to quit is not necessary; 3 Phillips Ev. 276.

This is the law in case of a denial *in pais,* much more is it so when he puts it upon record by his plea to the action.

PER CURIAM. No Error.

Cited: Gerringer v. Ins. Co., 133 N. C., 417.

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(109)

W. W. SCOTT v. WILLIAM A. WALTON.

Where a purchaser of land at execution sale obtained a rule upon the Sheriff, who sold the land, to require him to execute a conveyance, and the Sheriff gave as a reason for his refusal to make the deed, that the defendant in the execution claimed the land as a homestead, but it appeared that it had not been laid off, and was not occupied or claimed as a homestead at the time of sale; *Held,* that the rule should be made absolute.

RULE on the defendant, as Sheriff, to require him to make title to the plaintiff, for certain land purchased at execution sale, heard before *Cloud, J.,* at Spring Term, 1872, of ROWAN, upon a *case agreed.*

The case states, that A. H. Miller and others obtained judgment against one Aaron Miller at Spring Term, 1872, of said Court; that execution issued thereon and was levied upon the land in controversy, with other lands of said Aaron Miller; that the sheriff after due adver-

tisement, and notice in writing to the defendant in the execution, sold the land, without objection by said defendant. The land in controversy did not adjoin the tract on which Aaron Miller lived, but was several miles distant therefrom. Some time after the sale and payment of the purchase money by Scott, said Aaron Miller, for the first time, notified the sheriff that he claimed a homestead in the land, and forbid his executing conveyance.

His Honor, being of opinion that the land was not subject to sale, adjudged that the rule be discharged, and the plaintiff appealed.

Fowle and *Bailey,* for plaintiff.
Dupre and *Jones & Jones,* for defendant.

RODMAN, J. In this case the Sheriff sold the land, and received the plaintiff's money, but refuses to make a deed. He probably means to put his refusal on the ground that the land is the home- (110) stead of the defendant in the execution. But he says only that the defendant claims it as such, and does not set forth facts upon which it may be judged whether the claim is a legitimate one or not. Besides this, the Court would not pass on the right of the defendant in execution, in an action to which he is no party. It may be that the Sheriff has incurred penalties, under the Act of Assembly, by selling a homestead, and if that appeared, probably, the Court would not compel him to perfect the sale by a deed. But in this case, it is expressly said that the land had not been laid off and was not occupied or claimed as a homestead at the time of the sale. If a proper ground were laid the Sheriff might perhaps cause the defendant in execution to intervene, so that his claim to the homestead might be passed on so as to bind him. But that question does not arise here, and we express no opinion. We think, in the present case, the Sheriff has assigned no sufficient reason for his refusal to make the deed. Its effect when made is a different question, which can not be passed on here.

Judgment reversed, and rule on Sheriff to execute a proper conveyance made absolute.

PER CURIAM. Reversed.

(111)

T. B. JUSTICE to the use of BRONSON, HOYT & McENTIRE v. J. M. HAMILTON.

Payment, in 1863, to a Confederate Receiver, of a note for money belonging to citizens of New York, given before the late war to a citizen of this State who acted as their agent, and surrendered by him as their property to the Receiver; *Held*, to be no defence in a suit against the maker, brought by the payee, to the use of the beneficial owners.

DEBT, brought in 1866, to RUTHERFORD, and subsequently removed to HENDERSON, and tried at Spring Term, 1872, before *Henry, J.*

The suit was brought for the recovery of $414.91 and interest, the amount of three notes executed in 1860 and 1861 by the defendant to the plaintiff, Justice, a citizen of Rutherford County, for moneys which he had in hand as agent of Bronson, Holt & McEntire, a mercantile firm of New York. After the commencement of the late war, Justice, under a decree of a Confederate District Court, surrendered the notes to the Confederate Receiver for the 8th Congressional District.

The defendant relied upon the plea of payment, and it was proved on the trial that some time in the year 1863 he paid the amount of the notes to the Receiver, in the presence of Justice, and took them in possession and cancelled them. Upon finding of the facts by the jury, his Honor gave judgment for the plaintiff and defendant appealed.

No counsel for plaintiff.
Folk and *Dupre,* for defendants.

READE, J. The only question necessary to be considered is, whether voluntary payment of the amount of the notes sued on to the Confederate Receiver, was a satisfaction of the notes as against the
(112) beneficial plaintiffs who were not citizens of the Confederate Government? His Honor was of opinion with plaintiffs; and we are of the same opinion, for the reason that the payment was neither to the plaintiff nor any agent of his. See *Ward v. Branch,* 62 N. C., 71; *Blackwell v. Willard,* 65 N. C. R., 555.

PER CURIAM. No Error.

Cited: Elliott v. Higgins, 83 N. C., 461.

JOHN P. POINDEXTER v. WILLIAM DAVIS and others.

Where a county contracted a debt during the late war, for the purpose of equipping soldiers for the Confederate service, and afterwards borrowed money to pay that debt; *Held*, that a recovery can be had on a bond given for such money, on the ground that the illegality is too remote.

APPEAL from *Cloud, J.*, at Spring Term, 1872, of DAVIDSON, having been removed from STOKES, in which the action was commenced, upon the affidavit of the defendants.

The bond sued on was executed to the plaintiff by one J. J. Martin, as Chairman of the County Court of Stokes, as principal, and the defendants as sureties, 10 June, 1862, for the payment of $3,050, one day after date.

The evidence showed that in June and July, 1861, the county of Stokes, through its County Court, subscribed $10,000 for the purpose of equipping its first four companies raised for the Confederate service, and borrowed the amount from the Branch Bank of Cape Fear, at Salem. The bond in controversy was given for money borrowed of the plaintiff, under an order of the County Court, at its June Term, 1862, to pay off one of the notes given to the bank. There was (113) evidence that the plaintiff had knowledge of the object for which the money was borrowed of him, and that the bank debt was contracted for the purpose above stated. The plaintiff offered evidence that he had no such knowledge, but that he loaned the money merely as an investment.

Issues were submitted to the jury, as to the consideration of the bond, etc. His Honor charged, that the plaintiff was entitled to recover, whether he had knowledge of the purpose for which the money was borrowed, and the consideration of the notes to the bank, or not. Defendants excepted.

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

J. M. Clement, for the plaintiff.
Scales & Scales, and *Blackmer & McCorkle*, for the defendants.

READE, J. In the frequent decisions which we have made, to (114) the effect that we will not enforce contracts which were in aid of the rebellion, we are not to be understood as approving of, or aiding the party who attempts to evade his undertaking with his *particeps criminis*. Nor would we be understood as being favorably impressed

by the complacency with which their defences are frequently made, as if they supposed that, whatever crime there might be in a breach of *public* faith, it is abundantly atoned for by a breach of *private* faith. But, looking beyond these questions of casuistry, our position is, that, sitting as a Court, we can not enforce compliance with a transaction, which had for its end and aim the destruction of the Government, whose Constitution and laws we have to administer.

The facts in this case are, that the county had contracted a debt to equip soldiers in the Confederate service, and then contracted this debt to pay that off. The first transaction was clearly in aid of the rebellion, and, for that reason, illegal. But how did it aid the rebellion to pay that debt off? The mischief had been done, and the money borrowed of the plaintiff put not a soldier in the field. It was argued that it kept up the credit of the country and, in that way, aided the rebellion. How did it keep up the credit of the county to make one debt to pay another? The argument is a refinement, and the illegality is too remote.

The same question was before us at last term. *Kingsbury v. Suit*, 66 N. C. R., 601.

PER CURIAM. No Error.

Cited: Davis v. Com'rs, 72 N. C., 443; *S. c.*, 74 N. C., 375; *Electrova v. Ins. Co.*, 156 N. C., 236.

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(115)

EMERY H. MERRIMON to the use of SARAH PAXTON, v. WM. NORTON, Adm'r of W. C. KILGORE, W. P. POORE and B. C. LANKFORD.

The issues submitted to a jury in an action upon a note given in May, 1864, being as to the executor of the note and the currency in which it was solvable; *Held*, that a verdict finding "all issues in favor of the plaintiff for the value of Confederate money," is sufficient to support a judgment for the amount due according to the legislative scale.

ACTION, commenced in BUNCOMBE, afterwards removed to Henderson and tried at Spring Term, 1872, before *Henry, J.*

The opinion contains a sufficient statement of the case.

Phillips & Merrimon, for the plaintiff.

No counsel for the defendant.

BOYDEN, J. This was a civil action, brought upon a note for $2,000, dated 10 May, 1864, and this note had been properly assigned to the plaintiff.

The execution of the note was admitted by the defendants Poore and Lankford, but denied on the part of Norton for his intestate, Kilgore.

The following issues are submitted to the jury: 1st. "Did W. C. Kilgore execute the note sued on, as alleged in the complaint?" 2d. "Was the note sued on to be paid in good money or par money?"

His Honor states that the whole contest in the evidence, was as to how the note was to be payable—whether in Confederate money, or money of the value of legal currency. None of the evidence given on the trial is stated. The Court charged the jury that, if they found that the agreement was to pay in good money, they should find a verdict for the whole amount of the note, and interest, in present currency.

The jury returned the following verdict: "We find all the issues in favor of the plaintiff for the value of Confederate (116) money."

The plaintiff moved for a new trial, for what reason does not appear. The plaintiff then moved for judgment for the amount of the note, with interest from its date, in the present currency.

This motion was refused, and judgment was rendered for ——— dollars, the amount due according to the scale, at the date of the note. It is true the verdict of the jury is somewhat irregular, but it does not appear that there was any motion made to correct the verdict.

It does appear that both parties offered evidence before the jury as to funds in which the payment was to be made. There was no objection to the evidence offered, and the question seems to have been fairly submitted to the jury, as to what funds the note was to be paid in; and although the jury say "they find the issues in favor of the plaintiff," they further say for the value of Confederate money, and the Court rendered judgment for the value of the note in Confederate money, according to the scale as of the date of the note.

PER CURIAM. No Error.

(117)

S. M. GREEN to the use of H. ANDERSON v. THE COMMISSIONERS OF CHEROKEE COUNTY.

Upon a note given before the adoption of the present Constitution, by the Chairman of a County Court, expressed to be for the County, partial payments were made by the Commissioners before suit brought; *Held*, that it was not necessary for the plaintiff to show, that the said Chairman had authority to give the note, or demand and notice before suit.

GREEN *v.* COMMISSIONERS.

APPEAL from *Cannon, J.*, at Spring Term, 1871, of CHEROKEE. It was commenced before a Justice of the Peace, for a balance due on a note in the following words:

"On or before 1st Monday in September, 1858, I, for the county of Cherokee, promise to pay S. M. Green $100, for value received of him.
This 6 January, 1854. N. S. HOWELL, *Chairman.*"
"Attest: Drury Weeks."

The alleged consideration was land bought for county purposes.

The Justice gave judgment against the plaintiff, and he appealed to the Superior Court.

The Courthouse having been destroyed by fire in 1865, the plaintiff offered to show by the subscribing witness to the note, who was Clerk of the County Court when the note was given, that Howell was Chairman, and duly authorized to execute the note.

The defendants objected to the testimony; but it was admitted. The plaintiff then proved that payments were made on the note by a former Board of Commissioners, in October, 1868, and May, 1870.

Defendants moved to dismiss the action, because the complaint did not aver notice and demand before suit. Motion overruled.

(118) Judgment for plaintiff. Appeal by defendants.

Gudger, for the plaintiff.
No counsel for the defendants.

READE, J. The complaint is, that the county of Cherokee owes the plaintiff a balance for a tract of land bought for county purposes, and that the defendants are the Commissioners of the county.

1. It is objected, that the debt was not contracted by the present Board of Commissioners, the defendants; but, if at all, by the County Court, under the old system. There is no force in that objection, because it is the same *county,* and the present Board is the successor of the County Court.

2. The fact that the Board of Commissioners, under the new system, has recognized the validity of the claim and made several part payments, fully answers the objections as to the competency of the evidence to prove the authority of the Chairman of the old County Court to contract the debt, and the alleged want of notice.

PER CURIAM. No Error.

(119)

STATE v. ANN ELIZA DAVIDSON.

1. To disparage a witness, on cross-examination, he may be asked and required to answer almost any question, unless the answer may subject him to indictment, or to a penalty under the statute.
2. Therefore, on a trial of A for murder, after severance in an indictment against A, B, and C.; *Held*, that B, who having previously been convicted was examined as a witness for the State, might be asked by the defendant's counsel, for the purpose of contradicting him, whether he did not say to the counsel of C, while conversing with him, in jail, "that he was sorry A and C were put in jail for his devilment," etc.

MURDER, tried before *Logan, J.*, at Spring Term, 1872, of MECKLENBURG.

The prisoner was indicted jointly with one Nat. Caldwell and her mother, Minerva Davidson, for the murder of the infant child of the prisoner, Caldwell being charged as principal, and the prisoner and Minerva as accessories. There was a severance, and the defendant was tried alone, upon a count charging her with aiding and abetting the said Caldwell in killing the child.

Nat. Caldwell, who had previously been tried and convicted, and was then under sentence of death, was examined as a witness by the State. He stated, in substance, that the prisoner who was about seventeen years old, and lived in Charlotte, came to his house, some fourteen miles from Charlotte, when about four months gone in pregnancy, and remained there some time; that she left his house before the birth of the child, on account of the jealousy of witness' wife, and went to the house of one Dovie Turner, a neighbor; and that he and the prisoner formed a plot to murder the child, and he told Minerva Davidson of the plot and she approved of it; that about two weeks after the birth of the child, Minerva gave him money to hire a horse and buggy to bring the prisoner home, and told him to tell her that, if she carried the child with her, she (Minerva) would kill her; that he went to the house of Dovie Turner in a buggy, and started with the prisoner and the (120) child, about an hour by sun, on the road to Charlotte; that several times, on the way, he persuaded the prisoner to give him the child, that he might take it aside and destroy it, but she seemed reluctant to give it up; that when they got near Charlotte, in a thick piece of woods, he told her that was their last chance, and if she carried the child home her mother said she would kill her; that he stopped the buggy, gave the prisoner the reins to hold, went out and dug a hole and covered it up with leaves and dirt; that the child cried, and the prisoner began to weep; he threatened to give her the child to take home if she

did not hush. She promised to try, and he returned to the buggy, and he and the prisoner remained until the child ceased crying, when they went on to Charlotte. On the way, the prisoner exclaimed, "Oh, my poor baby; how can I face my mother, knowing that she is the cause of all this?" He told her to say that she had sent the child to a lady in Salisbury.

On cross-examination, the witness, with a view of contradicting him, was asked by the prisoner's counsel, whether he had not said to Col. H. C. Jones (who was the counsel of Minerva Davidson), while conversing with him in jail, that he was sorry that Eliza and her mother were put in jail for his devilment; that if Eliza would tell the truth upon her mother she would come clear. The State objected, and the Court refused to permit the question to be answered, on the ground that the representations to Mr. Jones were confidential communications. The prisoner excepted.

Other points were raised, but the opinion of the Court renders it unnecessary that they should be stated.

Verdict of guilty. Motion in arrest of judgment overruled. Judgment of death and appeal by the prisoner.

(121) *Attorney General, Battle & Son,* and *Dupre,* for the State.
Dowd, for the prisoner.

BOYDEN, J. On the trial of this case the following question was proposed to be put to the witness, Nat. Caldwell: "Did he not say to Col. H. C. Jones, while conversing with him in jail, that he was very sorry that Eliza and her mother were put in jail for his devilment, and that if Eliza would tell the truth upon her mother she would come clear." This testimony was objected to by the State, and the Court refused to permit the question to be answered, on the ground that the representations made by the witness to Col. Jones were confidential communications. It is admitted in this Court, on the part of the State, that if this evidence was otherwise admissible, it could not be rejected for reason given by the Judge. So, the question is, was the testimony competent for any purpose? If so, then it was error to reject it. *S. v. Patterson,* 24 N. C., 346. The question in that case was in relation to the transaction then under investigation, and about which the witness had deposed; and Judge Gaston, in delivering the opinion of the Court, in the case of the *S. v. Patterson,* says: "It is well settled that the credit of a witness may be impeached by proof that he has made representations inconsistent with his present testimony, and whenever these repre-

sentations respect the subject matter, in regard to which he is examined, it never has been usual to enquire of the witness, before offering the disparaging testimony, whether he has, or has not made such representations." These remarks of the Judge were made, not to show that the witness might not himself be asked the question, but in such a case the witness might be contradicted, without first asking him if he had not made such representations. In such a case, it has never been held that such a question might not be propounded to the witness. Indeed, the usual course is to put the question to the witness, but it is not necessary to do so, as in such a case he may be contradicted without first enquiring of the witness whether or not he has made such repre- (122) sentations. No reason can be given, why such representations may not be as well proved by the witness who made them, as by any other witness, save that they have a tendency to disparage him. But this doctrine, in regard to asking questions of witnesses, tending to disparage them, has been greatly modified in modern times, and it is now held that you may put almost any question to the witness, and that the witness is bound to answer it, unless the answer might subject him to an indictment, or to a penalty under a statute. The question, we think, should have been permitted, and he was bound to have answered it.

As this disposes of the case in this Court, it is unnecessary to decide the other questions made in the case, some of which are not free from difficulty.

PER CURIAM. *Venire de novo.*

Cited: S. v. Lawhorn, 88 N. C., 637.

EDMUND JONES v. THE N. C. RAILROAD COMPANY.

In actions for damages, a party alleging negligence cannot shift the burden of proof to the other side, until he has proved facts, at least, more consistent with negligence than with care;

Therefore, where a Railroad Company is sued for damages by its train to stock, after six months from the time of the injury, not only is the burden of proving negligence on the plaintiff, but he must show facts inconsistent with the probability of care; *e. g.*, that the whistle was not blown.

APPEAL from *Henry, J.,* at January Special Term, 1872, of MECKLENBURG.

There was a verdict and judgment for the plaintiff and the defendant appealed. (123)

The facts are stated in the opinion of the Court.

Vance and *Dowd,* for the plaintiff.
J. H. Wilson and *R. Barringer,* for the defendant.

RODMAN, J. The prayer of the defendant was, in substance, for the Judge to decide that, assuming all the evidence to be true, the facts proved did not amount to negligence. It was in effect, though informal, a demurrer to the evidence. The Judge refused the instruction asked for, but told the jury that the burden of proof was on the plaintiff, and left it to them to decide whether there was negligence or not. This was, in effect, to decide that the facts which the evidence tended to prove, if believed to exist did in law amount to negligence. For when the facts are found, negligence is a question of law.

Thus the question is necessarily presented, Did the facts proved constitute negligence? The material facts are very few. The train of the defendant was proceeding on a down grade, on a track straight for about a mile, in the day time; the plaintiff's horse, being or getting upon the track, ran about two hundred yards in front of the engine, when it was overtaken and killed. It does not appear whether or not the whistle was blown, or any effort made to check the speed of the train, or whether from the declivity of the grade it could have been stopped before reaching the horse, after it was seen that he persisted in remaining on the track; or whether the horse could have got off the track, or was unable to do so by reason of its being in a deep cut, or on a high embankment. It is admitted, the action not having been brought within six months after the injury, that the burden of proving
(124) negligence was on the plaintiff. But it is contended for the plaintiff, that the facts proved shifted the burden to the defendant, and required him to prove care. The truth of that proposition depends entirely upon whether the facts proved constituted negligence; not whether they raised a suspicion, and were consistent with negligence, but whether, from them, the jury could reasonably infer the absence of that ordinary care which the law requires. This is the question accurately stated. For it is a familiar law, that it is not sufficient for the party upon whom the burden of proof is, merely to prove facts which are equally consistent with the guilt or innocence of the other party, but he must prove facts which, if not absolutely inconsistent with innocence, (as would be required in a criminal action), are, at least, more consistent with, and the usual accompaniments of guilt.

And a party alleging negligence can never shift upon his adversary the burden of disproving it, until he has given in evidence some fact which, tested by the above rule, is proof of negligence.

Now to apply the rule to the present case. Every fact proved may be true, and yet the defendant *may* have used ordinary care; *may* have blown the whistle; *may* have made effort, to slacken the speed or stop the train, which were unsuccessful by reason of the steepness of the declivity or other cause. Notwithstanding all his efforts to the contrary, the damage *may* have happened. To hold that in such a case the burden is on the defendant to prove care, is to change the rule with which we started, viz, that the plaintiff must prove negligence, to the contrary one, that the defendant must prove care, and for no sufficient reason.

Let us take up each fact proved and see, whether separately or combined they are inconsistent with the probability of ordinary care. What are the facts? 1. The killing of the animal. It is conceded that by implication from the statute, if not by the prior law, that furnishes no presumption of negligence, unless the action be brought within six months.

2. That the horse ran ahead of the train for two hundred yards before being overtaken. On this the following observations may (125) be made: In *Herring v. R. R.*, 32 N. C., 402, it was held, that it was not the duty of the engineer to stop or slacken his train, when he saw a human being on the track ahead of him, unless he knew that the man was drunk or asleep, or otherwise put out of the general rule. As men in general have the instinct of self-preservation and the power of locomotion, the engineer might reasonably suppose that he would take notice of the danger and get off the track. Under a contrary doctrine, individuals might so embarrass railraods as to make the running of trains practically impossible. The same reasoning will apply, though with somewhat less force, to horses and other animals; they also have the instinct of self-preservation, though combined with less intelligence, and the power of locomotion. It would seem not to be a duty of the engineer to stop or slacken his train, whenever he sees an animal on the track. To do so would greatly impair the usefulness of the road, without a corresponding advantage to any one. But it is admitted to be clearly his duty to blow the whistle, for the purpose of frightening the animal. This precaution is usual, requires no sacrifice, and is generally successful. If it appeared that it was omitted on this occasion, it would clearly be evidence of negligence. But it does not so appear. That the whistle may have been blown is entirely consistent with all the facts proved. So that the question at last resolves itself into this: Was the burden on the plaintiff to prove that the whistle was not blown, or on the defendant to prove that it was? But it is conceded that the burden of proving negligence is on the plaintiff, and this answers the question.

Until he proves that the whistle was omitted to be blown (or some similar act) he has not given in evidence any act of negligence.

PER CURIAM. *Venire de novo.*

(126)

ELIZA O. POWELL v. W. C. JONES, JOHN BOWLES, SMITH H. POWELL and NICHOLAS JENKINS.

Where a *feme covert* filed a complaint against the purchasers of certain land, sold under execution as the property of her husband, and their bargainee, alleging that the land was bought with money arising from her separate property, and the deed was by inadvertence taken in the name of her husband; and the said purchasers and their bargainee averred in their answers that they purchased for value, and without notice of her equity, and such averments were not controverted; *Held*, that she was not entitled to relief.

APPEAL from *Mitchell*, J., at Fall Term, 1871, of CALDWELL.

The complaint alleged, that the plaintiff and the defendant, Powell, were married in 1838, and, before marriage, executed a contract, whereby such property as she then had, or might thereafter acquire, was secured to her separate use; that a few years after the marriage, her husband, as her agent, sold certain slaves that belonged to her, and with the money purchased a tract of land on which they made their home for eighteen years, that it was understood the deed was to be made to her, but by inadvertence it was made to him; that some time in the year 1860 the Sheriff sold the land, under executions against her husband, and they were dispossessed—the defendants, Jones and Bowles, being the purchasers, and having afterwards contracted to sell to the defendant, Jenkins; and that the defendants purchased with notice of her equity. She asked judgment, that the defendant Powell be declared trustee for her, and be required to convey to her, that the Sheriff's deed to Jones and Bowles be cancelled, and they adjudged to be trustees for her, and for damages for the detention of the land.

The answers of the defendants Jones, Bowles and Jenkins, denied most of the material allegations of the complaint, and stated that Jones and Bowles bought for value under executions issued on judg-
(127) ments rendered in 1867 and 1869, without notice of any claims by the plaintiff, and that Jenkins had bought from them, paying value, and without notice of any equitable interest in the plaintiff.

Issues were formed upon the points raised in the pleadings, and the plaintiff and the defendant Powell were examined as witnesses. No evidence was offered tending to show that the other defendants had notice of the plaintiff's claim of an interest.

Under his Honor's directions, the jury returned a verdict against the plaintiff and she appealed.

Armfield, W. P. Caldwell and *Dupre,* for the plaintiff.
Folk, for the defendants.

PEARSON, C. J. The equity set up by the plaintiff is met by the averment on the part of the defendant, Jenkins, "that he is a *bona fide* purchaser of the land for full value and without notice." This averment, not being "controverted," must be taken as true, and is a full defense to the action, upon the admitted doctrine, "where the equities are equal, the law prevails."

In our case the equity of the plaintiff is not equal to that of the defendant Jenkins; for her equity is supported only by parol proof, tending to show that the defendant Powell, her husband, instead of taking a deed of trust for her separate use, by "inadvertence" (as he says) took a deed to himself absolute on its face, which enabled him to have credit as the owner of the land. This state of things continued for eighteen years, during all of which time her husband was recognized as the owner of the land. These facts made her equity. Supposing her to have had one secondary to the equity of the defendant Jenkins, who is a *bona fide* purchaser for full value without notice (even if the plaintiff was equal to his, and was not subject to the drawback of fraud by allowing her husband to "sail under false colors," and incur debts upon the credit of his having a deed for this land), her case
fails. For the rule is, "when the equities are equal, the law pre- (128)
vails." Here the *defendant Jenkins* has the legal title, and having equal equity the Court will not interfere.

As to the other defendants the plaintiff has no cause of complaint, except against her husband, Smith H. Powell, for having by "inadvertence, and contrary to his intention," procured a deed to be made to him, without a declaration of trust in her favor; for the complaint is not framed with reference to any relief against the husband of the plaintiff.

PER CURIAM. No Error.

A. C. COWLES, Adm'r, etc., v. P. HAYES and T. N. COOPER.

1. A plaintiff who appealed from the judgment of a Justice for less than $25, in his favor, he claiming more, and the Judge having affirmed the judgment on the papers sent up to him, under sec. 539, C. C. P., is not entitled to a *recordari* to the Justice, as the case has already been removed from his Court.
2. Sec. 539, C. C. P., applies to appeals by *defendants* against whom judgment is rendered by a Justice for $25 or less, and not to appeals by plaintiffs, in whose favor judgment is given for $25 or less, and who fairly claimed more than $25 to be due.

RECORDARI heard before *Mitchell,* J., at Spring Term, 1872, of IREDELL.

The plaintiff brought an action as administrator of James Howard, against the defendants, before a Justice of the Peace, to recover $156.65, alleged to be due by note given at the sale of the intestate's property in the spring of 1865, before the end of the war. The plaintiff con-
(129) tended that the note was not liable to scale, but the magistrate gave judgment according to the scale, for $4.06 and costs. The plaintiff appealed, and the Justice sent up the papers to the Judge, under sec. 539 C. C. P. (without the evidence). The Judge affirmed the judgment. Thereupon the plaintiff filed a petition for a *Recordari,* alleging the foregoing facts, and stating that he arrived at the place of trial before the Justice, on the day fixed, before 11 o'clock with his witnesses to prove the value of the property for which the note was given, but found that the Justice had already given judgment according to the scale; that the Justice refused to open the case or grant a new trial; and that the case had never been heard on its merits. His Honor thereupon ordered a writ of *recordari* to issue, and upon its return, or motion, ordered the case to be put on the civil issue docket of the Superior Court. The defendant appealed.

Armfield, for the plaintiff.
Bailey, for the defendant.

READE, J. In cases like this a *recordari* is a substitute for an appeal, and is never allowed except where a party has been deprived of the benefit of an appeal by accident. In this case the plaintiff was allowed an appeal from the judgment of a Justice of the Peace, and the appeal went up; and the judgment of the Justice was affirmed by the Judge of the Superior Court. If the plaintiff was dissatisfied with that judgment, he had the right of appeal to the Supreme Court. But instead

of appealing to the Supreme Court, he applied for a *recordari* to bring up the case from the Justice again.

The reason given for this unusual proceeding is, that under C. C. P., sec. 539, in an appeal taken from a judgment of a Justice of the Peace, if the judgment appealed from is $25, or less, the Clerk of the Superior Court shall send the papers to the Judge, who shall determine only the matters of law therein. And that in this case the judgment appealed from was under $25, and was, therefore, sent by the (130) Clerk to the Judge, who, under the Code could not enter into the facts and try the case upon its merits. And so, the plaintiff alleges, that, although he is entitled to a judgment for more than $25, yet, because the magistrate gave him judgment for less than $25, he was altogether cut off from a trial of the facts and upon the merits. This would seem to be so, and would evidently be a denial of justice, if that section of the Code is construed to apply to judgment in favor of *plaintiff*, where more than $25 is fairly claimed and *apparently* due. As, if the plaintiff sue on a note or an account for $100, the magistrate could deprive him of the benefits of an appeal and a trial upon the merits in the Superior Court, by giving him a judgment for $25 or less. This could not have been the intention of the law; and, therefore, we must construe that provision to relate to appeals by *defendants*, against whom judgment is rendered for $25, or less, and who claim that it ought to be still less. And it does not apply to judgments in favor of plaintiffs for $25 or less, and who claim that it ought to be more, and who have an apparent, and not a sham claim for more. The idea is that a trial in the Superior Court before a jury, of facts and law, ought not to be entertained when the amount in controversy is $25 or less; and that a trial ought to be allowed when the amount is for more. The plaintiff, in this case, took his case from before the magistrate by an appeal, and that is an end of it, so far as the magistrate is concerned. Whether the plaintiff subsequently lost his rights by improvidence; and if he did, whether he has any other remedy under sec. 133 of the Code, is not for our consideration. It is very clear that he has no remedy by *recordari* to the magistrate.

There is error. This will be certified to the end that the *recordari* may be dismissed.

PER CURIAM. Judgment reversed.

Cited: Wells v. Sluder, 68 N. C., 157; *Com'rs v. Addington, Ib.,* 255; *Cowles v. Hayes,* 69 N. C., 400; *White v. Snow,* 71 N. C., 234; *Hinton v. Deans,* 75 N. C., 19.

(131)

GEO. W. McMINN et al. v. J. H. ALLEN, THOMAS A. ALLEN and others.

A surety, on the official bond of a defaulting Constable, is entitled to the benefits of a discharge under the Bankrupt law, from the liabilities of the bond consequent upon the Constable's default.

DEBT, begun in HENDERSON in 1867, and tried at Spring Term, 1872, before *Henry, J.*

The case is sufficiently stated in the opinion of the Court, his Honor having ruled that the discharge in bankruptcy of the defendant, Thomas A. Allen, would not avail, and refused to allow it to be set up, said defendant appealed.

Battle & Son, for the plaintiff.
Folk, for the defendants.

BOYDEN, J. This was an action of debt, commenced under our former system, upon a constable's bond, the defendant, Thomas A. Allen, being one of the sureties of the constable. The defendant, after the suit had pended several years, was adjudicated a bankrupt, upon his own petition, obtained his certificate of discharge, and pleaded the same in bar of the recovery. The only question in the cause is, whether, under the bankrupt law, a surety on the official bond of a constable, having complied with all the requirements of the law, and obtained his discharge, this discharge can avail in relieving him from his liability as surety upon the official bond of the constanble.

The 33d section of the Bankrupt law provides "that no debt created by fraud or embezzlement of the *bankrupt,* or by *his* defalcation as a *public officer,* or while acting in a fiduciary character, shall be discharged under this act;" and it is here gravely urged on the part of the plaintiff, that a surety on the official bond of a constable
(132) comes within one of the exceptions of the above recited clause.

Has the defendant been guilty of any defalcation, as a *public officer?* This is not pretended. Has he been acting in a fiduciary character? Not at all. But it is urged that his principal has been guilty of a defalcation as a public officer. Admitted! But why should that prevent an innocent surety from obtaining his discharge as a bankrupt? Can any reason be given for his exclusion from the benefit of this wise law? Are not the exemptions from its benefit, on account of the real or supposed moral delinquency of the party himself, who applies for his discharge? It would seem that mere sureties, guilty of no

default, the very head and front of whose offending was too much confidence in a friend or neighbor, should, in preference to all others, be entitled to the benefit of the bankrupt law.

And the amendatory act of 1868 plainly shows that mere surety liabilities are regarded by the act with more favor than the liabilities as principal debtors, as it provides that to obtain a discharge under this amendment, a debtor whose assets shall be equal to fifty per centum of the claims proved against his estate, upon which he shall be liable as principal debtor, shall be entitled to his discharge, without regard to his liabilities as surety. And it further provides, that by the written assent of a majority in number and value of his creditors to whom he shall have become liable as principal debtor, and who shall have proved their claims, he shall still be entitled to his discharge, without regard to the amount of his liabilities as surety, and without regard to the wishes of such creditors.

PER CURIAM. *Venire de novo.*

Cited: Simpson v. Simpson, 80 N. C., 334.

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(133)

JOHN D. WILLIAMS and others, Ex'rs of DUNCAN MURCHISON v. HUGH A. MONROE, Adm'r, etc., of ISAAC WRIGHT.

1. Where a note was given in 1864 for money borrowed, one-half of which was to be paid "two years after the termination of this war, without interest, in the then currency," *it was held,* that the legislative scale did not apply, and that half the sum borrowed was payable in United States currency at the time stipulated.
2. A note given during the late war for money borrowed expressly for the purpose of paying taxes to a County in one of the rebellious States, was not founded upon an illegal consideration, and the lender was held to be entitled to recover upon it after the close of the war.

ACTION upon a promissory note, given by the defendant's testator to the plaintiff's testator, and tried at the last term of CUMBERLAND, before *Buxton, J.*

The note sued on was in the following words:

12 December, 1864.

Borrowed of Duncan Murchison, Esq., President Little River Manufacturing Company, $12,000, one-half of which I promise to pay two

years after the termination of this war, without interest, in the then currency. In this sum is included $1,600, which I wish handed to Adolphus to pay my county dues, and if all is not required to pay, as heretofore directed, the balance is to be credited on this note, as was agreed on at the time the loan was offered and accepted.

Witness: A. E. MCDIARMID. J. WRIGHT.

Upon the trial the execution of the paper writing was admitted, and it was also admitted that, at the date of the note, the testator of the plaintiff lent to the defendant's testator the sum of $12,000 in Confederate currency, upon a contract evidenced by the note of which (134) the above is a copy. It was also admitted that the note was the individual property of the plaintiff's testator. The questions in dispute were, whether anything could be recovered upon the note, and if anything, how much? The defendant insisted that nothing could be recovered, for the reason that it was apparent upon the face of the instrument, and so was known to the lender, that a part of the sum borrowed, to-wit, $1,600, was to be applied to an illegal purpose, namely, to pay taxes to a county in rebellion against the United States, and that this circumstance vitiates the whole instrument, as it was impossible to designate which particular part of the sum borrowed and secured by the note was to be so improperly and unlawfully applied.

2. That if the contract was not void for the reason stated, then being a Confederate contract for the loan of Confederate money, the legislative scale should be applied, and the plaintiff should recover only according to the scale.

His Honor being against the defendant on both points, the plaintiffs had a verdict and judgment for $6,000, payable in national currency, with interest from 20 August, 1868, which was two years after the proclamation of peace by the President of the United States. From this judgment the defendant appealed.

B. and *T. C. Fuller,* for the plaintiffs.
W. McL. McKay and *McRae,* for the defendants.

DICK, J. The rules of law which govern this case are so well settled by recent decisions of this Court, that they need no further discussion: *McKesson v. Jones,* 66 N. C., 258; *Chapman v. Wacasser,* 64 N. C., 532, and other cases. The terms of the contract, upon which this action is founded, were made definite by the express agreement of the parties, and the legal presumptions created by statute, as to business transactions

during the rebellion, do not arise. The money to be paid was only half of the amount borrowed, and was not to bear interest (135) until two years after the war, which was the time of payment.

The objection made by the defendant, that part of the money loaned was for the express purpose of paying taxes to a county in a state of rebellion, can not be maintained.

The ruling of his Honor upon this point was correct and the judgment must be

PER CURIAM. Affirmed.

Cited: Johnson v. Miller, 76 N. C., 441.

MARY LITTLE, Executrix of JAMES LITTLE v. GREEN HAGER and wife and others.

1. A testator, dying in 1862, bequeathed a pecuniary legacy to M. L., his Executrix, and added a residuary clause, as follows: "I will and bequeath to E. L., to pay all my just debts, and to have all the balance of my estate and papers of every kind, after paying my just debts;" the Executrix received assets more than sufficient to pay her legacy, but not sufficient to pay the debts of the estate, excepting what was *bona fide* received in Confederate currency, or lost without any fault on her part; *held*, 1, that her legacy was not *ipso facto* paid.
2. That her said legacy was a charge on the real estate of the testator, devised in the residuary clause.

SPECIAL PROCEEDINGS in IREDELL for the sale of real estate to pay debts of a testator and a pecuniary legacy, brought before *Mitchell, J.*, at Chambers, by appeal, in January, 1872.

The petition was filed in September, 1871, by Mary Little, as executrix of James Little, who died in 1862, against the heirs and devisees of said testator, and the heirs of a deceased infant child of Elizabeth Little, his residuary legatee, the said Elizabeth (136) and her child having successively died shortly after the death of said testator.

The material portions of the testator's will are in these words:

1. I will and bequeath unto my mother, Mary Little, one negro boy, by name James, one by the name of Perry, also *four hundred dollars.*

2. I will and bequeath to my sister, Elizabeth Little, to pay all my just debts, and to have all the balance of my estate and papers of every kind, after paying my just debts.

The petition stated that the personal property had been exhausted in

the payment of debts, and that it was necessary to sell part of a tract of land belonging to the testator's estate, and embraced in devise to Elizabeth Little, to pay the unpaid debts, charges of administration, and the pecuniary legacy of $400 to the Executrix.

The answer of some of the defendants made a question as to the administration of the assets by the executrix, and the amount of debts due, and denied that the said legacy of $400 was a charge upon the real estate. It was referred to the Clerk to state an account of the administration, and he reported a balance of $298.38 as due from the estate on account of debts and charges of administration. He charged the plaintiff with a large amount of Confederate money, received mostly in 1863, and credited her with disbursements, and $400 funded in her name in 1864.

The defendants contended, that upon the facts stated in the report, the legacy of $400 was, *in law,* satisfied, and was, in no event, a charge on the land.

The Clerk adjudged otherwise, and ordered the sale of the land to pay the said balance due as debts and charges, and the legacy of $400. Upon appeal to the Judge from this decision he overruled so much of the judgment of the Clerk as adjudged the legacy of $400 to be a (137) charge on the land, and the plaintiff appealed to this Court.

Blackmer & McCorkle, for the plaintiff.
W. P. Caldwell and *Bailey,* for the defendant.

RODMAN, J. Two questions are presented in this case:

1. Was the legacy of $400 to Mary Little paid? She was an executrix and received assets to an amount greater than her legacy, but as it finally turned out, not sufficient to pay the debts and legacy. Much of the money received was Confederate, and she invested $400 of this in Confederate bonds, which were made payable to her as executrix.

We think neither of these circumstances amount to a payment. She had no right to apply any of the assets to her legacy until all the debts were paid. She was not obliged to take payment in Confederate money. And there is no proof that she elected to do so. The investment in Confederate bonds may have been because the creditors would not receive Confederate money. The mere identity of the amount invested with that of her legacy is of no importance, since the (139) bonds were expressly taken in her representative character and on no account of the estate.

2. Is the legacy a charge on the lands devised? or, to speak more ac-

curately, does it go to diminish the lands devised? The will gives to Mary Little $400, and proceeds: "Secondly, I will and bequeath to my sister Elizebeth Little to pay all my just debts, and to have all the balance of my estate and property of every kind, after paying my just debts."

We think the question must be answered in the affirmative, on the authority of *Robinson v. McIver,* 63 N. C., 645, approved in *Johnson v. Farrell,* 64 N. C., 267. It is in conformity with the English cases cited in 2 Jarman on Wills, 532, especially *Hassell v. Hassell,* 2 Dich., 526; *Bench v. Biles,* 4 Mad., 187, and *Cole v. Turner,* 4 Russ., 376.

It can make no difference, that the personalty was originally sufficient to satisfy both debts and legacies, if it was afterwards lost without fault of the legatee. The doctrine must be applied to the property as it turned out to be. The other cases cited for defendant, we think, do not apply.

The judgment below is reversed, and the case is remanded.

PER CURIAM. Reversed.

(140)

BURNS & SMUCKER v. HARRIS & ALLEN.

A portion of the effects of a partnership can be set aside to one of the partners, as his personal property exemption, with the consent of the other partner or partners. Without such consent it cannot be.

This cause was before this Court at last term, when it was remanded to the Superior Court of FRANKLIN, whence it came up that the facts might be ascertained and the rights of the parties determined.

At Spring Term, 1872, of FRANKLIN, the defendant Harris made a motion, to discharge an attachment obtained by the plaintiff, as to certain goods of the firm of Harris & Allen, which had been set apart to him as a personal property exemption, under a Justice's execution. The motion was, by consent, heard before *Moore, J.,* at Chambers.

The parties agreed to the following (in addition to those set forth in the case as reported in 66 N. C., 509) as the facts, which this Court intended should be ascertained:

1. That partnership effects were insufficient to pay the partnership debts.

2. The members of the firm had no individual property outside of their interest in the partnership property.

3. The property set apart was no part of that for which the plain-

tiff's claim was contracted, but was a part of the stock of goods purchased from the plaintiffs and others.

His Honor overruled the motion of the defendant Harris, and, on motion of the plaintiffs, ordered that the clerk, with whom the proceeds of a sale of the goods in controversy were deposited under a former order in the cause, apply said proceeds to the payment of the plaintiff's judgment for their debts.

From this judgment and order the defendants appealed.

(141) The defendants having been adjudicated bankrupts on creditor's petition, and C. L. Harris being appointed their assignee, at this term, said assignee filed a petition to be made a party defendant, by Moore & Gatling, his attorneys.

Battle & Son, for the plaintiffs.

A. M. Lewis, for the defendants.

READE, J. The motion of C. L. Harris, assignee in bankruptcy of Harris & Allen, to be made party defendant, is allowed, but we do not adjudicate any conflicting claims between the assignee and the defendants, as the defendants have no notice.

One of two or more partners can not have a portion of the partnership effects set apart to him, as his personal property exemption, without the consent of the other partner or partners; because the property is not his. But if the other partner or partners consent, then it may be done. The creditors of the firm can not object, because they no more have a *lien* upon the partnership effects for their debts, than creditors of an individual have upon his effects. In our case the partners did assent.

It is proper to say, that the counsel for the plaintiffs in this case was misled by a misprint, in the opinion of this Court, when this case was before us heretofore (66 N. C., 510), "Sufficient" is printed for "*in*-sufficient."

There is error. Judgment reversed, and judgment here that the property levied on be discharged from the levy, and the money in the hands of the clerk or other person will be paid over to the defendant. And if the money under the order of the Court below has been paid over to the plaintiffs, there will be judgment in favor of the defendant against the plaintiffs for the amount. And if the counsel do not agree, the clerk will ascertain the facts.

PER CURIAM. Judgment accordingly.

Cited: Allen v. Grissom, 90 N. C., 94; *Scott v. Kenan,* 94 N. C., 300;

Stout v. McNeill, 98 N. C., 4; *McMillan v. Williams,* 109 N. C., 256; *Richardson v. Redd,* 118 N. C., 678.

Dist.: Bruff v. Stern, 81 N. C., 190.

(142)

S. P. CALDWELL, Executor of S. L. CALDWELL v. R. J. BEATTY.

Where a petition to a Judge set forth, that certain judgments were rendered by a Justice of the Peace against the petitioner as Executor, while he was absent from the State, and without his knowledge, that the summons was not served upon him, but service was accepted by an attorney employed to act as counsel in the management of the estate, but with no authority to accept service of legal process, and that said attorney appeared on the trial, before the Justice, against the petitioners, etc.; *Held,* to be a proper case for a *recordari* and *supersedeas.*

PETITION for *recordari* and *supersedeas,* to bring up certain proceedings had before a Justice of the Peace, to the Superior Court of GASTON, heard by *Logan, J.,* at Chambers, in Shelby, on 9 April, 1872.

The opinion of the Court contains a sufficient statement of the allegations of the petition. His Honor refused to grant the prayer, and the petitioner appealed.

Guion, for the petitioner.

No counsel for the defense.

BOYDEN, J., This case came on before this Court, no counsel appearing for Beatty, and his Honor having given no reason for refusing the prayer of the petitioner, we are wholly at a loss to know upon what ground his Honor declined to grant the prayer of the petition. It appears, that the original warrants were issued against the petitioner when he resided out of the county of Mecklenburg, that there was no service of the warrants, but that one C. E. Grier, a young attorney, whom the petitioner had employed as his legal advisor in the management of the estate of his testator, but without any authority to acknowledge service of process, without the knowledge of the petitioner, and when there were no assets for the payment of the alleged claim of Beatty, and when Grier had in his hands for collection against Beatty a claim in favor of petitioner's testator of over $270, acknowledged service (143) of these several warrants; and then, acting as attorney of Beatty, obtained judgments in his favor in all these cases. And it further ap-

pears that, for the purpose of changing the jurisdiction in a case that properly belonged to the Superior Court, the plaintiff divided a running account of some four or five years, amounting to over $600, into a sufficient number of actions, to-wit, into five, so as to give a Justice of the Peace jurisdiction.

The petitioner states; that at the time when these judgments were rendered, he was living in the county of Mecklenburg, but that soon after he left the State to aid in the construction of a railroad, as civil engineer, which he had to abandon on account of ill health, which since his return has kept him so confined and enfeebled as to prevent his attending to business; that he did not hear or learn of such judgments until the Spring of 1871, nor learn the full particulars until within the last two months."

Upon the foregoing facts and statements of the petitioner, his Honor refused to grant the prayer of the petition.

In this we think there was error. Let a writ of *procedendo* issue tc his Honor, to the end, that the prayer of the petitioner be granted.

PER CURIAM. Judgment affirmed.

Cited: King v. R. R., 112 N. C., 321.

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(144)

THOMAS H. PEGRAM v. SAMUEL STOLTZ.

1. In an action for slander, if the defendant does not plead the Statute of Limitations, the plaintiff may recover, though the proof shows that the words were spoken more than six months before the commencement of the action.
2. When the slanderous words are alleged to have been spoken on a certain day, and at a certain place, the plaintiff may prove such words spoken on a different day, and at a different place.
3. In such case, if the defendant has been misled by such allegation, so that he failed to set up the Stat. Lim. in his answer, the Judge would, of course, allow him to amend his answer.
4. Under the C. C. P., if the complaint alleges a *positive* charge of crime, as slander, and the evidence shows a *conditional* charge, still the plaintiff can recover, if the conditional words convey the same idea to the minds of the jury.
5. If it appear upon the trial that a party has been misled in his preparation of the case, without his fault, the Judge has power to order a juror to be withdrawn, and make such other orders as may be proper.
6. Where a defendant, examined in his own behalf, was asked what conversation he had with a witness examined for the plaintiff, and the testimony of that witness was repeated to him; *Held*, not to be objectionable as *leading*.

PEGRAM *v.* STOLTZ.

7. This Court will not review the discretion of a Judge in allowing leading questions, under certain circumstances, unless error or abuse plainly appears.

ACTION for slander, tried before *Cannon, J.*, at Fall Term, 1871, of the Superior Court of FORSYTH.

The paragraph of the complaint, containing the words alleged as the cause of action, is in the following words: "That on 4 August, 1870, at and in the county of Forsyth, the defendant, in the presence and hearing of sundry persons, maliciously spoke concerning the plaintiff the false and defamatory words following, viz: 'He is a (145) perjured man; he went to Davidson County and swore, before the Board of Registrars for Davidson County, that he was a citizen of Davidson County, and in that he swore to a lie.'"

The answer simply denied the truth of that paragraph.

The plaintiff introduced two witnesses, whose testimony went to prove the speaking by the defendant of the words charged, at the time and place stated in the complaint. A third witness for him said, that in May, 1870, he heard defendant say that the plaintiff was mean and corrupt, that he had gone to Davidson and sworn he was a citizen of that county, while he was a citizen of Forsyth, "and if he did that he was guilty of a perjury." A fourth witness, one J. L. Crews, for the plaintiff, swore that *in November*, 1868, defendant said to him of plaintiff: "Can you confidence a perjured man? He went to Davidson and registered, and swore he was a citizen of Davidson County, and you konw he was then a citizen of Forsyth; that he had sworn falsely; that he (defendant) knew it, had seen it. Nelson Cook had it."

The defendant then introduced witnesses, who swore they were present on the occasion spoken of by plaintiff's two first witnesses, and the defendant did not say what they testified to, but said that plaintiff had gone into Davidson County and registered; "now, if he registered as a citizen of Davidson County, then, he swore to a lie." His own testimony was nearly to the same effect. He was asked by his counsel what conversation he had with J. L. Crews, and Crews' statement as above, was repeated to him. The plaintiff objected to the mode of examination, but it was allowed by his Honor.

The plaintiff asked several special instructions, some of which were given, others refused or modified. His Honor instructed the jury that, if the defendant did not directly charge that the plaintiff went to Davidson and swore before the registrars, etc., but only made the charge conditionally, and qualified it at the time, the plaintiff could not recover. He also charged that the plaintiff was not (146)

restricted to the time of the slander mentioned in the complaint, but might prove a repetition of the words alleged, provided they were spoken within six months before the commencement of the action; and also that the plaintiff could not recover for slanderous words spoken more than six months before the action was commenced.

Verdict for the defendant. Rule for a new trial; rule discharged. Judgment; and appeal by the plaintiff.

Masten and *T. J. Wilson,* for the plaintiff.
Blackmer & McCorkle, and *Clement,* for the defendant.

RODMAN, J. We think it clear that the Judge fell into error when he instructed the jury, the statute of limitations not being pleaded, that the plaintiff could not recover, for slanderous words spoken more than six months before the commencement of the action. This was, in effect, to give the defendant the benefit of the statute without his having claimed it, which is against both reason and authority. 2 Saund., 63 a., *Brickell v. Davis,* 21 Pick. 404, C. C. P., sec. 17. If defendant, either at first, or by permission of the Judge, upon the introduction in evidence of the words spoken in 1868, had pleaded the statute, then the instruction of the Judge, as to the way in which the jury should consider those words, would have been free from objection. But a Court can not thrust upon a party a defense which, having it in his power to make, he declines.

But, it is said that since a plaintiff may compel a defendant to answer on oath, he can not conscientiously answer by the general issue, and also by the statute of limitations. This idea proceeds from a mistake. Pleas are distinct and have no connection, unless made to have by a plain reference from one to another. Moreover, the form of the plea of the statute is, that "the plaintiff's action did not accrue within six months," etc.; 2 Saund. 63, a; and a defendant who chose to do so might, without prejudice, insert in his plea of the statute a protest
(147) that he had never spoken the words, although such a protest is wholly unnecessary.

Again, it is said that the plaintiff, by setting forth in his complaint words as spoken in Forsyth County on 4 August, 1870, misled the defendant to omit to plead the statute, and surprised him on the trial by evidence of words at a different place, and in 1868. This is, at least, possible; and it was to meet such a case that the last sentence in sec. 128, C. C. P., was added. That section is as follows:

"Section 128. No variance between the allegation in a pleading and

the proof shall be deemed material, unless it have actually misled the adverse party to his prejudice, in maintaining his action (*or defense*) upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the Court, and in what respect he has been misled; and thereupon the Judge may order the pleading to be amended, upon such terms as shall be just."

The words "or defense," italicized, are not in the Code, but they are clearly necessary to complete the sense, since there can be no reason why a defendant, who has been misled, shall not have like liberty of amending with the plaintiff.

In this case, if the defendant had alleged, that he had been misled by the form of the complaint, into supposing that the plaintiff did not go upon any words spoken at any other time than on 4 August, 1870, and consequently he had omitted to plead the statute of limitations, it can not be doubted that the Judge would have allowed him to amend without terms. But he did not ask leave to amend. In the absence of such a plea, there is no principle on which the Judge could have excluded evidence of words spoken in 1868, as a ground of action. For it is common learning that allegations of time and place are not in general material or traversable. And there is nothing in this complaint to take these out of the general rule. If, therefore, the defendant has been prejudiced by the admission of evidence of the words in 1868, it would have been owing to his own failure to avail himself of the (148) liberty given by sec. 128.

As our opinion on the Judge's instruction, excluding words spoken in 1868, as a ground for recovery, entitles the plaintiff to a new trial, it is not necessary to consider the other points discussed. But we have frequently said, that when a question has arisen, and is likely to arise again, and is one of practice only, we felt at liberty to decide it, though not required to do so, for the sake of avoiding unnecessary litigation. Hence in this case we will do so. The point is this: The complaint alleges that defendant positively charged plaintiff with perjury, and the plaintiff introduced evidence tending to prove the allegation. The defendant then introduced evidence tending to show that he did not make a positive charge, but a conditional one only, "if the plaintiff swore," etc. Upon this the defendant contended that, if the jury believed that he did not use the positive words alleged, but only the conditional words stated by his witnesses, there was a material variance between the plaintiff's allegations and his proofs, and that plaintiff could not recover. His Honor so instructed the jury. In this we think he was in error.

We concede, on the authority of *King v. Whitley,* 52 N. C., 529, that before the C. C. P., the law was as he contends. But we think the intention and effect of the first sentence, in the section above cited, was to alter the rule before established, which was founded on old authorities, themselves founded on reasons which no longer exist. Why should a plaintiff be defeated of his recovery because the proof varies from his allegations—unless the defendant is in some way misled by the variance, when notwithstanding the allegations, the defendant knows what case upon the evidence he will have to meet?

In this case, the defendant did know what the evidence would be, tending to produce a variance; for it all comes from his witnesses. It is evidence that he was not misled by any allegation of a positive charge of perjury, and a variant proof of a conditional charge. The
(149) evidence that he made a conditional charge of perjury comes all from him. He is at liberty to contend, that what he said did not, in substance and meaning, amount to charging the plaintiff with perjury. But he is not at liberty to say, "True, I did use words from which all hearers understood, and were justified, in understanding, that I charge the plaintiff with perjury; but he can not recover, because he alleges a charge of perjury in a direct and positive form, and I have proved that the charge I made was dependent upon an *if.*"

It must be noted, that we have not intimated any opinion as to whether the words testified to by the defendant's witnesses were calculated to convey an actionable meaning. It is not within our province; at least at present, to form any opinion on that point. All we mean to say is, that if they do, the plaintiff is not precluded from recovering upon him a ground of action, because, substantially, the same charge is variantly alleged in his complaint.

While on the subject of variances, it will not be improper to add, that even where one party has not been misled in his pleading by the other, yet if it appears to the presiding Judge that he has been misled, without any fault of his own, in the preparation of his case, to his prejudice, the Judge has power to stop the trial and order a juror to be withdrawn, and to make such other orders as may be just and proper.

As to the supposed leading question, we do not see that the question was, under the circumstances, a leading one. Moreover, a Judge has a discretion to allow leading questions under certain circumstances, and this Court can not review an exercise of that discretion, unless it plainly

appears that there was error or abuse, neither of which appear in this case.

PER CURIAM. *Venire de novo.*

Cited McCurry v. McCurry, 82 N. C., 298; *Hamilton v. Nance,* 159 N. C., 58.

(150)

DOE *ex dem.* J. S. LINKER v. MARTHA BENSON.

1. Where, in an action of ejectment, the plaintiff's lessor claimed title under a deed which was in the possession of the defendant, who asserted a right to it by virtue of an endorsement upon it: *Held,* that the Court had the power to order the production of the deed, for inspection, or other legitimate purpose, but not to order the registration of the deed, before the question of the right of the defendant to some equity by virtue of endorsement was tried and decided against him.
2. *It seems,* that a Probate Judge has no means of knowing whether a deed presented for registration is rightfully in the possession of one offering it for probate: and a Judge of a Court of law has no power to cancel a registration once made, but must give it its legal effect.
3. Where a tenant in common of land had been in the sole reception of the profits for more than seven years, yet, without evidence to the contrary, it will be presumed that his original entry was permissive, and under an assertion of his own claim, and that of his co-tenant; and no subsequent claim to the whole could make his possession adverse, without proof of *actual ouster.*

EJECTMENT, commenced by service of the declaration 4 April, 1860, and tried before *Logan, J.,* at Fall Term, 1871, of CABARRUS, upon a plea of General Issue.

It was admitted that both parties claimed under one W. F. Taylor, who had title, and that the defendant, Martha Benson, was in possession under the title of said Taylor, claiming the entire property as his heir at law.

Linker, the lessor of the plaintiff, offered in evidence a deed dated 6 November, 1852, purporting to have been duly registered, made by said Taylor to Linker, for *one-half* the land described in the declaration. It was admitted that the deed was registered under the following circumstances: The deed was in the possession of the defendant, and claimed as her property, by virtue of an endorsement, signed by (151) Linker, in these words: "I transfer the within deed to W. F. Taylor again. 11 May, 1853." This deed was demanded by the plaintiff during the pendency of the suit, and the defendant refused to surrender the same. At Spring Term, 1868, his Honor, Judge Mitchell,

ordered its production under a rule of Court, and it was produced and filed by the Clerk among the papers in the cause. The said deed was afterwards recorded and registered.

The defendant objected to the admission of the deed in evidence, on the ground that the Court had no power, by rule, to require its production by the defendant, nor to order it to be recorded and registered. The Court admitted the evidence, and the defendant excepted.

The plaintiff having closed his case, the defendant asked the Court to charge, that the plaintiff was not entitled to recover.

1st. Because no ouster or demand had been proved, as was necessary in case of a tenancy in common.

2d. Because the defendant, and those under whom she claimed, having been in undisturbed possession of the premises for seven years and five months, from the date of the deed to the commencement of the action, the plaintiff was bound by the Statute of Limitation.

His Honor refused so to charge, but instructed the jury that the plaintiff was entitled to recover. A verdict was rendered accordingly.

Rule for a new trial discharged; judgment for plaintiff and appeal by the defendant.

When this case was before this Court before (64 N. C., 296) it was held, that the endorsement on the deed, above quoted, had not the effect to reconvey the title from Linker to Taylor.

J. H. Wilson, for the plaintiff.

R. Barringer and *Bailey,* for the defendant.

(152) RODMAN, J. Taylor originally owned the whole of the land. He conveyed an individed half of it to the plaintiff, who afterwards, and without having registered the deed, returned it to him with an endorsement, signed by plaintiff, to the effect that he transferred the deed back to Taylor. The effect of this endorsement was passed on by this Court in *Linker v. Long,* 64 N. C., 296, and it need not be noticed here. The defendant afterwards became entitled to the other half of the land as the heir of Taylor, and came into possession of the deed to Linker.

1. The defendant contends, that the deed should not have been allowed in evidence, because the Judge wrongfully compelled its production by the defendant, in order that it might be registered, and because, further, the registration, not having been made at the instance of the rightful owner, was irregular, and can not benefit the party claiming under it. The Revisal Code, ch. 31, sec. 80, gives to Courts of law the

same power to compel the production of writings which Courts of Equity had. To the extent of ordering the production of the deed, for inspection or any other legitimate use, there can be no question of the power of the Judge. And to that extent it was rightfully exercised here, for the writing in question was a document of the plaintiff's title. The terms of the Judge's order do not go further than this. It does not appear that he ever allowed the deed to be taken out of the possession of the Clerk for probate and registration. Such an order would have been beyond his jurisdiction. A Court of Equity would not have ordered the probate and registration of the deed; without previously deciding that the endorsement on it created no equity in the defendant to prevent such an order. But this decision the Judge of the Court of law was unable to make; and to have decided that the plaintiff was entitled to have possession of the deed, for the purpose of probate, would have been to decide in anticipation, and without trial, on the equitable rights of the defendant. 3 Dan. ch. pr. 2049, citing *Linger* (153) *v. Simpson,* from 6 Mad. 290.

2. The next question is, can the plaintiff take advantage of a probate and registration obtained through wrongful possession? The question is necessarily a general one, and can not be confined to the circumstances of this case. And so considering it, it occurs to us that a Probate Judge has no means of knowing whether a person presenting a deed for probate is rightfully in possession of it or not, and a Judge of a Court of law has no power of cancelling a registration once made, and he is obliged to give it its legal result. It seems to be a case where the rule applies, *"Fieri non debet sed factum valet."* Moreover, it does not appear at whose instance the deed was offered for probate. It may have been by the defendant. The objection on this ground is untenable.

3. The defendant also contends, that the deed was not so proved as to be admissible in evidence, on its probate and registration merely, but that additional evidence was required on the trial. It is not necessary to decide this question, and we express no opinion of it.

4. The defendant contends, that being a tenant in common, the plaintiff can not recover without an admission of an ouster, by the consent rule, or proof of an actual ouster. This is admitted. And on the autority of *Halford v. Tetherow,* 47 N. C., 393, it is also admitted that, as the defendant was allowed to plead without actually entering into any consent rule, it will be presumed that he entered into a special rule and admitted lease and entry only, and not ouster. The question, then, is, Was there evidence of an actual ouster before the commencement

of the action? For, of course, the defence to the plaintff's action can have no prior relation.

In this case the defendant had been in the sole possession for seven years and five months, and when the action was brought was in the sole possession, claiming the whole. What is an actual ouster, has been discussed since the time of Lyttleton. He says, "If one (154) tenant in common occupy all, and put the other out of possession, it is ejectment." Upon this Lord Coke says, "The reception of the whole profits is no ejectment. But if the tenant in possession drive out of the land any of the cattle of the other tenant, or not suffer him to enter or occupy the land, this is an ejectment." Co. Lit. 199, b., 1 Thomas Coke 906. In Reading's case, 1 Salk, 392. One tenant in common may disseize the other; but it must be by actual disseizure, as turning him out, hindering him to enter, etc. But a bare perception of profits is not enough. In *Hellings v. Byrd,* 11 East. 50, *per curiam,* "One tenant in common in possession, claiming the whole and denying possession to the other, is beyond the mere act of receiving the whole rent, which is equivocal. This was certainly evidence of an ouster of his companion." In that case there was a demand and refusal. In *Fisher v. Proper,* 1 Cowp. 217, the question came before Lord Mansfield, who brought to it his usual freedom in putting a case on its reason. He says, "So in the case of tenants in common, the possession of one tenant in common; *eo nomine,* as tenant in common, can never bar his companion; because such possession is adverse to the right of his companion, but in support of their common title, and by paying him his share he acknowledges him cotenant. Nor, indeed, is a refusal to pay, of itself, sufficient, without denying his title. But if, upon demand by the cotenant of his moiety, the other declines to pay, and denies his title, saying he claims the whole and will not pay, and continues in possession, such possession is ouster enough."

It will be seen that none of these cases are precisely in point with the present.

In the absence of direct authority, we turn to analogies, and we find this decided: That where a bailee is put in possession of personal property, he can not change the nature of his possession by any mere words claiming the whole. He must do some *act,* as a refusal upon (155) demand, or the like, before his possession becomes adverse. *Koonce v. Perry,* 53 N. C., 58.

To apply the analogy: In this case, the defendant was in the sole reception of the profits for upwards of seven years; but her original entry must be understood to have been permissive, and under the as-

sertion of her own claim and that of her co-tenant. There is no evidence that it was otherwise. In such case no mere subsequent claim of hers to the whole could make her possession adverse. It required some *act.* We think, therefore, the possession of the defendant, at the time the action was brought, was not adverse, and consequently the action will not lie. This renders it unnecessary to consider any question supposed to arise out of the statute of limitations.

If the possession was not adverse from the beginning of the defendant's possession, there is no room for the statute under such interpretaiton.

PER CURIAM.—Judgment reversed; and judgment here for the defendant.

Cited: Neely v. Neely, 79 N. C., 480; *Page v. Branch,* 97 N. C., 102; *Gilchrist v. Middleton,* 107 N. C., 681; *Carson v. Carson,* 122 N. C., 647; *Bullin v. Hancock,* 138 N. C., 202; *Dobbins v. Dobbins,* 141 N. C., 217.

(156)

E. NYE HUTCHISON v. J. V. SYMONS.

1. Under sections 264 and 266, C. C. P., there is a distinction made in the requirements for proceedings supplementary to execution, where the execution is returned *unsatisfied,* and where the execution is issued, but before its return; in the former case, an affidavit that the execution has been *returned unsatisfied,* and that the defendant has property, or choses in action, which ought to be subjected, is sufficient to warrant the proceedings; in the latter, the affidavit should show that the debtor has no property which can be reached by execution, and that he has property, or choses in action, which he unjustly refuses to apply to the satisfaction of the judgment.
2. The purpose of the Code was, to give proceedings supplementary to execution, only in case the debtor has no property liable to execution, or to what is in the nature of the execution, to wit, proceedings to enforce a sale.
3. The proper construction of the act of 1812, in relation to the sale of trusts and equities of redemption under execution, discussed by *Pearson, C. J.*
4. Where a judgment was rendered in one county, and docketed in another, proceedings supplementary to execution should be instituted in the county in which the judgment was rendered, as the action is pending in that county until the judgment is satisfied.

PROCEEDINGS *supplementary to execution,* heard before *Cloud, J.,* at Chambers, in June, 1872, upon appeal from an order of the Clerk of the Superior Court of DAVIDSON.

A judgment was rendered before a Justice of the Peace, in favor of the plaintiff, against the defendant, for $289.62, in the county of Mecklenburg, on 2 December, 1870, and docketed in the Superior Court of that county a few days thereafter, and also in the Superior Court of Davidson. Execution having been issued, and returned "unsatisfied,"

(157) the plaintiff, on 15 December, 1871, made affidavit before the Clerk of the Superior Court of Davidson, as a foundation for these proceedings. The affidavit, after reciting the judgment, and its being docketed as aforesaid, sets forth that "an execution upon said judgment against the property of the defendant, the said James V. Symons, was, on 13 December, 1870, duly issued to the sheriff of Davidson County, and of Mecklenburg County, where the said defendant, J. V. Symons, before then resided, and that the sheriff has returned said execution entirely unsatisfied and that said judgment still remains unpaid, and that Wm. Loftin, Lindsey Gardner, M. S. Loftin, Turner Harris and Henderson Adams as adm'r of J. F. Rodman, has property of the judgment debtor, and are indebted to him, defendant, more than $10."

Thereupon an order was issued by the said clerk for the examination before him of said Loftin and others, in relation to their indebtedness to the defendant. Wm Loftin and said Adams were accordingly examined, and Loftin admitted indebtedness to the defendant to the amount of $97.75 and interest. Whereupon the clerk ordered "that S. F. Watkins be appointed receiver of the property and articles of defendant, judgment debtor, and that said receiver be invested with the usual rights and powers of receivers." From this order the defendant appealed to the Judge of the Court.

His Honor, Judge Cloud, adjudged that the proceedings be quashed, because the affidavit fails to set forth that the defendant has no property liable to execution, out of which any portion of plaintiff's execution can be satisfied; and the plaintiff appealed.

Blackmer & McCorkle, for the plaintiff.
Bailey and *Fowle,* for the defendant.

PEARSON, C. J. We concur with the ruling in the Court below, not on the ground that the affidavit is insufficient, but on the ground that the supplemental proceedings should have been had in the county of Mecklenburg, where the original judgment was rendered.

1. By secs. 264, 266, C. C. P., a marked distinction is made between the mode of taking out supplemental proceedings after the execution

is returned "unsatisfied," and the mode of taking out such proceedings after the execution is issued, but *before* its return.

In the latter case, such extraordinary proceedings will not be ordered, unless a necessity for it is made to appear by an affidavit that the debtor has no property which can be reached by the execution, and that he has property or choses in action, or things of value, *"which he unjustly refuses to apply to the satisfaction of the judgment."*

In the former case, an affidavit that the excution has been "returned unsatisfied," is sufficient to show a necessity for extraordinary proceedings; and to induce the action of the Court it is only necessary to say just the further fact, on knowledge or information, that the debtor has property, choses in action or things of value which (159) ought to be subjected to the payment of the judgment.

In our case the affidavit sets out the fact that executions to the sheriffs of both the county of Davidson and the county of Mecklenburg had been returned "unsatisfied;" this is sufficient to show a necessity for extraordinary proceedings. The affidavit further sets out that Loftin, Adams and others are indebted to the judgment debtor. This is sufficient to show that the supplementary proceedings will result in something useful to the ends of justice, and that the aid of the Court is not invoked for an idle purpose. The ruling against the sufficiency of the affidavit is put on the authority of *McKeithan v. Walker,* 66 N. C., 95. True, in that case, the execution was returned "unsatisfied," but the return also sets out a levy upon the resulting trusts of Walker in certain land, subject to the payment of the creditors secured by a deed of trust.

The Court holds that the purpose of the Code was to give supplemental proceedings only in case the debtor has no property liable to execution, or to *what is in the nature of* execution, viz: *proceedings to enforce its sale.* And so, if the debtor has property on which the creditor has acquired a lien, it must be shown either by a sale of the property, or by affidavit that the property is insufficient in value to satisfy the debt; otherwise the application for supplemental proceedings has no sufficient ground to rest on; for it does not appear that the debt will not be made out of the property bound by the execution, and so a resort to the extraordinary proceedings is not shown to be necessary. In that case, the return showed there was land subject to the execution, by proper proceedings to enforce it. In this case the return is, "This execution is unsatisfied," within the very words of sec. 264, C. C. P., clause 1, which, for the purpose of this proceeding, is in legal effect, "no goods or chattels, lands or tenements to be found." This authorizes supplemental proceedings. Note the diversity between our case

(160) and that of *McKeithan v. Walker,* and note further, that the inadvertence in failing to notice that, in that case, land had been levied on, for which it was necessary to account, by affidavit, of its insufficiency before supplemental proceedings could be applied for, whereas in this case it does appear that the debtor has no property that can be reached by the ordinary proceedings, might have led to a misapprehension of the law; such as occurred in *Glover v. Pool,* 13 N. C., 129, where the Court, lamenting the evil consequences of the decisions, and confounding the distinction between "a trust" and an "equity of redempton," feels itself obliged to follow *Harrison v. Battle,* 17 N. C., 537, without adverting to the fact, that in that case, *all of the debts, secured by the deed of trust, had been satisfied by the sale of the personal estate,* and the debtor had an unmixed trust, which was the subject of execution; and so all that is said about how it would have been in case the debts secured by the deed of trust, had remained unsatisfied, is *"obiter,"* but by inadvertence was allowed to give a wrong direction to subsequent decisions, by which the plain distinction between a trust and an equity of redemption is confounded, notwithstanding that the statute of 1812, by having two distinct sections, takes care to prevent this confusion, and treats a trust and an equity of redemption as two separate and distinct things. In buying the one, the purchaser at execution sale gets only a rght to have the legal estate, on payment of the amount secured by the mortgage; in buying the other, the purchaser acquires the legal title by force of the sheriff's deed. A purchaser of the legal estate, *without notice,* takes subject to an equity of redemption; for it is in the nature of a *condition,* and is annexed to the land. A purchaser of the legal estate *without notice* takes discharged of a trust, for it is a personal confidence not annexed to the land. *Glover v. Pool* leaves nothing for the first section of the act of 1812 to operate upon. A resulting trust, in land conveyed to be sold for the payment of debts, is an equity of redemption and may
(161) be sold under the second section. By parity of reasoning, the equitable estate of a vendee of land, the purchase money remaining unpaid, has "an equity of redemption."

This construction as we have seen, made upon an "obiter" draws everything under sec. 2 of the Act of 1812, and leaves nothing for sec. 1 to operate on.

2. We are of opinion that the proceedings ought to have been taken out, as supplemental to the judgment, in the county of Mecklenburg, where the original judgment was rendered. The effect of docketing a judgment in another county is not to make *a case there,* but merely

to give a lien upon all of the real estate of the debtor situate in that county, and to give notice of this lien by the record. The regulaton is new to our law, and was introduced by C. C. P., on the idea that the condition of the land in a county in respect to the *liens* that are upon it, should appear on the record, in the same way that the condition of the land in a county in respect to the *title* appears by the Register's books.

This regulation contemplates a system of *leins of record* for debts, constituted by judgments docketed, which may stand over for years.

The people of this State have not heretofore been in the habit of suing, except when the creditor intends to make the money as soon as the law will allow; and it may be doubted whether this new regulation will be of much utility, as constituting a permanent lien for the security of debts, by way of investment; but it is the duty of the Courts to carry out the will of the law-makers as far as it has been expressed. That we are disposed to do, without, however, feeling that we are called upon to extend the provisions, in regard to docketing judgments, beyond the object which the statute has plainly in view.

Giving to the several sections of C. C. P. a full consideration, we are satisfied that it was not the object to join to the fact of "docketing a judgment" any other effect than to constitute *"a lien of record"* on all of the real estate of the debtor, then owned by him or (162) which he might thereafter acquire in said county, and the right to have it sold by the sheriff under execution issued by the Court of that county. This seems to be clear. How, then, can it be contended that the object of C. C. P. was to constitute a case in *two or more counties,* in either of which counties motions may be made as on a case pending, as if the same case could be pending in two counties at the same time? We can impute no such absurdity to the C. C. P. The provision is, *"the case" remains of record* in the Court of the county in which the original judgment was rendered. Judgments are allowed to be docketed in other counties, for the purpose of giving a lien on the real estate of the debtor, which he owns at the time or may thereafter acquire, in that county; but all motions in the cause must be made in the Court where the case is pending. It is pending until the judgment is satsfied in the county where it is rendered. So, in this case, motion for supplemental proceedings could not be made in the Court of the county of Davidson, for no case was pending in that county, but the case is pending in the Superior Court of the County of Mecklenburg; for it is provided by sec. 503, C. C. P., the judgment of a Justice of the Peace, when docketed in the Superior Court, shall be a judgment of that Court *in all respects.* So here we have a case originating before a Justice of the Peace of the

county of Mecklenburg, but now pending in the Superor Court of that county for all the purposes of execution.

This view, that the case is pending only in the Superior Court of the county where the judgment was originally rendered, although for the purpose of a lien, the judgment may be docketed in many other counties, is made clear by the provision, sec. 254, "All executions, issuing upon judgments docketed in a county other than that in which the original judgment was rendered, shall be returned to the Court from which they issued, the return noted on the docket, and the executions trans-
(163) mitted to the Clerk of the Court in which the original judgment was taken;" showing that "the finale" is to be exhibited upon the record of the Court of the county in which the judgment was originally rendered, and where the case is deemed to be pending until the judgment is satisfied.

In coming to this conclusion, we pursue that analogy furnished by *Martin v. Duplin Co.,* 64 N. C., 65, where it is held, a motion to vacate can not be made in the county where a judgment is docketed, but must be made in the county where the judgment was originally rendered; for the reason that the case is pending and remaining upon the record of the Court of that county. *Williams v. Rockwell, Ib.,* 325.

In *Ledbetter v. Osborne,* 66 N. C., 379, it is held, although the docketing of a Justice's judgment in the Superior Court has the effect of making it a judgment of the Superior Court for the purposes of a lien and of having execution, still it remains a judgment of the Justice's Court, and a motion to vacate will not lie in the Superior Court, and the *case* can only be taken up to the Superior Court by appeal, or writ of *recordari.*

But the broad words of sec. 503 makes it a judgment of the Superior Court of the county *in which it was rendered,* for all the purposes of having execution after it is regularly docketed.

No error.

PER CURIAM. *Venire de novo.*

Cited: Birdsey v. Harris, 68 N. C., 95; *Whitehead v. Hellen,* 74 N. C., 683; *Hasty v. Simpson,* 77 N. C., 70; *Rand v. Rand,* 78 N. C., 19; *Broyles v. Young,* 81 N. C., 319; *Weiller v. Lawrence, Ib.,* 68; *Hinsdale v. Sinclair,* 83 N. C., 342; *McCaskill v. Lancashire, Ib.,* 398; *Hackney v. Arrington,* 99 N. C., 112; *Mayo v. Staton,* 137 N. C., 680; *Oldham v. Rieger,* 148 N. C., 550.

(164)

JOHN D. WILLIAMS *et al.*, Executors of DUNCAN MURCHISON v. MARY A. MUNROE.

1. The widow can not, as a purchaser of land from the assignee of her husband, a bankrupt, set up title against the purchaser under a deed in trust executed by her husband several years prior to his bankruptcy.
2. The negligence and unfaithfulness of the trustee in a deed in trust, in which both personal and real property were conveyed in not selling the personalty first, as required in the said deed, can not be made a question between the purchaser of the land under the deed in trust, and those who succeed to the rights of the bargainor in such deed. Their remedy, if they have any, must be pursued against the trustee.
3. The widow of the bargainor, in a deed in trust, executed in 1859, who was married before the execution of such deed in trust, can not claim dower against the purchaser under such deed.

ACTION to recover a tract of land tried before his Honor, *Buxton, J.*, at CUMBERLAND, Spring Term, 1872.

The case, so far as a statement of it is necessary to the proper understanding of the opinion of this Court, was as follows:

The plaintiffs claimed as executors and by virtute of a power in the will of Duncan Murchison, who had purchased the land in question at a sale made in March, 1870, by John D. Williams, one of the plaintiffs as trustee in a deed of trust executed by Christopher Munroe, to secure a debt due to Murchison, Reid & Co., a firm of which the said Duncan Murchison was a partner.

In the deed of trust which bore date 25 April, 1859; it was declared that it was made subject to the satisfaction of a mortgage executed before that time, to-wit, 5 December, 1856, between the said Christopher Munroe of the first part and Duncan Murchison and others of the second part, this mortgage, it was alleged by the plaintiffs, (165) had been discharged before the sale under the deed in trust. Besides the land, seventeen slaves were embraced in the deed in trust.

On the part of the defendant it appeared that Christopher Munroe was, upon his own petition, declared a bankrupt in January, 1869, that shortly thereafter an assignee was appointed who sold the land in controversy, when it was purchased by the defendant, who was the widow of the said bankrupt, he having died a short time before. His Honor was asked to charge the jury that the plaintiffs could not recover for the following reasons:

1. Because Christopher Munroe, through whom the plaintiffs claim, had on 5 December, 1856, by deed of mortgage, conveyed the land to Duncan Murchison and others in trust, with directions to reconvey

the residue after the payment of the debts, the title was still outstanding in the mortgage, at the date of the deed of trust to John D. Williams, and there never had been any reconveyance.

2. Because the heirs or devisees as such of Duncan Murchison should have continued the prosecution of the suit, and not his personal representatives, who, it was contended, had no power given them to sue for and recover land.

5. Because the value of the slave property, which was directed to be sold first by the deed of trust, was greatly in excess of the debts secured, and that such slaves ought to have been sold, and it was laches in the trustee not to have sold them, which laches affected the rights of the other creditors of Christopher Munroe, to which rights the defendant had succeeded by reason of her purchase, from the assignee in bankruptcy, of the land of her said husband.

4. Because the power to sell the slaves and other property being by deed between the parties, the agreement to extend the time of sale, which was given by parol to the trustee, should have been given in writing, which not being done, the trustee, or the *cestui que trusts,* should (166) be at the loss incident to the emancipation of the slaves, and they should not be allowed to have recourse to the land.

5. Because the sale by the trustee occurred after the death of Christopher Munroe, and inasmuch as the deed in trust required that the slaves should be sold first, the heirs of Christopher Munroe were entitled to notice.

6. Because the defendant, being the widow of Christopher Munroe, was entitled to dower.

In his charge to the jury, his Honor submitted two questions of fact to the consideration of the jury. 1st, Were the debts secured by the mortgage paid and satisfied before the sale made under the deed in trust, as testified by one of the witnesses; 2d, Were the slaves retained in the possession of Christopher Munroe after the execution of the deed of trust, and the sale of them under the said deed postponed by the trustee at the instance of Christopher Munroe with the concurrence of the *cestui que trusts* until their emancipation thus rendering recourse to the land necessary to pay the debts secured by the deed in trust. These questions of facts were found in the affirmative, and the plaintiffs obtained a verdict and judgment from which the defendant appealed.

B. & T. C. Fuller, for the plaintiffs.
W. McL. McKay, for the defendant.

BOYDEN, J. Several questions in this case were discussed by defendant's counsel, which this Court holds can not be raised in this action, as now constituted. The action is against the widow of the bargainor in a deed of trust, under which a sale was made and the land purchased by the plaintiffs' testator.

The defendant in this case can set up no defense which could not be set up by the bargainor in the deed of trust.

The widow, the defendant in this case, can set up no defense not allowed her husband. This is settled by *McNeil v. Riddle,* 66 N. C., 290. In that case the widow, in the lifetime of her hus- (167) band, had purchased the land at a sheriff's sale, under a judgment and execution subsequent to the making the deed of trust. It was held that her possession could not be adverse to the trustee or to a purchaser under the trust. So here, although the bargainor had been declared a bankrupt subsequent to the execution of the deed of trust, and the bargainor's interest in the land had been sold by the assignee and purchased by the widow, the defendant; still, her title, if any, thus acquired could not be set up as a defense to this action. The purchaser from the assignee in bankruptcy could stand in no better condition than a purchaser at sheriff's sale under a judgment and execution. *Walke v. Moody,* 65 N. C., 599. The sheriff, or the assignee, could sell only such interest as the bargainor in the trust had, and all that was subject to the prior right of the purchaser under the trust.

The defendant, in her answer, sets up the deed of trust under which the plaintiffs claim, and alleges, that this deed of trust, besides the land in controversy, conveyed some seventeen valuable slaves, that these slaves were ample for the payment of the debts secured in the trust, and were to be first sold; and that the trustee was guilty of negligence and unfaithfulness in not selling the slaves, and paying the debts out of the proceeds of such sale. What claim there may be against the trustee for negligence or unfaithfulness, can not be made a question in this case; and parties interested must pursue their remedy against the trustee, if they have any.

The fifth defense set up in the answer of the defendant can not be made in this action—that the plaintiff's testator was a member of the firm of Murchison, Reed & Co., and one of the trustees in the deed of trust of Christopher Munroe, and therefore could not become a purchaser at his own sale. The deed of trust is to John D. Williams alone, the plaintiffs' testator being one of *cestui que trusts* in (168) said deed; but if it were as alleged it would not avail the defendant.

The seventh defense set up, to-wit: that the husband, at his death, had an equitable interest in the lands, and that his wife was entitled to be endowed of that equity, can not avail the defendant, as the deed of trust, under which the plaintiffs claim, was made subsequent to the marriage of the defendant with the bargainor in trust.

His Honor submitted two, and only two, questions to the jury. "First, was the Bank debt of Christopher Munroe, upon which Duncan Murchison, Alexander Murchison and Archibald Graham were endorsers, and to indemnify whom the deed of mortgage was made to them as mortgagees, of 5 December, 1856, paid and satisfied in the manner testified by John D. Williams?

"Second. Were the slaves retained in possession of Christopher Munroe after the execution of the deed of trust to John D. Williams, trustee, of 25 April, 1859, and the sale under the trust postponed by the trustee, at the instance of Christopher Munroe, with the concurrence of the *cestui que trusts* until emancipation, thus rendering recourse to the land necessary to pay the debts secured in the trust?"

Both the questions thus submitted to the jury were found in favor of the plaintiffs, and if his Honor erred at all it was not against the defendant.

PER CURIAM. No Error.

Cited: Bruce v. Strickland, 81 N. C., 271; *O'Kelly v. Williams,* 84 N. C., 283.

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THE EXCHANGE BANK OF COLUMBIA AND C. H. BALDWIN v. WILLIAM TIDDY and R. H. DAVIDSON.

1. The dissolution of a banking corporation, with no provision of law for collecting its debts, deprives it of the power to do so; but *it was held,* that an act of the Legislature of South Carolina, passed since the war to enable its banks to renew their business, or to place them in liquidation; and a decree of a Court in that State declaring a certain bank to be insolvent, and putting it in liquidation, did not dissolve the corporation, but continued its existence for the purpose of collecting its debts and winding up its affairs.
2. *It appears* that under the C. C. P., sec. 299, which allows an appeal to the Supreme Court from an order of the Superior Court, granting or refusing a new trial, the Supreme Court may grant a new trial because of the refusal of the continuance of his case to a party by the Superior Court, where in law he was entitled to it, or where the refusal was manifestly unjust and oppressive, and merits were shown.
3. The act of 1869-'70, ch. 4, which authorizes the defendants in judgment obtained by banks chartered by this State upon a note given to, or a

contract made with a bank or its officers, to pay and satisfy the same with the bills of such bank, is constitutional, and construed with the act of 1868, ch. 47, and 1868-'69, ch. 77, *in pari materia*, applies as well to foreign as to domestic banks.

APPEAL from *Henry, J.*, at a Special Term of MECKLENBURG, January, 1872.

The action was commenced in April, 1869, in the name of the Exchange Bank of Columbia, a corporation created by a statute of South Carolina prior to the year 1868, and it sought to recover from the defendant the amount of a note stated in the complaint.

Shortly before the adjournment of the Court, on the last day set for the trial of issues of fact, this case was called for trial. The defendants' counsel stated to the Cout that the case had been reached unexpectedly, by the laying over of a large number of cases on (170) account of the sickness of a member of the bar, and as his client, William Tiddy, an old and infirm man was detained from Court by the inclemency of the whether and by the belief that his case could not be reached, he was not ready for trial, and desired a continuance of it until the following Monday, or some other day of the term. The Court denied the application, and ordered that the trial proceed. The counsel for the plaintiffs then exhibited to the Court a long exemplification of a record from South Carolina, showing that the Exchange Bank had gone into liquidation about 1 December, 1869, and that C. H. Baldwin had been duly appointed receiver of its effects and assets, and moved the Court that the said C. H. Baldwin be made a party plaintiff with the Exchange Bank, and showed that a notice of the motion had been given to the defendants at July Term, 1871. The motion was opposed by the counsel for the defendants on the ground, that as early as Spring Term, 1870, of the Court, the dissolution of the bank, as a corporation, had been suggested on the record. The plaintiff's motion was granted, and C. H. Baldwin was made a party plaintiff with the bank.

The defendants' counsel then insisted that such an amendment in a substantial matter operated as a continuance; but the Court ruled otherwise, and ordered the trial to proceed.

The plaintiffs' counsel then read the note and endorsements, and there being no evidence on the part of the defendants, the plaintiffs, under the charge of his Honor, had a verdict for a sum ascertained by the legislative scale applied to the note, which was dated in April, 1864.

The counsel for the defendants then moved for a new trial upon an affidavit, which stated, in effect, that when the case was called for trial he was absent, for the reason that his counsel had informed him that

his case could not be reached that day, and also because of his feeble health and the inclemency of the weather; that owing to his (171) absence he had been unable to obtain the benefit of the plea, as a set off, of the bank bills of the Exchange Bank which he then held, and still holds, to a larger amount than the debt due the plaintiffs.

The motion for a new trial was disallowed and a judgment rendered on the verdict.

The defendants' counsel then moved for and obtained a rule upon the plaintiffs to show cause why they should not accept the bills of the Exchange Bank of Columbia in payment of the debt, and have satisfaction of the judgment, excepting the costs of the action, entered of record.

The plaintiffs' counsel, admitting that the defendants held the bills of the bank, showed for cause against the rule, that the Exchange Bank of Columbia was not a bank chartered by this State, but by the State of South Carolina, and that the present action did not come within the provisions of our statutes relating to the set-off of bank bills to debts due by banks, and actions brought by them or by any assignee, or endorsee, or receiver, or officer of such corporation seeking to recover such debts.

His Honor being of opinion that the defendants were not entitled to the benefit of the said statutes, which related only to domestic, and not to foreign banks, dismissed the rule, and the defendants thereupon appealed from the judgment rendered for the plaintiffs.

Jones & Johnson, for the plaintiffs.
Guion and *J. H. Wilson,* for the defendants.

RODMAN, J. The points made by the defendant before the rendition of judgment against him need be noticed only briefly.

1. If the plaintiff corporation has been dissolved and there is no provision of law by which the debts owing to it can be collected, of course the plaintiff must fail. *Fox v. Horah,* 36 N. C., 358. But we think that is not the result of the Act of the Legislature of South Carolina to which we were referred, or of the action of the Circuit (172) Court of that State. The corporation has been declared insolvent and put in liquidation; to some extent the exercise of its corporate privileges has been prohibited; but the interest and object of the whole proceeding is to keep it alive until its assets have been collected and distributed under the superintendence of the Court.

2. The C. C. P., sec. 299, allows an appeal to this Court from an order of the Superior Court granting or refusing a new trial, and if it

appeared that a continuance had been refused to a party when, in law, he was entitled to it, or when the refusal was manifestly unjust and oppressive, and merits were shown, perhaps this Court might grant a new trial on that ground. But neither of those was the case here. The junction of Baldwin's name with the Bank as plaintiff was no surprise to the defendant, for notice of an intention to do so had been given at a previous term. The amendment did not in any way alter the defense, or require or permit any change in the pleading. No separate right was claimed for Baldwin. He was made a party as receiver, and merely to note to whom the recovery, if obtained, would be payable. As to the reasons for a continuance grounded on the absence of the defendant, etc., evidently his Honor was a much better judge of them than we can be. And even if, in any case, we had the right to revise his discretion, it must certainly be one of plain and palpable error, to justify us in undertaking to do so. Nothing of that sort appears here.

3. The principal question is upon the motion of the defendant, that satisfaction of the judgment be entered on his paying into Court the amount of the judgment in the bills of the plaintiff Bank. The Judge declined to allow it. In this we think the Judge erred.

At the close of the war it appeared that most, if not all, of the Banks of the Southern States, were unable to redeem their bills in lawful money, and that consequently they were depreciated, not only below their face value, but in some cases below what might be paid on them if the assets of the Bank were faithfully applied to (173) their redemption. This state of things offered a field for the Banks and their officers, who alone could know the extent of the assets and the actual value of the bills, to buy them up at depressed prices, while they were collecting the debts due to them in lawful money. Under these circumstances, it seemed to the Legislature a wise policy to allow the debtors of the Banks to set-off the bills of the Banks against their indebtedness.

In this view the acts of 22 August, 1868, and of 17 March, 1869, (Laws 1868-'9, ch. 77) and of 13 December, 1869 (Laws 1869-'70, ch. 4) were passed. The two first acts applied to Banks generally. The last, by which the right claimed by defendant in this case is given, is confined in its terms to Banks chartered by this State, and the plaintiff contends that it can not by legitimate construction be extended to it. He also contends that the whole of this legislation, both as to domestic and foreign Banks, is unconstitutional, as impairing the obligation of contracts. Certainly if this last position be correct as respects foreign Banks, it will equally hold with respect to domestic ones. For

the Legislature has no more right to impair the obligation of a contract made with one than the other class of Banks. But it does not seem to us that the legislation in question is open to this objection. The doctrine of set-off has long had a place in the law. And although, under the practice before the acts in question, a defendant could only plead as a set-off a debt of the plaintiff owing to him at the commencement of the action, yet this was not by reason of any unchangeable principle of justice, but arose out of the rules of pleading. For if a defendant, whose claim was rejected under his plea of set-off, could obtain a judgment on it in a separate action before payment of the judgment against him, the Court would set-off the two judgments and allow execution for the excess only. The law of set-off was a part of the law of the remedy, and consequently within the power of the Legisla-
(174) ture to change at its pleasure, by prescribing the time or stage of the plaintiff's action at which it should be available.

That is all that the Legislature has done. It does not deny to the plaintiff the full obligation of the contract to him; it only says to him you must also perform the contract you have made. *Mann v. Blount,* 65 N. C., 99; *Bank v. Hart,* at this term, *post* 264.

As to the application of the act of 1869 to foreign Banks suing in this State, corporations created in one country can sue in the Courts of another country by comity only. *Bank v. Earle,* 13 Pet., 519. The Legislature may deny to a foreign corporation that right, or may impose conditions on its exercise.

It would be a strange policy for a State to allow to a foreign Bank, suing in its Courts, privileges denied to its own. We think that, by a proper construction of the act of 1869, all Banks suing a citizen of this State in the Courts of this State must be regarded in that suit as chartered by this State, for their charter and corporate existence is recognized by the law of this State for the purposes of the suit. The former acts include foreign Banks in their general terms. All three of them however are in *pari materia,* parts of the same general policy, and must receive a similar construction. Judgment below affirmed and on payment of the bills of the plaintiff into Court. Let satisfaction be entered in this Court.

PER CURIAM. Judgment accordingly.

Cited: Blount v. Windley, 68 N. C., 3, 6; *Moore v. Edmiston,* 70 N. C., 482; *Carson v. Dellinger,* 90 N. C., 232.

(175)

STEPHEN W. ISLER v. ISAAC BROWN and W. A. COX.

1. As a general rule, as soon as the facts of a case are determined, whether by the pleadings, a case agreed, a special verdict, or a general verdict subject to a case agreed, it is the duty of the Court having jurisdiction to give judgment upon them, and if the case be in the Supreme Court upon appeal, it is the duty of that Court to give such judgment as the Court below ought to have given.
2. When the facts have been once determined, provided there has been no irregularity in the proceedings, no Court has a right to deprive the parties of the standpoint they have gained, by setting aside the verdict or other form of finding, and reopen the issues thus regularly concluded.
3. The Court will not grant a *certiorari* to operate as a *supersedeas*, upon a suggestion that the record in the Court below is erroneous, and rely upon the contingency of an amendment, especially when the party has had ample opportunity of having the same amended so as to speak the truth.

MOTION for judgment and a writ of possession heard before *Clarke, J.*, at Spring Term, 1872, of JONES.

This case was before the Court at January Term, 1872 (66 N. C., 558). The facts are stated in the opinion of the Court.

Upon motion in the Court below his Honor entered judgment upon the record for the plaintiff: "That he recover the said lands and tenements specified in the complaint, and that he is entitled to a writ of possession," etc.

Defendants appealed.

Green, for the plaintiff.
Haughton, for the defendants.

RODMAN, J. As the record now appears before us the case is this: The plaintiff alleged title in fee to certain lands which defendants were wrongfully possessed of. Defendants admitted pos- (176) session but claimed title in themselves. Upon this issue was joined. It was submitted to a jury, who under the instructions of the Court found for the defendants as to the lands conveyed by Cox to Brown. At the same term of the Superior Court the record states, "The facts in this case being admitted and agreed on by the parties, and it being submitted by the parties to his Honor whether in law upon the facts admitted, the plaintiff is entitled to recover, his Honor decides that the plaintiff has no title to the land aforesaid, but that he recover a different tract also sued for, etc." From this judgment the plaintiff

appealed to this Court, and the facts admitted were sent up as a part of the record, as a case agreed. The case is reported in 66 N. C., 568.

This Court held that plaintiff was entitled to recover, reversed the judgment below, and ordered a *venire de novo*. We did not then notice that the case had come up on a case agreed; but supposing that our opinion settled the questions between the parties, and that perhaps the plaintiff might desire to amend his complaint so as to demand judgment for a conveyance of the legal estate of Brown to him, and that it would be more convenient to all parties to have the judgment rendered below, than here, we remanded the case in order that the proper proceedings might be had in the Court below. On getting back to that Court, the defendants contended that they were entitled to a new trial of the issues before a jury, notwithstanding they had admitted a state of facts and submitted their case to the Court upon it. His Honor, however, gave judgment for plaintiff, and defendants appealed.

We think there can be no doubt as to the practice proper under the circumstances. There is an apparent, though not a real, inconsistency between a general verdict for the defendants and a case agreed, or state of facts admitted. The effect and meaning of the whole is, that there was a general verdict subject to a case agreed; that is, sub-
(177) ject to be modified or altered according to the opinion of the Court on the effect in law of the facts admitted. The parties by agreement converted the general verdict into a special one. If the general verdict had stood without being qualified by agreement, the plaintiff would have excepted to the instructions of the Court, and upon his exceptions being sustained, the Court would of necessity have ordered a new trial, because no determined state of facts would have been before it to which it could apply the law. But we think it is true, at least as a general rule, that as soon as the facts of a case are determined, whether by the pleadings, or a case agreed, or a special verdict, or a general verdict subject to a case agreed (as here), provided they be of such a nature that a Court can give judgment upon them, it is the duty of the Court having jurisdiction to give judgment upon them; and if the case be here upon an appeal, it is the duty of this Court to give such judgment as the Court below ought to have given. When the facts have been once determined, provided there has been no irregularity in the preceedings by which they are determined, no Court has a right to deprive the parties of the standpoint they have gained, by setting aside the verdict or other form of finding, and re-open the issues thus regularly concluded. To do so would be to violate the policy of the law, which favors the speedy adjustment of controversies, to en-

croach on the powers of the rightful triers of facts, and to injure the parties. See *Ins. Co. v. Boykin,* 12 Wall. S. C., 433, and authorities cited. If when this case was last before us, it had been called to our attention it was upon a case agreed (as in substance it was) we would have then given final judgment here.

Judgment that plaintiff recover the lands described in his complaint, with five cents damages and costs.

After the following opinion had been prepared, but before it was delivered, the counsel for the defendant moved for another *certiorari,* upon a statement that although the transcript of the record (the accuracy of which is not denied), shows that a certain state of facts was agreed to, yet such was not the understanding and (178) intention of the parties. The only way in which, under the *certiorari,* if allowed, the defendant could vary the record from its present appearance, would be by procuring an order for its amendment in the Court below, upon such proof as would satisfy the Judge that it was erroneous in point of fact. We have no means of knowing whether this could probably be done or not. But we think we can not grant a *certiorari* returnable to the next term, which would operate as a *supersedeas* of execution, upon any such contingency.

All defenses must be taken in apt time, and the defendant has had abundant opportunity to have the record amended so as to make it speak the truth, if it fails to do so as it is.

PER CURIAM. Motion refused.

Cited: Rush v. Steamboat Co., 68 N. C., 73; *Isler v. Brown,* 69 N. C., 125.

BENJAMIN F. STILLY and wife v. MYER RICE, Ex'r.

1. Where an executor buys property at his own sale, either directly or indirectly, such sale will (as of course) be set aside at the instance of the parties interested.
2. The agent who bids in the property at such sale is not a necessary party in a proceeding to set it aside.

PETITION to set aside a sale of land heard before *Moore, J.,* at Fall Term, 1871, of PITT.

The following statement was signed by the presiding Judge: "This cause coming on for further direction upon the complaint, answer and proofs, the Court proceeded to hear the cause, and after argument

finds the facts to be: That the testator of the defendant Myer
(179) Rice died seized of two separate tracts of land which he directed in his last will and testament to be sold by said executor, Myer Rice: that said executor exposed to sale both tracts together, in consequence of which the land did not bring more than one-half of its real value, and that said land was bid off by the wife of the executor. The Court doth further find that there was a collusion between the executor and his wife and James A. Garland, the auctioneer, for the purpose of defrauding the plaintiffs and preventing competition among bidders. The conduct of said executor on the day of sale, was calculated, and was intended and did discourage competition among bidders. The Court doth thereupon order and adjudge that the sale of the real estate heretofore made by the defendant Myer Rice, as executor of Thomas Wiggins, be set aside, and that said Rice proceed to sell, at the court-house door in Greenville, the real estate devised to be sold, in separate tracts upon a credit of twelve months, etc., etc.

The cause retained for further orders.

From the foregoing order the defendant Myer Rice appealed to the Supreme Court.

Phillips & Merrimon, for the plaintiff.

Warren & Carter and *Batchelor,* for the defendant.

PEARSON, C. J. There is no error in the order made in the Court below, of which the defendant can complain; the facts found establish that the executor either directly or indirectly attempted to buy property at his own sale. Such dealings have always met with the disapprobation of the Court, and are, as of course, set aside at the instance of the parties interested in the fund.

The only exception to the ruling of his Honor, that the learned counsel in this Court could suggest, was that the wife of the executor having bid in the property, was a necessary party. This exception is not tenable. The wife could not make a contract or bid except as the agent of her husband, and the agent is not a necessary party.
(180) In our case, there is not only the agency implied by law, but the executor in his answer admits, that "he had determined before the sale, that if the lands did not bring more than he regarded as a fair value for them, he would have them bid off for his own benefit."

The facts show, that the executor is not a fit person to make the sale of the land, and it also appears that many articles of personal property were bid in by the executor, or by his wife, or by other persons, for his

benefit. There is also, from the evidence, probable cause to believe that many articles of personal property were not exposed to sale, but were sent up to the garret as things belonging to the wife of the executor.

The decree in the Court below will be modified, so that the Judge in the Court below, instead of ordering the sale to be made by the executor, shall order it to be made by some fit person to be selected by the Court.

The decree will also be modified, so that the order of reference may direct the clerk in stating the account of the executor, to charge him wtih the full value of every article of personal property bought by him, or for him, directly or indirectly, and of any article of personal property belonging to the testator, which was not sold. Costs to be paid by appellant.

PER CURIAM. Judgment accordingly.

Cited: Froneberger v. Lewis, 79 N. C., 434; *Cole v. Stokes,* 113 N. C., 273.

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(181)

L. W. BATCHELOR, Adm'r, v. L. G. MACON *et al.*

1. A purchaser of land is never required to accept a doubtful title. He is not required to do so, although the fullest indemnity by way of general warranty may be tendered.
2. When an action is brought by an administrator against the obligors of a bond, to recover the purchase money for a tract of land, and it appears from the pleadings that there is a *question* as to the title of the land not "free from doubt," and that the "right can not be administered" without having the heirs at law and all parties in interest before the Court, the case, under the present system, will be remanded, with a view of making the proper persons parties.

APPEAL from *Clarke, J.,* at Spring Term, 1871, of HALIFAX.

The record shows that an action was commenced by the plaintiff against the defendant on 31 March, 1871. At Spring Term, 1871, this entry is made on the appearance docket: "Case for Supreme Court, whereupon the plaintiff executes his appeal bond, etc., which is accepted, and is herewith sent up," etc.

The following statement, as a case agreed, is filled with the transcript, viz: "This was an action for the recovery of two notes, given by the defendants to the plaintiff, for sum of $1,854.50, with interest, from 2 February, 1870. The notes were given for the purchase of a tract of land sold by the plaintiff, as administrator of John Faulcon, deceased, under proceedings for that purpose, which are admitted to be regular."

The defendant alleged that the said John Faulcon had no title to

the said lands, and objected to paying the notes for that reason, and in support of this allegation he showed the will of Mrs. B. Faulcon, by which the land was devised to said John Faulcon. The following is a copy of so much of the will as is material to the case:

"Item 4. I will and bequeath to my beloved son John Faul-
(182) con, all my lands lying west and north of Smiley's branch, except the Winters tract, and that part of the Atkins tract given to the children of C. B. Allen. Also, one-half of my negro slaves that I may die possessed of, together with those now in his possession (except those loaned to my granddaughter, Ann P. Allen, in this will) to him and his heirs forever. But should my son John Faulcon die without lawful issue, then, and in that case, it is my request, inasmuch as it was his father's wish, that the above given legacy be by him conveyed by will in writing to his brother, Isaac N. Faulcon, or to any one or more of my grandchildren."

It is admitted that the land devised by the testatrix in the foregoing clause of her will, to the said John Faulcon, was the same which was sold by the plaintiff, as administrator of the said John Faulcon, and purchased by the defendants, and for which the said two notes were given.

It is further admitted, that the said John Faulcon died intestate and without issue, leaving surviving him the said Isaac N. Faulcon and five or six grandchildren of the said testatrix.

"It is thereupon agreed between the said parties, that if the said John Faulcon did not acquire an estate in fee simple in the said land under the said will, then judgment shall be rendered for the defendant. But if the said John Faulcon did acquire an estate in fee simple under the said will, then judgment shall be rendered in favor of the plaintiff for the amount of said notes and interest."

Upon this case agreed is rendered the following judgment, by his Honor W. J. Clarke:

"Upon consideration of the foregoing *case agreed* I am of opinion that John Faulcon, deceased, did not, under and by virtue of the will of Mrs. Faulcon, acquire an estate in fee in the land in the pleadings referred to."

(183) *Batchelor* and *Moore & Gatling,* for the plaintiff.
Badger and *Devereux,* for the defendants.

PEARSON, C. J. A purchaser is never compelled to pay up the purchase money and to accept a doubtful title; he is not required to do so, although the fullest indemnity by way of general warranty be tendered.

Upon the opening of the argument it seemed clear that, on the case agreed, the questions growing out of the construction of Mrs. Faulcon's will were worthy of serious consideration, and that the validity of the title, which the plaintiff offers to make to the defendant, based upon the assumption that his intestate was seized of an absolute fee simple estate, is a question that can not be considered as free of doubt. So it was evident that "the right could not be administred," unless the heirs-at-law of the intestate, and also all of the persons who may be embraced by the supposed contingent limitation, or contingent power of appointment, or contingent declaration of trust (which it may be termed), interested in the construction of the will of Mrs. Faulcon, were made parties to the proceeding. Under the old mode of procedure, the plaintiff would have taken judgment at law upon the two sale notes, whereupon the defendant would have filed his original bill in equity for a specific performance of the contract, if the vendor could make a good title. Otherwise, for its rescission, and in the meantime, for an injunction against an execution on the judgment at law, a reference, as of course, to enquire into the title, report the vendor cannot make a perfect title, decretal order, allowing the vendor six months in which to perfect his title by procuring releases, confirmation, etc. Final decree, "the contract is rescinded, etc."

Under the C. C. P., all of these proceedings are had in one Court, and the legal conclusions from the facts set out in the case agreed must grow out of the equitable counter-claim set up by the defendant, which is, in plain English, "he don't want to pay his money unless he gets a good title to the land; but is willing to pay up provided he (184) gets a good title."

The facts set out in the case agreed do not put it in the power of the Court "to administer the right," for an adjudication of the question of title, as between the plaintiff and defendant, will not conclude the question in regard to the persons setting up claim under the will of Mrs. Faulcon. Under the old mode of procedure, the result would have been a rescission of the contract of sale; but in C. C. P., sec. 61, "the right can be administered" under the power to make any person a party, who is a necessary party to a complete determination of the question involved in the controversy. To this end the persons above referred to are necessary parties, in order to make the judgment conclusive in respect to all of the parties having an interest or claim in respect to the subject of controversy. One of the recommendations of the new Code is, that it supplies this desideratum in the old mode of procedure, and

enables the Court *in one action* to settle the whole question and put an end to the litigation.

The case will be remanded, to the end that new parties may be made, and the costs of this appeal will abide the result of the action.

It may be observed, that this case furnishes an illustration of the truth, that a knowledge of the old mode of procedure is necessary to a thorough understanding of C. C. P., and will explain why applicants for licenses are required to study Chitty, Stephens and Adams on equity. C. C. P. can not be understood and practically applied without a knowledge of the old mode of procedure.

PER CURIAM. Cause remanded.

Cited: Miller v. Feezor, 82 N. C., 195; *Castlebury v. Maynard,* 95 N. C., 284; *Leach v. Johnson,* 114 N. C., 88; *Woodbury v. King,* 152 N. C., 680; *Elkins v. Seigler,* 154 N. C., 375.

(185)

HENRY REIGER v. JOHN D. DAVIS *et al.*

1. It is a rule of law, that where a debtor much embarassed, conveys property of much value to a near relative, and the transaction is secret, and no one present to witness the trade except these near relatives, it must be regarded as fraudulent. But where these relatives are examined as witnesses, and depose to the fairness and *bona fides* of the contract, and that there was no purpose of secrecy, it then becomes a question for the jury to determine the intent of the parties, and to find the contract fraudulent, or otherwise, as the evidence may satisfy them.
2. A Judge, in commenting upon the testimony may, by his manner and emphasis, intimate an opinion upon the facts, and violate the act of 1796. The record, however, must show *such* peculiarity of manner and emphasis, that the Court may see whether or not the act has been violated.
3. An absolute conveyance for a valuable consideration is good, notwithstanding the intent of the maker to defraud, if the grantee was not a party to such fraud, and bought without any knowledge of the corrupt intent.

The action was brought to recover possession of a lot in the town of Beaufort. Both parties claimed under Abigail Hill; the plaintiff under a judgment and execution against Abigail Hill and a sale by the sheriff in May, 1869; the defendant, Ward, under a purchase from the said Abigail Hill, prior to the teste of plaintiff's execution, his deed bearing date 1 November, 1865.

Plaintiff introduced the record of a judgment, at Fall Term, 1867, of

Carteret Court against Abigail Hill and C. W. Hill, which was founded on a note given in 1856. Upon this judgment executions were issued, the last of which was a *ven. ex.* from Fall Term, 1868, under which the sheriff sold. The plaintiff, to show the indebtedness (186) of Abigail Hill, introduced the record of other judgments against her, some of them upon claims due before the date of defendants' deed. He also introduced evidence tending to show the insolvency of the said Abigail Hill after her conveyance to the defendant Ward. It was in evidence that the defendant Ward was a nephew of Mrs. Hill, and that the consideration of the deed was a note of $2,000, principal and interest given by Mrs. Hill to her son, C. W. Hill and which had been purchased by Ward for the sum of $1,300, the face of the note. Evidence was also introduced tending to show that Ward had very little property, that he was a young man who had been in the Confederate army until the surrender, and that during the year 1865 he lived with Mrs. Hill, and was not engaged in any particular business. It was also proved by a witness that he was the agent of Mrs. Hill to rent her lots in Beaufort, from the Fall of 1865 until the Fall of 1868, and the first information he had of the sale was from a letter dated in April, 1867.

The defendant Ward was examined as a witness. He testified, that he bought the lot in dispute from Mrs. Hill for $2,000. The payment was made in a note due from her to her son C. W. Hill for $1,300, given in 1866. He purchased this note for $1,300, and paid for the same $500 in cash and the remainder in a note given by himself for $800. This purchase was made in October, 1865. The deed was written by C. W. Hill and delivered at Mrs. Hill's house a few days after it was written. It was kept by witness until its registration in September, 1868. Witness had no special business in 1865, and lived with C. W. Hill and Mrs. Hill, his mother. He worked for the $500.

He further testified, that he claimed the property from and after the execution of the deed to him in November, 1865, and that the note was given to C. W. Hill by his mother in settlement of her guardian account.

C. W. Hill was examined as a witness and testified, that there was no *secrecy* in the transaction between his mother and de- (187) fendant Ward, and that the trade was known to the neighbors. The note of $1,300 was given to him by his mother, for the consideration which had been stated by Ward. He was paid as Ward had testified, and used the $800 note in payment of debts. Witness sold the note to raise money which he needed at the time. He wrote the deed and witnessed it with two others.

There was evidence as to the value of the property, varying from $2,000 to $3,000.

His Honor charged the jury, that fraud vitiates every transaction into which it enters, and affects all who are cognizant of it. The part for the jury to determine is, was the conveyance from Mrs. Hill to Ward, dated 1 November, 1865, executed for the purpose of defrauding the plaintiff, a creditor of Mrs. Hill, or all of her creditors? If so, the deed is void.

If Mrs. Hill and her son C. W. Hill conspired to cover up her property to defraud her creditors, Ward must be proved to have known it, or circumstances must be shown which would have conveyed such information to a man of ordinary prudence and intelligence.

A voluntary conveyance of property without consideration by one in insolvent circumstances would be *prima facie* fraudulent. But a man in failing circumstances may prefer one creditor to another. Mrs. Hill may lawfully perfer her son to other creditors, but such transactions are viewed with suspicion. A badge of fraud is secrecy. How was it in this case? Ward and Hill say there was no secrecy, and, in addition, there were other witnesses to the deed. If the vendor remains in possession, it is not indication of fraud if such possession is consistent with the deed; but continuing in possession with gross inadequacy of price is a badge of fraud. Does the evidence satisfy that Mrs. Hill was insolvent in 1865? Her becoming so after the deed to Ward does not affect him. Does the bargain between Ward and
(188) C. W. Hill, in the purchase of the note for $1,300, afford, of itself, or in connection with other circumstances, satisfactory evidence that Ward was a party to the *iniquitous* transaction of endeavoring to defraud Mrs. Hill's creditors? Is it consistent with reason that every man who trades with one in failing circumstances is a party to a fraud?

If Ward made a good bargain, it does not vitiate the deed, unless the price was *grossly inadequate.* And even if Mrs. Hill and her son acted dishonestly, it does not affect Ward if he was an innocent purchaser for a valuable consideration. The jury must be satisfied that the note purchased was fictitious, and that Ward knew it, or ought to have known it. His Honor said that the purchase of a note for $1,300, worth $2,000, was not a grossly inadequate price. Nor is the purchase of property valued at $3,000 for $2,000, with rents reserved, such a grossly inadequate price, as of itself singly and alone, to constitute fraud.

There was a verdict for the defendants. Rule for new trial. Rule discharged. Judgment and appeal.

Haughton, for the plaintiff.
Smith & Strong and *Batchelor,* for the defendants.

BOYDEN, J. This was a civil action for the recovery of land, both parties claiming under Abigail Hill. The plaintiff, by a purchase at a sale of the sheriff, under a judgment and execution against the said Abigail, and the defendants by a purchase made by Ward, under whom the defendant claims, previous to the test of the execution under which the plaintiff sets up title; and the main question in the cause was as to the *bona fides* of the sale to Ward. This is quite a different case from the case of *Satterthwaite v. Hicks,* 44 N. C., 105, cited by plaintiff's counsel. In this case the parties to the transaction were examined as witnesses, and testified that the trade was fair and *bona fide,* and likewise proved the consideration paid for the land was a fair price, and that there was no purpose of secrecy. But in the case cited by plaintiff there was no evidence how, or upon what consideration (189) the several bonds used in payment were founded, and these formed a large portion of the consideration for the purchase.

It is a rule of law, to be laid down by the Court, that when a debtor, much embarrassed, conveys property of much value to a near relative, and the transaction is secret, and no one is present to witness the trade but these near relatives, it is to be regarded as fraudulent; but when these relatives are made witnesses in the cause, and depose to the fairness and *bona fides* of the transaction, and that there was, in fact, no purpose of secrecy; it then becomes a question for the jury to determine the intent which influenced the parties, and to find it fraudulent or otherwise, as the evidence might satisfy them. Upon this part of the case we think His Honor submitted the question fairly to the jury, with proper instructions to enable them to arrive at the truth of the transaction.

There were various badges of fraud alleged on the part of the plaintiff, but all these were brought by His Honor distinctly to the notice of the jury, in his charge, with the like proper instruction, and we find no error in this.

But it is insisted on the part of the plaintiff that His Honor invaded the province of the jury, and violated the Act of '96, by expressing an opinion upon the facts of the case.

This violation of the Act of '96 is alleged to have been made in using the following language:

"Does the bargain between Ward and Dr. Hill, by which he bought a note on Mrs. Hill, amounting in principal and interest to $2,000, for its face, $1,300, afford of itself, or in connection with the embarrassed condition of Mrs. Hill, satisfactory evidence that Ward was a party to the iniquitous transaction of endeavoring to defraud Mrs. Hill's creditors? Is it consistent with eason, that every man who trades with one in failing circumstances, is a party to a fraud?"

These questions might have been asked in such a tone and
(190) manner as to convey to the jury His Honor's opinion upon the facts. But when the record merely shows that these questions were asked, without anything in the record showing the emphasis or manner in which they were asked, this Court can not see that his Honor violated the Act of '96. In *S. v. Simmons,* 51 N. C., 21, cited as authority by the counsel, it appeared upon the record that His Honor who tried that case asked the question with emphasis and in an animated tone, *where was the evidence to establish the fact?* Had the record in this case showed that these questions had been asked with peculiar emphasis and in an animated tone, as in *S. v. Simmons,* this Court would have felt bound, by that authority, to grant a new trial.

It is further insisted that His Honor erred in instructing the jury "that if Mrs. Hill and her son conspired to cover up her property to defraud her creditors, Ward would not be affected by such fraud if he had no knowledge thereof, and the trade was in fact *bona fide* on his part."

The counsel for the plaintiff, to show that his Honor erred in this part of his charge, cited *Devries v. Phillips,* 63 N. C., 53. The opinion of his Honor in that case is misrepresented, if it is supposed to mean that a fraudulent intent on the part of the debtor alone will render the contract void on the ground of fraud, when the grantee has no knowledge of this fraudulent intent, and the trade is *bona fide* on his part and for a fair consideration. To vitiate the trade and render it fraudulent and void the grantee must be a party to this corrupt intent, or have some knowledge of the execution of it at the time of the execution of the contract. *Lassiter v. Davis,* 64 N. C., 498.

PER CURIAM. No error.

Cited: McCulloch v. Doak, 68 N. C., 273; *Humphries v. Ward,* 74 N. C., 787; *Churchill v. Lee,* 77 N. C., 345; *Tredwell v. Graham,* 88 N. C., 213; *Cannon v. Young,* 89 N. C., 266; *Savage v. Knight,* 92 N. C., 499; *Beasley v. Bray,* 98 N. C., 270; *Brown v. Mitchell,* 102 N. C., 370, 371; *Helms v. Green,* 105 N. C., 263; *Haynes v. Rogers,* 111 N. C., 231; *Bank v. Bridgers,* 114 N. C., 386; *Williams v. Lumber*

Co., 118 N. C., 939; *Redmond v. Chandley,* 119 N. C., 579; *Davis v. Blevins,* 125 N. C., 434; *Austin v. Staton,* 126 N. C., 789; *Cox v. Wall,* 132 N. C., 741; *Withers v. Lane,* 144 N. C., 190; *Calvert v. Alvey,* 152 N. C., 613; *Sanford v. Eubanks, Ib.,* 701.

EPHRAIM WESTCOTT, Adm'r, v. HENRY C. HEWLETT.

A Judge of the Superior Court has no power, upon motion, to set aside and vacate a judgment of the former County Courts, rendered in a matter touching the administration of a dead man's estate. Such motion should be made before the Clerk, as Judge of Probate.

MOTION to set aside and vacate a judgment of the County Court heard before *Russell, J.,* at January Term, 1872, of NEW HANOVER.

Alexander I. Hewlett died in the county of New Hanover in 1865, having previously made and published his last will and testament. The will was duly admitted to probate at January Term, 1866, of the County Court, and the plaintiff Westcott was appointed administrator, with the will annexed. By the said will the testator devised to Henry C. Hewlett a lot in the town of Wilmington, known as No. 70. He also devised other real estate to his other children, James and Jeremiah Hewlett, who are made parties to this motion, and to several others, who are defendants in this motion, with the administrator Westcott.

At December Term, 1866, the administrator, Westcott, filed his petition in the County Court against Henry C. Hewlett, to make the land devised to him assets for the payment of debts. None of the other devisees were made parties defendants and Henry C. Hewlett was a non-resident and was brought into court by publication. He did not enter an appearance or make any defense to the action. At March Term, 1867, the prayer of the petition was granted and an order made to sell the land. In pursuance of the order the land was sold by the administrator, a report was made of the sale, purchase money paid and title was made to the purchaser. His Honor after hearing the argument of counsel disallowed the motion to set aside and vacate the order of sale, etc. And the parties making the motion appealed to the (192) Supreme Court.

Strange, for the appellants.
W. E. & D. J. Devane, for the appellee.

RODMAN, J. This was a motion before the Judge of the Superior Court to vacate what purported to be a judgment rendered in the Court

of Pleas and Quarter Sessions, under our former system, granting a license for the sale of the land of a decedent, for the payment of his debts; and the party making this motion was a party defendant in the original action, and now bases his right to vacate on the ground that the judgment of the County Court was a mere nullity, and absolutely void. If this be so (which we do not undertake to decide) then the entries on the records of the said Court, purporting to be a judgment, can injure no one, as all parties whose interest would have been effected by said entries, had they constituted a judgment in fact, may now treat the proceedings of the County Court as having no existence, as they can in no way be prejudiced by them.

But, were it otherwise we think the party has mistaken his remedy, if he has any, and that the motion to vacate should have been made before the Clerk of the Court, as Judge of Probate, and not before the Judge of the Superior Court. This is a matter touching the proper administration of a dead man's estate, which jurisdiction of the County Court has been transferred to the Clerk as Judge of Probate, and not to the Superior Court. This point has been heretofore decided by this Court.

Per Curiam. Affirmed.

Cited: Lovinier v. Pearce, 70 N. C., 171.

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(193)

WM. McCOMBS, Adm'r, etc., v. THE N. C. RAILROAD COMPANY.

1. Where a witness was examined to prove that a Railroad Company had failed to deliver, to another company, four bales of cotton according to its undertaking, it was not competent for said witness to state the conclusion to which he had come, by a comparison of the receipts given by the latter company for a week's shipment, and the books kept by the plaintiff in the action.
2. When there is no evidence to sustain the declaration of a plaintiff, it is the duty of the Court so to instruct the jury.
3. When a bailment is for the benefit of the *bailee only*, he is bound to take extraordinary care, but when it is for the benefit of *the bailor only*, the bailee is only liable for gross neglect, *Crassa negligentia.*

Action of assumpsit, begun under the old system, tried before *Logan, J.*, Fall Term, 1871, of Mecklenburg.

This action was brought to recover the value of four bales of cotton, which came into possession of the defendant and were alleged to have been lost by negligence. Plaintiff declared:

1. Upon a special contract, to deliver the cotton to the Charlotte and South Carolina Railroad Company, at Charlotte for shipment.

2. Upon a general undertaking, or custom of defendant's agents, to deliver cotton shipped over its road to the agents of the Charlotte and South Carolina Railroad Company.

3. Against the defendant as a warehouseman.

4. Against defendant as a common carrier.

Dr. Gilmer testified that he contracted to sell to Farrow, plaintiff's intestate, who was a cotton merchant in Charlotte, four bales of cotton by sample. He lived at a depot called Harrisburg, some fifteen miles from Charlotte. He contracted with defendant to carry four bales of cotton from Harrisburg to Charlotte. Witness came to Charlotte with his cotton which was taken out of the cars and placed in the depot building of defendant. Plaintiff's intestate sent one of his clerks, with witness, to examine the cotton, which was done, and the cotton weighed and paid for. The cotton was weighed on the scales of (194) defendant in the depot building, and left there.

Nesbit testified that he was in the employment of plaintiff's intestate at the time spoken of by Dr. Gilmer. That a clerk of the house was sent with Gilmer to examine and weigh the cotton. That during the week they purchased from ninety to a hundred bales of cotton, all of which were delivered to the Charlotte and South Carolina Railroad Company for shipment, and receipts taken therefor.

Plaintiff proved by this witness, after objection by the defendant, that he had never seen the cotton bought from Gilmer, but that he compared the receipts given with the books kept by plaintiff's intestate, and there was a deficiency of four bales.

Witness further testified that it was the practice or custom, between the defendant and the Charlotte and South Carolina Railroad Company, for the agents of the former at Charlotte to deliver to the agents of the latter any cotton which came over the North Carolina Railroad for shipment, and take receipts therefor, without any special direction. This evidence was objected to, but received by the Court.

A. H. Martin testified that he was agent of the Charlotte and South Carolina Railroad Company, at the time spoken of; and that the cotton was not received at the depot of his company.

After objection, this witness was permitted to prove the custom spoken of by Nesbit, viz: That it was customary for defendant to deliver cotton intended for shipment over the Charlotte and South Carolina Railroad directly, without any special instructions from the shippers.

His Honor was requested to instruct the jury, that the four bales of

cotton were not embraced within the custom alleged by plaintiff, and that there was no special contract to forward the cotton beyond Charlotte, or to keep it in defendant's warehouse. His Honor, after reciting the evidence, instructed the jury that a common carrier was an
(195) insurer, except against injury or loss occasioned by the act of God or the common enemy; that a warehouseman was responsible for ordinary neglect for goods entrusted to his care; that a bailee for hire was bound for ordinary neglect, but a gratuitous bailee for extraordinary care.

He left it to the jury to say, whether the defendant was liable as a common carrier, warehouseman, bailee, or under a special contract, and did not otherwise respond to the defendant's prayer.

Verdict for plaintiff. Rule for *venire de novo*. Rule discharged. Judgment and appeal.

J. H. Wilson for the plaintiff.

Barringer and *Bailey* for the defendant.

Pearson, C. J. We can see no principle upon which the witness, Nesbit, should have been allowed to state, "that on Saturday of that week, in comparing the shipping receipts with intestate's books, it was found that there was a difference of four bales."

If the books had been produced in Court, the entries could not have been offered in evidence, and it was still more objectionable, to permit a witness to state the result at which he had arrived, by a comparison; neither the shipping receipts nor books being present to verify its correctness.

His Honor erred in refusing to instruct the jury, "that there was no evidence of an undertaking on the part of the defendant to deliver those four bales to the Charlotte and South Carolina Railroad for transportation. By a contract with Gilmer, the defendant undertook to deliver the cotton at its depot in Charlotte to Gilmer, there being no consignee. Gilmer came on the same train and received the cotton at the defendant's depot in Charlotte; so the contract with Gilmer was executed, and Gilmer, like a prudent man, had an eye to the cotton until it was
(196) weighed and paid for. It had been taken into the depot house of defendant, for the purpose of being weighed. After that Gilmer had no further concern with it, and, for aught that appears, the four bales of cotton were left on the floor of defendant's depot house, and were not in the charge of any one, except that it was constructively in the possession of Farrow, who had bought and paid for it, and so, of course, was under his charge, or that of his agents.

There is no evidence that Farrow notified the agent of defendant, that he had bought Gilmer's four bales of cotton. There is no evidence that Farrow requested the agent of the defendant to carry the four bales from the defendant's depot and deliver it to the Charlotte and South Carolina Railroad for transportation, and undertook to pay what such carrying from the one depot to the other was reasonably worth, and there is no evidence that Farrow notified the defendant's agent of the consignee, to whom the cotton was to be sent, or of the place to which it was to be sent. Under these circumstances, had the defendant shipped the cotton on the Charlotte and South Carolina Railroad, consigned to no one, and without a place of delivery, the act would not only have been looked upon "as officious," and subjecting the defendant to damages, but foolish.

Suppose there was a custom, or general undertaking, binding on the defendant, to deliver to the Charlotte and South Carolina Railroad all cotton which came on the defendant's road to Charlotte, *"for shipment to market,"* that is with a through ticket to some consignee at some place beyond Charlotte, such custom or general undertaking had no application to these four bales of cotton. This cotton was not sent on the defendant's road to Charlotte, *"for shipment to market,"* but was, by the contract with Gilmer, to be carried to Charlotte, and there to be delivered to him; with which contract the defendant fully complied, and that was the end of it, in the absence of any evidence that the defendant, at the instance of Farrow, undertook to deliver the cotton to the Charlotte and South Carolina Railroad, for transportation be- (197) yond that point.

Pressed with this difficulty, the plaintiff's counsel, as we infer from his Honor's charge, then took the position that the defendant undertook, as warehouseman, to keep the cotton for the plaintiff. His Honor ought to have instructed the jury that there was no evidence to support the allegation, that the defendant had undertaken as a warehouseman, to keep the cotton for the plaintiff. There is no evidence that the defendant knew that the plaintiff had bought the cotton, or ever had any communication with him in respect to this cotton.

We must infer from his Honor's charge, that plaintiff's counsel then took the position that as the cotton, after being weighed, was left on the floor of the defendant's depot house, it will be presumed that the defendant gratuitously undertook to keep it for the owner, whoever he might be, and as the plaintiff turns out to be the owner, he has the right to avail himself of this gratuitous undertaking.

Without conceding this presumption, but supposing it to be so for

the sake of the argument, his Honor erred in charging the jury that "a gratuitous bailee is bound to take extraordinary care." This is manifest erroneous, as applicable to the case in hand. His Honor inadvertently reversed the rule of law, and confounded the matter. When a bailment is for the benefit of the *bailee only,* he is bound to taken extraordinary care, and is liable for slight neglect. When a bailment is for the benefit of the *bailor only,* which is the supposed case we have under discussion, the bailee is only liable for gross neglect, *"crasso negligentia,"* approaching very near to fraud.

It is not necessary to advert to the other points in this case. Either these four bales were sent on the Charlotte and South Carolina Railroad, and there is a mistake in the comparison of the shipping receipts and the books of Farrow, or else the cotton was misappropriated by the agents of Farrow, or by the agents of the defendant, or it was stolen by some third person. Although this action was commenced in
(198) 1857, it is the plaintiff's misfortune that he has not, as yet, been able to reach the merits of the case.

PER CURIAM. *Venire de novo.*

Cited: Best v. Frederick, 84 N. C., 181; *Basnight v. R. R.,* 111 N. C., 596.

S. B. ALEXANDER v. ATLANTIC, TENNESSEE & OHIO RAILROAD COMPANY.

1. Where a railroad company issued bonds, payable at their office, in a particular way, and at the maturity of the bonds there was no office of the company at *the place; Held,* that a demand for payment elsewhere was sufficient.
2. A bond of a railroad company for the payment of money, executed in 1862, comes within the provision of the ordinance of the Convention of 1865, and is "presumed to be solvable in money of the value of Confederate currency, subject to evidence of a different intent by the parties."
3. In the absence of all evidence to show the consideration of such bonds, or that the parties intended otherwise than is presumed by the ordinance, a different *intent* will not be implied from a provision in the charter, that the company may make contracts for building the road, and may pay contractors in bonds at par value.

APPEAL from *Henry, J.,* at a Special Term of MECKLENBURG held in January, 1872.

The plaintiff declared on three bonds of $500 each, issued by the

Atlantic, Tennessee and Ohio Railroad Company, in April and May, 1862, and also for two hundred and three coupons of said bonds, of similar series. The payment of these bonds and coupons was guaranteed by the Charlotte and South Carolina Railroad Company.

The folowing is a copy of one of the bonds:

"State of North Carolina, (199)

Atlantic, Tennessee and Ohio Railroad Company.

On 1 November, 1869, the Atlantic, Tennessee and Ohio Railroad Company promises to pay to Charlotte and South Carolina Railroad Company, or bearer, at their office, in Charlotte or Statesville, $500, with interest, etc., semi-annually, according to the tenor and upon the presentation of the coupons, etc. This bond is issued in conformity to the charter, and by the authority of the stockholders, and may be converted into stock of said company at par by the holder."

The coupon is in the following form:

"The Treasurer of the Atlantic, Tennessee and Ohio Railroad Company, in North Carolina, promises to pay to bearer, on 1 November 1869, $15 for interest due on bond No. 169. M. L. W., *Treasurer.*"

It was proved, that the iron of the Atlantic, Tennessee and Ohio Railroad Company had been taken up by the Confederate authorities in 1863, and that, after that, there was no office of the company in Charlotte or Stateville, until 1870.

This suit was begun in November, 1869. The President of the Company swore, that from 1864 until 1869 the books of the Company were kept at Columbia, and that, as President, he was the financial agent of the company, and kept his office in Charlotte, N. C.; that the reconstruction of the road commenced in 1869, and that after that time the Treasurer's office was kept in Statesville, N. C.

Defendant's counsel asked the Court to charge the jury, that the plaintiff could not recover, for want of a demand according to the tenor of the bond and the endorsement thereon; that the bonds and coupons were subject to the scale of depreciation, established by law.

His Honor charged that, if the defendant had no office either in Statesville or Charlotte, at the time of the demand alleged in (200) the complaint, which was made of the company, but at no specified place, it was sufficient; and that the scale of depreciation established by the Legislature did not apply to the bonds or coupons.

Verdict for plaintiff. Motion for new trial. Motion overruled. Judgment and appeal.

Jones & Johnston for plaintiff.
Wilson and *Barringer* for defendant.

READE, J. The case presents two points:

1. Whether there was a sufficient demand, before action brought?

2. Whether the bond and coupons are subject to the legislative scale?

1. The bonds on their face were to be presented at the office of the defendant in Charlotte or Statesville. They were not so presented, because, as was alleged, the defendant had no offices at those places at the time of their maturity, and so they were presented to the defendant elsewhere, and payment demanded.

His Honor instructed the jury, that, if the defendant had no offices at the places named, then the demand made at their office in Columbia, S. C., was sufficient. We think the instruction was right, even upon the supposition that a demand was necessary.

2. The ordinance of the Convention, October, 1865, provides that all executory contracts, solvable in money, made between certain dates, including the date of these bonds, shall be deemed to have been made with the understanding that they were solvable in money of the value of Confederate currency, according to a scale which the Legislature should fix, subject to evidence of a different intent of the parties.

Here was a contract solvable in money, and deemed to be
(201) solvable in Confederate currency. Was there any evidence that the parties intended otherwise, so as to take this case out of the presumption made by the ordinance? It is not pretended that there was any such intent *expressed* by the parties, but it is insisted that such intent is to be *implied*—that the bonds express upon their face that they are issued in "conformity to the charter," and that the charter forbids the bonds of the company "to be used at a discount below their par value," and, therefore, it is to be implied, that when the company issued these bonds it got par value for them; and that when the company comes to pay the bonds, it must pay par value, *i. e.*, the nominal amount. But this seems not to be true in fact. The charter (sec. 41) provides that the company may make contracts for building the road, and may pay the contractors in bonds at par value, *i. e.*, may pay a hundred dollar debt with a hundred dollar bond; but then, the debt may have been contracted with a view to the depreciation of the bond with which payment was to be made, so that a hundred dollar contract in *name* may have been only a fifty dollar, or a ten dollar contract, in *value*. And, in such a case, a hundred dollar bond issued at par in name, in payment of such contract, would really be issued for the value of fifty dollars or ten dollars. So that, in view of the history of the time when these bonds

were issued, of which we take notice, it is rather to be implied, if indeed it be not to be taken as certain, that the bonds, although issued at par in name, were really issued at very great discount. Especially is this to be taken to be so, inasmuch as the plaintiff has not shown for what these bonds were issued, or what consideration was actually paid for them.

It would have been competent for the plaintiff to show that these bonds were given in payment for labor, or for materials, and to show the value of the labor or materials. But he has shown nothing to relieve the case from the presumption that the bonds are solvable in money, of the value of Confederate currency at the time they were issued.

And then it is insisted, that if it appears, either expressly or by implication, or by presumption, that the bonds were issued for (202) less than par, then the company acted *ultra vires,* and the bonds are void.

It would do the plaintiff no good to maintain this, for thereby he would lose his debt altogether; and the defendant has made no such objection. The plaintiff's counsel did insist, that no such presumption attached to the bonds; because the company had no power to issue bonds with such a quality. But still, he insisted, that if the bonds have that quality, yet, the company can not take advantage of its own wrong, and repudiate them. The argument is a dangerous one for the plaintiff, because the authorities are, that if the company had no *power* to issue the bonds, they are void; but if they had power to issue them, and there was only some *irregularity* connected with them, the company shall not take advantage of such irregularity. Here then, the plaintiff says, the company had power to issue the bonds, and is liable for their *full* value; the company admits its power to issue the bonds, but insists, that it is liable only for their real value. Both parties, therefore, admit the *power* to issue the bonds just as they are, and their *construction* only is before the Court. The charter authorizes the issue of the bonds, at their par, or full value, in payment for building the road; and allows them to be converted into stock, dollar for dollar, or redeemed with money; and then the statute says, that shall be deemed to be money of the value of Confederate Treasury notes, nothing else appearing. The bonds themselves stipulate, that they may be converted into stock at their par value, by the holder. The holder, the plaintiff, has chosen not to convert them into stock, but to sue for their money value; which,

in the absence of proof to the contrary, the statute fixes to be money of the value of Confederate notes.

PER CURIAM. *Venire de novo.*

Cited: Alexander v. Comrs., post 332.

(203)

J. N. HARSHAW, *et al.*, Ex'rs, etc., v. JOHN DOBSON.

Where the presiding Judge of a Superior Court, at one of its terms in the fall of 1863 made a violent charge to the grand jury, upon the subject of *Confederate money in payment of debts*, in which he said, among other things, that a refusal to receive such money was an indictable offense and threatened to punish all who so refused; and where he procured a presentment to be made by the grand jury against a judgment creditor, who refused to take Confederate currency in payment of a judgment rendered in 1858, upon a bond given for land, and payable in specie; and furthermore, threatened said creditor that if he did not receive such currency he would send him to jail, or to Richmond, Va.; and the creditor, under fear, being an infirm old man, did receive such currency in payment of his judgment, and did execute and deliver a deed for the land, which he had contracted to sell;

1. *Held*, That the receipt of the Confederate currency, under such circumstances was under duress, and was not a payment of the judgment further than the value of such currency, and that the land conveyed should be considered a security for the purchase money.

2. A judgment debtor who pays a debt and receives a deed under such circumstances of intimidation and duress, although he did not procure them to be brought about, can not avail himself of such an advantage to perpetrate an unconscientious act.

APPEAL from *Mitchell, J.*, at Spring Term, 1872, of CATAWBA.

This case was before the Court at January Term, 1870, upon the complaint and demurrer filed. The demurrer was overruled, and, by agreement of parties, the defendant was allowed to answer. His answer was filed; issues of fact, under the direction of the Court, were submitted to a jury, and several witnesses were examined.

The material parts of the complaint and answer, the issues, and the facts proved, are stated in the opinion of the Court.

Plaintiff moved for judgment on the fourth issue, which, with the response of the jury, is as follows:

"Did Harshaw receive Confederate money in payment of said
(204) judgment, under fear and duress, and against his will?"

Response of jury. "He did."

His Honor refused plaintiff's prayer for judgment, and gave judg-

ment for the defendant, from which plaintiff appealed to the Supreme Court.

Bynum and *Folk* for plaintiffs.
No counsel for defendant.

READE, J. This case was before us at January Term, 1870, reported in 64 N. C., 384. It stood then upon demurrer to the complaint, upon the ground that the facts set out did not constitute duress.

The demurrer was overruled, and judgment would have been rendered then for the plaintiff, but for the fact that it was agreed of record by the parties that, if the demurrer should be overruled, there should not be judgment for the plaintiff, but the defendant should answer and the case should stand upon proofs. It is now before us, not in the usual form, and, on that account the delicate questions involved are the more embarrassing. There are no exceptions to evidence received, nor to evidence ruled out; no instructions asked for, nor objections to instructions given. Indeed, it does not appear that any instructions were given at all; but the complaint, answer, issues, verdict, testimony of witnesses, and the judgment of the Court, are sent up as the "case" for this Court.

The complaint is, that in 1850, the plaintiff's testator, Jacob Harshaw, sold to the defendant a tract of land, at $5,000, and took the defendant's bond for the price, and gave the defendant penal bond in $10,000, to make title when the money should be paid. There was a balance due upon the defendant's bond when the war commenced. Harshaw had sued upon the bond before the war, and obtained judgment in Burke Superior Court. After the war commenced and Confederate money was in circulation at a depeciation, Harshaw gave the Clerk of the Court directions not to issue execution, and not to (205) receive Confederate money. At Fall Term of Burke Superior Court, there being much excitement in the public mind about Confederate money, and prejudice against those who refused it, the Judge who held the Court charged the Grand Jury, "that it was an indictable offense for a citizen of the Confederate States to refuse to receive its money in payment of debts; and that, from his place on the bench, said Judge threatened with punishment and imprisonment, in the county jail, or in some prison of said Government, such person who should dare to refuse said money in payment as aforesaid." That during the term of the Court the defendant, by his counsel, moved, "to be allowed to pay off and satisfy said judgment in Confederate money. And the Court allowed the motion, and directed said payment to be entered of record

in said Court, as a satisfaction of said judgment." That Harshaw, by his counsel, protested against the payment before the Court. That the Judge, during the term, "sent word to Harshaw that it was his fixed purpose, in case he did not receive Confederate money in payment of said judgment, to cause him to be sent to Richmond." "That on receipt of said message, being infirm in bodily health, and well stricken in years, the said Harshaw, knowing the fanatical character of said Judge, and believing that such was his purpose, and under terror and fear of his life," received the money. It is also stated, that Harshaw had, before that, refused to receive Confederate money from the defendant, and that the defendant continued to procure the threats of the Judge, and well knew of the terror excited thereby, and took advantage of it to pay off the debt in depreciated currency.

The answer denies that the defendant had before tendered Confederate money to Harshaw, and had been refused; or that he procured the charge or threats of the Judge, or that Harshaw received the money unwillingly, or under duress, or that he was in any danger.

1. The first issue was, Did Jacob Harshaw refuse to take (206) Confederate money in payment of the judgment?

To this the jury respond, "he did, but after consultation with his counsel received it."

2. Did Harshaw give notice to the clerk, not to receive any other money, except gold or silver coin in payment of said judgment?

To this the jury respond, "He did."

3. Did Harshaw receive Confederate money in payment of said judgment voluntarily and of his own consent?

To this the jury respond, "No."

4. Did Harshaw receive Confederate money in payment of said judgment under fear and duress, and against his will?

To this the jury respond, "He did."

Taken in connection with the complaint and answer, the question is, Do these findings by the jury, make out a case of payment under duress? Clearly they do. They make out a case of judicial tyranny as monstrous as, we are glad to say, it is rare. We have looked into the testimony, not for the purpose of controlling the case thereby, but to see whether the case was not overstated in the complaint, and in the finding of the jury; but it is manifest that the facts go even beyond the complaint. From uncontradicted testimony, it appears that the judge not only did charge the grand jury to present every man who refused Confederate money, but that he went into the grand jury room with a presentment prepared against Harshaw, and directed the grand jurors

to sign it, and send it into Court by the foreman; that he took the presentment in an envelope to the clerk, and directed him to send it to the authorities. He was seen writing a *mittimus* to send "Harshaw to jail," and when remonstrated with, "that Harshaw was an old man and it was a pity to send him to prison" he sent the witness to Harshaw and said, "Go to Harshaw and tell him, if he don't take Dobson's money, I will put him in jail." And there was much more (207) behavior to the same effect, which it seems not only put Harshaw in fear of his life, and excited the community, so that according to one witness, "it was in every body's mouth," "and the sentiment was that the people must take it or be punished." And it would seem that even the bar were appalled, and made no protest against it; and even Harshaw's own counsel, after going to see the judge, came back and told his client, that "he had better take it."

But supposing all this to be true, that Harshaw did receive the money under duress, still the defendant says he is not affected by the duress; because he did not procure or cause it. And it is true, that, in response to issue 5:

5. "Was the said payment in Confederate money forced upon Harshaw by fraud and circumvention of the defendant?"

The jury respond, "No, it was not."

And the question is, how does that finding affect the case? It must be remembered that the jury, upon prior issues, found that Harshaw had not only refused to receive Confederate money of the defendant, but had instructed the clerk not to receive it. Aside from the question of duress, therefore, the defendant had no right to pay Confederate money to the clerk, because the clerk had no right to receive it. Harshaw might have refused to receive the money of the clerk, and then, the payment would have amounted to nothing. And, although he received the money of the clerk, yet, that did not amount to a ratification of the payment, because, he received it under duress. But, furthermore, although the defendant did not instigate the duress; yet, he took advantage of it, to perpetrate an unconscientious act, upon an infirm old man; and it is the same as if he had instigated it.

It is further said by the defendant that, whatever may have been the effect of what was done about his payment of the money to Harshaw, it was all cured by the fact that, some time afterwards, the said Harshaw voluntarily made him a deed to the land; and such is (208) the finding of the jury upon the sixth issue. But then, it must be remembered that Harshaw was under a penal bond of $10,000, to make the deed when the money was paid; and the acceptance of the

deed, under the circumstances, was a continuation of the advantage which the defendant had obtained; and, in a Court of conscience, it can not be allowed to avail him. And, again, it can not avail him, because it does not affect the question as to whether the debt was paid, but only the question as to whether the land ought to be held liable as a security for the debt. And we think that, very clearly, it ought to be held as security for the debt, notwithstanding the deed from Harshaw to the defendant.

In view of the fraud and duress which was practiced upon Harshaw, we have considered, whether the defendant is entitled, as a credit upon the judgment, to the *value* of the Confederate money which he paid. And we incline to the opinion that the plaintiff would have been entitled to an issue, as to whether Harshaw had used the money to profit, and if he had not, he would not be liable to account for it; but it appears, that the plaintiff moved for judgment, only for the balance due him upon his judgment, after deducting the value of the Confederate money paid, fixing the value by the legislative scale.

We are of the opinion that his Honor erred, in refusing the plaintiff judgment according to his prayer. And it is considered that judgment be entered here, as it ought to have been entered below, for the balance due, $3,300 as of 1 December, 1862, with interest from that time, subject to a deduction of the amount of the *value* of the Confederate money paid at that time, according to the legislative scale, with interest thereon, as to which there will be a reference to the Clerk here. It is also considered, that the land mentioned in the pleading is a security for the satisfaction of the judgment; and that if the money is not paid, or if the execution which may issue shall be returned not satisfied,
(209) the defendant shall surrender the deed to be cancelled, and such further proceedings shall be had as may be necessary, to subject the land to sale for the satisfaction of the judgment in this Court.

PER CURIAM. Reversed.

Dist.: Wells v. Sluder, 70 N. C., 60.

W. P. MOORE v. THE N. C. RAILROAD COMPANY.

The Clerk of the Superior Court of one county has no right to issue a summons returnable to the Superior Court of another county; but irregularity of service is waived by an appearance and answer in bar.

MOTION to dismiss a civil suit, heard before *Logan, J.,* at CABARRUS, Spring Term, 1872.

STATE *v.* JONES.

The plaintiff sued out a summons from the Clerk of the Superior Court of Mecklenburg County, against the defendant, returnable to Spring Term, 1870, of Cabarrus Superior Court. The summons was returned "executed." Plaintiff filed a complaint at the appearance term, and at the same term the defendant answered in bar of the action. At Spring Term, 1872, a motion to dismiss was made by the defendant's counsel, upon the ground that the clerk of Mecklenburg had no power to issue a summons returnable to Cabarrus Superior Court.

It was agreed that plaintiff lived in Craven, and that defendant was a corporation, extending through and doing business in the counties of Mecklenburg and Cabarrus. His Honor allowed the motion and dismissed the suit. From which judgment plaintiff appealed to the Supreme Court.

J. E. Brown and *Wilson* for plaintiff. (210)
C. Dowd and *Barringer* for defendant.

RODMAN, J. The Clerk of the Superior Court of Mecklenburg has no right to issue a summons returnable to the Superior Court of Cabarrus. *Howerton v. Tate,* 66 N. C., 431; Laws 1868-'69, ch. 76, sec. 2.

The defendant nevertheless appeared and answered in bar. We are of opinion that the irregularity was thereby waived. If no summons at all had been issued, the filing of a complaint and answer would have constituted a cause in Court.

Judgment reversed, and case remanded, to be proceeded in according to law.

PER CURIAM. Reversed.

Cited: Fleming v. Patterson, 99 N. C., 405; *Cherry v. Lilly,* 113 N. C., 28; *Davison v. Land Co.,* 118 N. C., 369; *Webb v. Hicks,* 125 N. C., 205; *McClure v. Fellows,* 131 N. C., 510; *Harris v. Bennett,* 160 N. C., 342.

STATE v. ANDREW J. JONES.

1. General words in a statute do not authorize an act to be done, which is expressly prohibited by a former statute; plain and positive words must be used.
2. The act of the General Assembly, ratified 16 February, 1871, requiring "the President and Directors of the several Railroad Companies of this State, upon demand, to account with and transfer to their successors all the money, books, papers and choses in action belonging to such

company," is sufficiently general in its language, taken by itself, to embrace bonds of the State; but the said act must be taken and constructed in connection with two other acts, viz: act 5 February, 1870, and act 8 March, 1870. Thus taken and construed, the acts of 5 February, 1870, and 8 March, 1870, dispose of the bonds as special tax bonds, and the act of 1871 has reference only to "money, choses in action, property and effects belonging to the company;"

3. Therefore, an indictment under the said act of February, 1871,
(211) can not be sustained against a former president of the Western Railroad Company, for refusing to transfer to his successor in office certain special tax bonds, which were issued under an act ratified 3 February, 1869, and which came into the hands of the said former president, for the use and benefit of the company.

APPEAL from *Buxton, J.*, at Spring Term, 1872, of MOORE.

The indictment charged, in substance, that the defendant, A. J. Jones, "was heretofore president of the Western Railroad Company, and that on or about 18 January, 1872, one L. C. Jones was elected president, to succeed the said A. J. Jones as president, and that on 23 February, 1872, demand was made by the president and directors of said company upon the said A. J. Jones, that he should account with the president and directors of said company, who had been elected to succeed him, the said A. J. Jones, president, and the late directors of said company, and transfer to them forthwith all the moneys, books, papers, choses in action, property and effects belonging to the said company, and that the said A. J. Jones, etc., did refuse to ac-
(212) count for and transfer to the said president, etc., all the money, books, papers, choses in action, property and effects belonging to said company, for which he ought to have accounted and transferred to them, to-wit: certain coupon bonds of the State of North Carolina, which said bonds were delivered to the said A. J. Jones, president of the Western Railroad Company, on or about 22 June, 1859, by the Public Treasurer of the said State, in payment of the subscription made by the State of North Carolina to the capital stock of the said Western Railroad Company, amounting to about the sum of $1,264,-

NOTE.—Chap. 72, Laws 1870-'71, ratified 16 February, 1871:

SEC. 1. *The General Assembly of North Carolina do enact*, That the President and Directors of the several railroads of this State, and all persons acting under them, are hereby required, upon demand, to account with the President and Directors elected or appointed to succeed them, and shall transfer to them forthwith all the money, books, papers, choses in action, property and effects of every kind and description belonging to such company, and that a refusal or failure to account for and transfer all the money, books, papers, choses in action, property and effects, as herein required, shall be deemed a misdemeanor, and, upon conviction in any Superior Court of this State, shall be punished by imprisonment in the penitentiary of this State for not less than one or more than five years, and by fine, at the discretion of the Court.

983.42, which were received by the said A. J. Jones for the use and benefit of said company, and also certain money which had been at times received by the said Jones while president, for the use and benefit of the company; to the evil example, etc., and contrary to the statute in such case made and provided, and against the peace and dignity of the State."

Defendant pleaded not guilty.

In the case made out and sent to this Court by the Judge below, all the testimony is incorporated. A greater part of this testimony, which is very voluminous, is not important to be stated, under the view taken of the matter in the opinion of the Court.

It was proved that the defendant, as President of the Western Railroad Company, received from the State Treasury 132 special tax bonds with coupons attached, and running for thirty years. He also received $30,000 in cash, in payment of interest on these bonds. A demand was made by the president and directors for the bonds (special tax) issued for the benefit of the company, and "all other assets and effects of the Company." Defendant presented an account of $55,000; said he did not recognize the authority of the directors, but proposed to leave the account if they would allow it. The board refused to allow it. It was then withdrawn. He stated that the bonds had been (213) placed in the hands of brokers to be sold, and that only a portion had been sold. None of the bonds were returned to the Railroad Company or to the State Treasury.

The counsel for the defendant, among other prayers for special instructions, asked the Court to charge the jury:

That the act of 3 February, 1869, was no longer operative, having been repealed by an act ratified 8 March, 1870.

1. That the repealing act of 8 March, 1870, is valid, because the power of repeal was reserved to the Legislature by Art. VIII, sec. 1, of the Constitution.

2. If the repealing act of 8 March is not valid in consequence of the Legislature having no right to repeal, still the special tax bonds are not subjects to be accounted for by the defendant; because they are not named as such in the act of 16 February, 1871, under which the indictment is drawn, and because the act of 16 February, 1871, could not have these special tax bonds in view, as it was passed subsequently to the act of 5 February, 1870, being the act to restore the credit of the State, which required the return of these bonds to the State treasury.

3. If the repealing act of 1870 is valid, it affected all the special tax bonds authorized by the act of 3 February, 1869, to be delivered to the

Western Railroad Company, not only the $1,000,000 to pay the additional subscription, but also the $500,000 in bonds to be exchanged for second mortgage bonds, etc.

The Court charged, in response to this request, that whether the act of 8 March, 1870, was valid or not, it did not relieve the defendant from liability, under the act of 16 February, 1871, for what he may have received for the use of the Railroad Company. Compliance with the act, requiring a return of the bonds to the State treasury, would have
(214) relieved the defendant from liability, but such compliance is nowhere alleged or proved.

The Court was further of opinion, that, although the act of 16 February, 1871, did not mention coupon bonds *nominatim,* yet terms are used broad enough to embrace them, viz.: all money, books, papers, choses in action, property, and effects of every kind and description belonging to said company.

Many other requests for special instructions were made. There were also exceptions to the ruling of the Court upon questions of evidence. To set these out in full is not necessary.

The Judge, after an elaborate charge, concluded by saying: "Upon the whole, so far as the legal positions assumed by the defendant's counsel are concerned, the Court is of opinion, and so instructs the jury, that they are insufficient to shelter the defendant from legal liability under act of 16 February, 1871."

The jury returned a verdict of guilty; Rule for new trial; Rule discharged. There was a motion for *venire de novo,* which was also refused; Motion in arrest of judgment was overruled; Judgment and appeal by defendant.

Attorney-General, McRae, and *Battle & Son* for the State.
B. and *T. C. Fuller* for the defendant.

PEARSON, C. J. It is not enough that a man is guilty; his guilt must be proved according to the law of the land before he can be punished. This principle is set out in "the Declaration of Rights," as a sacred guaranty necessary for the protection of life and liberty.

The prisoner is indicted under the act of 16 February, 1871. The gravamen of the charge is, that as president of the road he received a million and a quarter of the bonds of the State, and on demand by his successor in office, failed to account for and transfer the said
(215) bonds. The prisoner has no doubt been guilty of a breach of his official duty; say, he squandered away these bonds—com-

mitted a devastavit, as the old books term it; say, if you choose, that he carried the bonds to the city of New York, and recklessly lost them at gaming tables—for which he deserves and has received the reprobation of all honest men; still, if the bonds are not embraced by the provisions and meaning of the statute under which he is indicted, his guilt has not been proved according to the law of the land.

We are of opinion, that the act of 16 February, 1871, does not embrace these bonds. The general words of the act are broad enough to include these bonds, and if the act stood by itself, such would be its construction; but there are two other acts that must be taken in connection with the act under consideration, and the matter is made clear by the forcible point of view in which it was presented by Mr. Fuller, on the argument.

Suppose the three acts to be set out in one statute: Sec. 1. It shall be the duty of the several presidents of railroads, who have received bonds of the State, to file before the Governor a statement on oath, showing the amount of the bonds received, what amount of the bonds have been sold or hypothecated, and what amount of the bonds remain on hand. And it shall be the duty of such president to return to the *Public Treasurer,* subject to the order of the governor, all of the bonds remaining on hand, and in case of neglect or refusal, such president shall be guilty of a felony, and on conviction, he shall be imprisoned in the State prison for not less than five years. Prosecutions under this act shall be in the Superior Court of Wake County. (Act 5 February, 1870.) Sec. 2. All acts passed at the last session of the Legislature, making appropriations to railroad companies, are hereby repealed, and all bonds of the State issued under said acts, now in the hands of any president, shall be immediately returned to the Treasurer. (Act 8 March, 1870.) Sec. 3. The presidents of the several railroads in this State are hereby required, upon demand, to account (216) with the presidents elected or appointed to succeed them, and shall transfer to such successors forthwith, "all the money, books papers, choses in action, property and effects of every kind and description, belonging to such company, and a refusal to account for and transfer all the money, books, etc., as herein required, shall be deemed a misdemeanor, and such president, upon conviction in any Superior Court of the State, shall be punished by imprisonment in the penitentiary of the State, for not less than one, or more than five years, and by fine, at the discretion of the Court. (Act 16 February, 1871.)

By the first two sections, the acts under which the special tax bonds (as they are termed) were issued, are repealed. The bonds are de-

clared to be worthless, and a requisition is made upon the presidents of the railroads having any of them on hand, immediately to return them to the Public Treasurer, on pain of imprisonment for not less than five years in the penitentiary.

By the third section, if it be construed to embrace "special tax bonds," the bonds are treated as things of value, belonging to the railroad company, and the outgoing presidents are required to account for and to transfer these bonds to their successors, on pain of imprisonment in the penitentiary not exceeding five years.

This construction makes the three acts inconsistent, and results in absurdity. How can a president of a railroad transfer to his successor in office the very same bonds which he is required to return to the Public Treasurer?

This absurdity is avoided by the construction that the acts of February, 1870, and March, 1870, dispose of the special tax bonds, and the act of February, 1871, has reference only to money, choses in action, property and effects belonging to the company, and remaining in the hands of a president, who has gone out of office, and refuses on
(217) demand to account for and transfer the same to his successors.

This must be so, unless we impute to the General Assembly an intention, "covertly," to repeal the acts 5 February, 1870, and 8 March, 1870, and by the use of general words in the act 16 February, 1871, to give to the special tax bonds a direction, as things of value belonging to the railroad company, different from the disposition which had been made of them by the two preceding acts, in which these bonds are specified *nominatim* and expressly. Had the intention been to repeal the two preceding acts, and to make a different provision in regard to the special tax bonds, it was easy to have said so, in direct words, and we are not at liberty to assume that it was the intention to effect the purpose by indirection. *S. v. Krebs,* 64 N. C., 604, is in point. *"General* words in a statute do not authorize an act to be done, which is expressly prohibited by a former statute; plain and positive words must be used." In that case, the defendant justified under a statute, allowing the corporation to sell land, etc., "in any manner or mode that the corporation shall deem best." It was held, these general words do not authorize sales by means of lotteries, that mode of selling being expressly prohibited by a former statute. *McAden v. Jenkins,* Appendix, 64 N. C., 800, is also directly in point. The Treasurer of the State was directed to deliver to the Wilmington and Rutherford Railroad Company $500,000 of the bonds of the company upon the surrender to him of "$500,000 of State bonds." Here the words were general; but

it is held that special tax bonds are not embraced by the provision and meaning of the act, as such bonds had been by previous legislation declared to be worthless and of no value. We rely upon these two cases, and "have nothing further to say than what has been already said." This disposes of the case, and entitles the prisoner to a *venire de novo.*

The bill of indictment, after charging the prisoner with a misdemeanor, in respect to the "one million two hundred and sixty-four thousand nine hundred and eighty-three dollars and eighty-two cents, of special tax bonds" adds "and also certain money which had been at divers times received by the said Andrew Jackson Jones, (218) while president of said company, for the use and benefit of said company."

It is evident, from the statement of the case sent up to this Court, that this little charge about the *money,* which the prisoner had received, was on the trial in the Court below run over and passed by, like a rabbit in a fox chase; neither the counsel nor the Judge, or the jury, seemed to have had this little money item of $55,000 in view. The whole field, men, horse and dogs were in hot pursuit and open cry of the $1,264,983.82, of bonds, the gravamen of the prosecution; so, in point of facts, as to the item of $55,000 in money the prisoner has never been tried. If allowed to look at the evidence, which his Honor has sent up for our perusal, we should say, the prisoner was ready and willing to account for the money that had come to his hands; in fact he tendered an account in respect to the money and exhibited his vouchers, showing a balance in his favor of some $3,000. It is evidence that the demand in regard to the bonds, which, as we have seen, the company had no right to make under the act of 1871, was the cause of the refusal by the company to accept and consider the account, which the prisoner tendered to the new president and directors, in respect to the money, and his vouchers for its expenditure. In this point of view his Honor ought to have left it to the jury to say, whether the prisoner was not ready and willing to account for the money received by him, apart from the special tax bonds; and whether the account and transfer in regard to the money, choses in action, property and effects of the company, would not have been effected, but for the claim on the part of the company in respect to the special tax bonds.

PER CURIAM. *Venire de novo.*

(219)

STATE v. FERGUSON, *et al.*

1. It is well settled, that if a Court issuing process has a general jurisdiction to issue such process, and the want of jurisdiction does not appear upon the face of the paper, a sheriff and his assistants may justify under it.
2. A civil action may be maintained against a Justice who acts without his jurisdiction, and also if he acts irregularly and oppressively; but he is not liable for a mere mistake, or error of judgment. To maintain a criminal action against a Justice of the Peace, it must be alleged and shown that he acted without his jurisdiction, or corruptly, and with a criminal intent, or at least maliciously and without probable cause.
3. A person who acts in good faith, and makes a lawful application to a Justice of the Peace for relief within his jurisdiction, can not be held criminally responsible for any irregularities in the proceedings before the said Justice.

INDICTMENT for forcible trespass, tried before *Mitchell, J.*, at Spring Term, 1872, of WILKES.

It was in evidence, that on 26 February, 1872, the defendants went to the house of the prosecutor and put him and his family out of possession, and against his will. The defendant Ferguson was the sheriff. Jennings was a deputy. Powers and Hampton were summoned to assist. Peden was the plaintiff in an action before the Justice of the Peace, under the landlord and tenant act. Foster was the Justice of the Peace, and was not present at the time of the eviction.

The defendants justified under process, and showed an execution issued by Foster, Justice of the Peace, and directed to the Sheriff commanding him to put Peden into possession of the lands on which the prosecutor lived.

The State insisted that the process was void, and was no protection to the defendants, and offered in evidence a record of the proceedings, trial, verdict, orders, entries, etc., of the Justice of the Peace,
(220) and examined Foster as a witness. The following is a summary of the proceedings:

"Motion to quash, on the ground of a want of legal notice. Motion overruled. Defendant demanded a jury, which was granted, and a jury summoned. Motion to dismiss, for that Peden was not the agent of Mrs. King. Motion overruled, and adjudged that he was agent. Jury were impaneled, who say that they find in favor of the defendant. The jury dispersed; afterwards were called back, and the following was added to the verdict: By defendant giving security for the rents of the year 1871, and on his failure to give security in fifteen days,

execution to issue for the possession of the premises described in the affidavit. Plaintiff asked for an appeal, which was granted. Afterwards, 24 February, 1871, the following order was made, viz: Defendant failing to give security, plaintiff declines to appeal, and asks for judgment and possession of the premises described, which is granted. The prosecutor was not present when this order was made, and he had no notice before."

The Justice of the Peace issued the process on 24 February, 1871, deputy sheriff went to prosecutor's house on that day, and informed him that he had the writ, and asked him to vacate the premises. He refused to do so, and forbade the sheriff from evicting him. On 26 February, the sheriff, with other defendants, except Foster, who was not present, went to the house of the prosecutor and turned him out. The sheriff returned the process "executed." Peden was present, but gave no assistance.

Under the direction of the Court, a verdict was entered for the State, the Judge reserving the questions of law. Afterwards, upon consideration, the verdict was set aside, and a verdict of not guilty entered, and the State appealed.

Attorney-General, Battle & Son for the State.
Armfield for defendants.

RODMAN, J. This is an indictment for a forcible trespass, by turning the prosecutor out of his house, against the Sheriff, his (221) deputy, and several persons summoned by the Sheriff to his aid, and also against Peden, the plaintiff in the execution under which the Sheriff acted, and Foster, the Justice who issued the execution. Foster was not present at the eviction. Peden, it is said was present, "but gave no assistance;" from which we must understand that he did not take possession of the premises, from which the prosecutor was evicted.

The case of the Sheriff and his deputy and assistants stands on a different ground from that of the Justice and the plaintiff in this execution, and they must be considered separately.

1. *As to the Sheriff.* The law is well settled, that if the Court issuing the process had a general jurisdiction to issue such process, and the want of jurisdiction in the particular case did not appear on the process, the Sheriff may justify under it. *Phillips v. Biron,* 1 Strange, 509; *Parsons v. Loyd,* 2 Wm. Bl., 846; *S. v. Weed,* 2 Heard Lead. Cr.

Cas., 202 and notes; *Welch v. Scott,* 27 N. C., 72; *S. v. McDonald,* 14 N. C., 468; *S. v. Mann,* 27 N. C., 45; *Haskins v. Young,* 19 N. C., 527.

2. *It is equally clear that the assistants,* summoned by the Sheriff, can justify in like manner with him. In *Grant v. Blogge,* 3 East, 128, it was said on the argument, that Willis, C. J., had doubted of this. But Lord Ellenborough said there was no authority to warrant a doubt.

In this case, the Justice, under the Landlord and Tenant Act (1868-'69, ch. 156) had jurisdiction, under proper circumstances, to issue an execution like that pleaded. There was nothing on the face of the process to inform the Sheriff that the Justice had acted irregularly. The Sheriff was not bound to look beyond his process, and we think he was justified in obeying it.

If the action had been a civil one for the trespass, and the Sheriff had joined in pleas with parties who could not have availed themselves of his peculiar defense, the plea, being bad as to them, would (222) have been bad as to him also. But on an indictment, the plea of each defendant is several, and each is entitled to any defense he can set up under it. We concur with the Judge as to these defendants.

3. *As to the Magistrate.* A civil action may be maintained against a Justice who acts without his jurisdiction. *Cave v. Mountain,* 39 E. C. L., 432 (1 M. & G.), 42; *Ib.,* 825 (12 B. 889); *Ib.,* 2 Q. B. 600, 47; *Ib.,* 100 (1 C. & K. 100). And also if he acts irregularly and oppressively, as if he issues a warrant for an assault, not *super visum,* and not complained of on oath, before him. *Welch v. Scott, ubi, sup.* But he is not liable for a mere mistake or error of judgment. 1 East., 563, note.

To maintain a criminal action, it must be alleged and shown that he acted without his jurisdiction, or corruptly and with a criminal intent, or at least maliciously and without probable cause. *S. v. Zachary,* 44 N. C., 432; *Rex v. Barron,* 3 B. and Ald., 432; *Fentiman, ex parte,* 2 A. and E. 127 (29 E. C. L. R.).

There is no such allegation or proof in this case.

4. *As to the Plaintiff Peden,* we have had more doubt, and have found no authority directly bearing on his case. Our reasoning is this: It is true he set in motion the proceeding which terminated in the illegal eviction of the prosecutor, but it is not alleged or proved that he did it maliciously, or with the intent to procure an illegal eviction. For aught that appears, he made a lawful application to the Justice for a relief within his jurisdiction. The subsequent irregularities were the act of the Justice, over which the plaintiff had no control, and for which he is not responsible. He was present at the eviction, but gave no aid. If the proceeding had been regular, as he may have supposed it was, he

had a right to be present and receive possession. We think he also was not guilty.

PER CURIAM. Affirmed.

(223)

E. NYE HUTCHINSON *et al.* v. B. B. ROBERTS *et al.*

1. Proceedings to effect a settlement of an estate against an executor must be commenced before the Probate Court.
2. Where the *primary* subject matter and the parties do not make a case to be commenced in the Superior Court, a change of jurisdiction can not be effected by an averment, that the judgment demanded in behalf of *all* the plaintiffs against both defendants, is "preliminary and auxiliary" to the judgment sought in behalf of *three* of the plaintiffs against *one* of the defendants.
3. In a civil action, in the nature of a bill in equity, for an account and settlement of a trust estate, in behalf of three *feme* plaintiffs, it is a misjoinder to make other plaintiffs, who are not embraced by the trust; and likewise a misjoinder, to make one a defendant who has no concern with the management of the trust fund.

APPEAL from *Logan, J.*, at Spring Term, 1872, of MECKLENBURG.

The plaintiffs allege, that Joel H. Jenkins died in the county of Rowan in 1859, having made and published his last will and testament, which was admitted to probate in 1860, and that the defendants, Roberts and Davis, were appointed and qualified as executors:

That at his death the testator left several children—Elizabeth, who intermarried with plaintiff Hutchison; Ella, who intermarried with plaintiff Burwell; Sarah, who intermarried with J. H. McAden; Charlotte, John H., and Thomas.

The plaintiff, Brown, was appointed guardian of John and Thomas. That Thomas died unmarried and A. Burwell is his administrator, and that Charlotte has no guardian and sues by her next friend, A. Burwell;

That, by said will, the testator devised and bequeathed to his wife certain real and personal estate absolutely, certain other real estate to her for life, remainder to his children to be equally di- (224) vided between them, with legacies of $6,000 to each of the children, except Elizabeth and Ella, if Mrs. Cowan's will was established;

That testator's wife is dead:

That he died seized and possessed of a large real and personal estate, estimated at $250,000, and consisting of town lots, lands in Rowan and Iredell counties, and valuable land in Arkansas, a number of solvent notes, exceeding in amount $100,000, slaves in this State and Arkansas, railroad bonds, stock in the North Carolina Railroad Company, Florida

bonds, etc., all of which passed into the hands of the defendants Roberts and Davis, executors aforesaid;

That according to the best information and belief of plaintiffs, the estate was worth $150,000, after payment of debts;

That defendants have made no return of the estate, except an inventory at May Term, 1860, nor of the condition of said estate, until very recently, and then only under the compulsion of legal proceedings;

That by the terms of the will the estate bequeathed to the *feme* plaintiffs is directed to be vested in the defendant Roberts as trustee, upon trust to hold the same for the sole and separate use of the *feme* plaintiffs, but that said Roberts, up to the commencement of this action, has not, to the knowledge of plaintiffs, accepted the said trust, but, on the contrary, has failed and neglected to procure a settlement between himself and Davis, as executor aforesaid, or to cause the property to be conveyed to him as trustee under the will; that plaintiffs have reason to believe, and charge that a conspiracy has been entered into between the defendants Roberts and Davis to defraud the plaintiffs;

That plaintiffs have frequently called upon the defendants, and especially the defendant Roberts, as the trustuee named in the said will, to come to a fair and just settlement with them, touching their rights and interests under the said will, and to convert and pay
(225) over to them the said estate in their hands, but the defendants have refused to comply with said request unless plaintiffs would accept a large proportion of the amount due to them, in Confederate bonds and notes and other worthless securities.

Complaint charges, that the defendants have mismanaged the Arkansas lands, in not collecting rents, etc., and that they received payment since July, 1863, in Confederate money, of well-secured notes; that neither of the defendants are worth more than $25,000, and are not able to pay such judgment as plaintiffs are entitled to and must recover in this action.

Wherefore they demand judgment: That as preliminary and ancillary to the relief sought in behalf of the *feme* plaintiffs, an account may be taken, by and under the direction of this Court, of all the estate, real and personal, which has, or ought to have come into the hands or under the control of the defendants as executors, and of their disposition thereof, and also an account of what estate, if any, has come, or ought to have come, into the hands of the defendant, Roberts, as trustee, etc.

That the trusteeship be declared vacant, and that some suitable person be appointed trustee in the place of Roberts, to receive such estate as may be due the *feme* plaintiffs under the will, and the defendant be

required to make an assignment of the stock to the said trustee, with apt words to create a separate use for the benefit of such *feme* plaintiffs.

There is also a prayer that defendants pay to the trustee appointed such part of the estate as may be ascertained to be due, under pain of contempt, and to the other plaintiffs, Brown as guardian and Burwell as administrator, and to the guardian who may be appointed for Charlotte Jenkins, such part of the estate as may be due them. There is also a prayer for a receiver.

To this complaint defendants demurred and assigned as grounds of demurrer:

1. That this Court has no jurisdiction of the persons of defendants. (226)

2. That this Court has no jurisdiction of the subjects of this suit.

Upon argument his Honor sustained the demurrer and gave judgment accordingly. Plaintiffs appealed to the Supreme Court.

Bynum and *Bailey* for plaintiffs.

J. H. Wison and *J. M. McCorkle* for defendants.

PEARSON, C. J. It is manifest by a perusal of the complaint, that the primary and all-important thing which must be done in the first instance, before the other matter in respect to the trustee for the *femes* plaintiff can be dealt with, is to have an account and settlement of the estate of the testator; for this purpose all of the proper parties are joined, and the only difficulty is that the proceeding was commenced before the Judge of the Superior Court in term time, and not before the Judge of Probate; so the proceeding is *coram non judice*. This is settled. *Hunt v. Sneed*, 64 N. C. 176; *Sprinkle v. Hutchinson*, 66 N. C., 450. To meet this difficulty the plaintiffs demand judgment, "that as *preliminary and ancillary to the relief sought in behalf of the femes plaintiff*, an account may be taken of all the real and personal estate of the testator, which has, or ought to have, come into the hands of the defendants, as executors," etc.

Calling this demand for judgment, that the defendants, as executors, account for all the estate of the testator, *"preliminary and ancillary* to the relief sought in behalf of the *femes* plaintiff," does not make it ancillary and a mere incident. A matter arising collaterally in the progress of a case properly constituted for an account and settlement of a trust fund, in behalf of the three *femes* plaintiff, when it is perfectly evident that the first thing to be done is to have a settlement of

(227) the whole estate. See *Sprinkle v. Hutchinson,* 66 N. C., 450.

The relief sought in behalf of the *femes* plaintiff can not be had, until there is a trust fund ascertained and set apart for them. There has been no settlement of the estate by the two executors, and no assent by them to the several legacies and devises.

Treating this as a civil action, in the nature of an original bill in equity, for an account and settlement of a trust fund in behalf of the three *femes* plaintiff, there is a misjoinder in respect to the other three plaintiffs who are not embraced by the trust, and there is also a misjoinder in respect to the defendant Davis, who has no concern with the management of the trust fund. In short, the subject matter and the parties make a case for the Judge of Probate.

The *primary* subject matter and the parties do not make a case to be commenced in the Superior Court. A change of jurisdiction can not be effected by an averment, that the judgment demanded in behalf of *all* of the plaintiffs against *both* of the defendants, is "preliminary and ancillary" to the judgment sought in behalf of *three* of the plaintiffs against *one* of the defendants. See *Froelich v. Express Company, ante* 1.

PER CURIAM. Affirmed.

(228)

R. F. DAVIDSON, Trustee, etc., v. JAMES H. ELMS.

Under the C. C. P., one who holds a note as trustee of an "express trust," may bring an action upon it in his own name, with or without joining the *cestui que trust.*

An objection for want of proper parties should be taken by demurrer. C. C. P. S., 95.

APPEAL from *Henry, J.,* at Special Term, January, 1872, from MECKLENBURG.

The action was brought in the name of R. F. Davidson, trustee, to the use of Allison. The note upon which it is founded is fully set out, with the endorsement thereon, in the opinion of the Court.

The case was tried before a Justice of the Peace and testimony was introduced by each party upon the merits. Judgment was rendered for the plaintiff, and defendant appealed to the Superior Court.

When the case was called in the Superior Court, the defendant moved to dismiss for want of proper parties. The motion was sustained and the suit dismissed. Plaintiff appealed to the Supreme Court.

J. H. Wilson for plaintiff.

C. Dowd for defendant.

BOYDEN, J. This was a civil action commenced before a Justice of the Peace, upon a bond, in the following words and figures:

"On or before 1 June next, we promise to pay Allison and Daniels, $125, value received, for hire of negro boy, Sam. I further promise to give him the usual clothing, say one winter suit, hat, blanket, etc., 1 January, 1858." Upon the back of this bond is the following (229) endorsement: "Pay to R. F. Davidson, trustee for John R. Daniels, for Allison & Daniels."

This being a civil action, commenced before a Justice of the Peace, it is unnecessary to enquire, whether under our former system of pleading this action could be sustained in its present form. Sec. 57, C. C. P., provides that in such a case as this, the trustee may sue in his own name. But it is not necessary to discuss this question further, for *Mebane v. Mebane,* 66 N. C., 334, cited for the plaintiff, decides the very question now under consideration. It is proper further to remark, that the Court ought not to have dismissed the suit, as the objection if available should have been taken by demurrer, sec. 95, C. C. P. A party can not be permitted to lie by, and permit a judgment to be rendered against him before a Justice of the Peace without making an objection, take an appeal to the Superior Court, and then when the case is about to be tried, for the first time take the objection that the suit is in the name of the wrong party. By such conduct, the defendant will be considered as having waived the objection. But, however that may be, the objection could not have availed the defendant, if taken in apt time, for the reason that the suit was properly constituted.

PER CURIAM. Reversed.

Cited: Love v. Johnson, 72 N. C., 420; *Wilson v. Pearson,* 102 N. C., 314.

(230)

JAMES B. BAIRD *et al. v.* JACK HALL.

1. A collecting officer or agent, without instructions to the contrary, is authorized to receive, in payment of such debts as he may have to collect, whatever kind of currency is received by prudent business men for similar purposes, and whatever an officer is authorized to receive, a debtor is authorized to pay.

2. When, therefore, a Clerk and Master, in 1863 received Confederate currency in payment of the purchase money due for lands sold in 1858, it is to be determined upon the principle above stated, whether the money should have been taken or not. If not, the Master is responsible for the value of the currency, and the purchaser entitled to a credit *pro tanto,* and in a proceeding against him, to collect the money or sell the land, the Master should be made a party.

3. Where instructions are given, or the parties interested assent to the payment of Confederate money to the Master, he and the purchaser are released from any liability therefor.

4. When the widow and heirs at law unite in a petition to sell the lands descended, she electing to take the value of her dower in money, and she becomes the purchaser and resells to a third person; *it was held*, that, in a proceeding against the second purchaser to collect the money or resell the land, he is entitled to a credit for the value of the dower, and likewise for the value of the shares of any one or more of the heirs at law who were capable of assenting, and did assent to payment in Confederate currency.

ACTION to subject real estate in the hands of a second purchaser, to the payment of the purchase money due on a Clerk and master's sale. Appeal from *Cloud, J.*, Fall Term, 1871, of ROWAN.

Plaintiffs allege, that they are the heirs-at-law of one Horace Baird who died in the county of Rowan, in the year 1858, seized of a large real estate; that they, in connection with the widow of the deceased, filed a bill for the sale for partition of said lands; that a decree was made in 1858, directing a sale of the same; that the real estate (231) was sold by the Clerk and Master, one Luke Blackmer, and the widow became the purchaser, for the aggregate sum of $5,710; that the Master in September, 1863, made a deed for the said real estate to the purchaser, Mrs. Baird, who subsequently sold the same to the defendant Hall, and that no part of the purchase money has been paid.

The complaint demands judgment, that the defendant be ordered to convey the land to the plaintiff, or that the same be sold and the proceeds applied to the payment of the purchase money, etc.

The defendant, in his answer, admits the filing of the bill, the decree, sale, and purchase by Mrs. Baird, but alleges, by way of defense, that in February, 1863, Mrs. Baird, by her agent, Luke Blackmer, contracted in writing to sell to him, as of January, 1863, the most valuable part of the real estate, for the sum of $10,000 in Confederate money; that he paid to the said Mrs. Baird, on 25 February, 1863, through her agent Blackmer, the said sum of $10,000 in Confederate money, and took from her a written undertaking to make title as soon as a survey could be made; that on 15 September, 1863, Mrs. Baird agreed in writing to sell him the remainder of the real estate, for the sum of $5,000 in Confederate money; that he subsequently paid the money to Mrs. Baird, and took a deed for the whole of the land on 21 October, 1863; that the Clerk and Master did make to Mrs. Baird a deed for the real estate in September, 1863, but that it was not the first deed;

that shortly after the payment of the $10,000, the said Clerk and Master made a deed to Mrs. Baird, and she conveyed to the defendant, but that afterwards, and after receiving the balance of the purchase mony from Mrs. Baird, the Clerk and Master made a deed to her including *all* the real estate purchased, which she then conveyed to him.

Defendant alleges, that he paid Luke Blackmer, Clerk and Master in Equity, and the agent of Mrs. Baird, the sum of $15,000 in Confederate money; that $10,000 was paid in February, and (232) the remainder in September and October, 1863. Defendant insists that it was a valid payment, and as such was accepted and received by Blackmer, Clerk and Master.

Defendant insists, that he has a right to be substituted to the rights of Mrs. Baird; that she and the other plaintiffs, who were of age, assented fully to the receipt of the Confederate money by Blackmer, and that, in any event, he is entitled to the value of the Confederate money *paid.*

At Fall Term, 1871, several issues were submitted to the jury, under the direction of the presiding Judge. The most material of said issues are:

1. Did L. Blackmer act as the agent of Mrs. Baird, in the sale of her interests in the lands, to the defendant Hall?

2. Did Blackmer apply the money received from Hall to the payment of Mrs. B's bid, and if so, did he act as her agent in so doing?

3. Did any of the heirs-at-law of Horace Baird assent to, or concur, in the sale of the land by Mrs. B. to Hall, and Hall's payment of the bid in Confederate money?

The jury found affirmatively on each issue submitted. There was a motion for a new trial on account of some irregularity in receiving the verdict. The motion was overruled, and plaintiffs appealed.

Jones & Johnston for the plaintiffs.
Blackmer & McCorkle, and *Clement* for the defendant.

READE, J. It appears that the widow, Mrs. M. L. Baird, authorized the Clerk and Master, Blackmer, to receive Confederate money in payment for the land sold by him.

Any alleged claim of hers therefore, against the defendant, may be put out of the question. It also appears that there are others of the plaintiffs, who also authorized the Clerk and Master to receive the Confederate money. Their claim also may be put out of the question; for having once assented, they cannot be heard now to ob- (233)

ject. But it is to be inferred from the finding of the jury, that there are others of the plaintiffs who did not *assent,* although it does not appear that they made any *objection.* Whether, as to them, the payment was good, depends upon the question, whether prudent business men, in that locality, would have received *such* money in satisfaction of *such a debt.* For, without instruction to the contrary, a collecting officer, or agent, is authorized to receive whatever kind of money is generally received by prudent business men, in payment of *such* debts as he has to collect. *Atkins v. Money,* 61 N. C., 31. And of course, whatever the officer Blackmer was authorized to *receive,* the defendant was authorized to *pay.* If the Clerk and Master was not authorized to receive the money because of its depreciation, then, as to such as did not assent, it was a *part payment* only, to the *value* of the Confederate money paid, and the Clerk and Master was liable for that *value,* and the defendant was still liable for the balance. This was the rule established in *Emerson v. Mallett,* 62 N. C., 234, as the most equitable and convenient under the circumstances.

As the case is now presented, the defendant is entitled to have it enquired, whether on 26 February, 1863, when he paid the money to the Clerk and Master, Confederate money was generally received by prudent business men, in payment of such debts as the Clerk and Master had to collect. If that is answered in the affirmative, then, he has paid the debt, and is not liable at all to any body. If answered in the negative, then, he is entitled to the enquiry, what was the *value* of the Confederate money which he paid; which enquiry may be answered by the Legislative scale; and then, treating it as a part payment for so much, he will be liable for the balance. But still, he will be entitled to have it enquired, what is the widow's share of the proceeds of the sale, in lieu of her dower; and he will be entitled to be allowed that. And so (234) he will be entitled to have it enquired, who among the plaintiff's assented to the payment; and then, as to them, the payment will be in full, so that his liability, in any event, can only be to those who did not assent; and, as to them, only for the balance after allowing him the *value* of the Confederate money.

It must also be considered, that whatever amount the defendant has to pay to remove the equitable incumbrance on the land which the plaintiff Margaret L. Baird sold him, in that amount she becomes indebted to him; and he has an equitable lien upon her interest in the funds, in the hands of the Clerk and Master, which has not been paid over to her. And he would be entitled to an order to have that interest applied in liquidation of any balance which may be found against him,

if any. It will be seen, therefore, that as we said in *Emerson v. Mallett, supra,* the Clerk and Master ought to be a party: for in the event that it appear that he was authorized to receive Confederate money, then, the defendant will be discharged altogether and he alone will be liable to the plaintiffs. And in the event he was not authorized to receive it, still, it was a payment to the amount of its *value,* and he is liable to the plaintiffs for that. And so, he is liable to the defendant for the widow's interest now in his hands, in the event that the defendant has anything to pay, to remove the encumbrance upon the land which she sold him.

From what we have said, it will be seen, that it is impossible for us to give any judgment which will fully adjust the rights of the parties, because sufficient facts are not found to enable us to do so. We have, however, endeavored to declare their rights in different aspects, to meet any state of facts which seems to us to be probable.

Judgment will be reversed, and a *venire de novo,* to the end that the Clerk and Master may be made party defendant, and there may be such issues as are suggested, and such as the law allows.

PER CURIAM. *Venire de novo.*

Cited: *Purvis v. Jackson,* 69 N. C., 481.

(235)

C. F. WATSON v. C. C. and W. H. SHIELDS.

1. Under the C. C. P., sec. 133, a Judge may, in his discretion, and upon such terms as he may think just, at any time within a year after notice, relieve a party from a judgment order, or other proceedings taken against him, by mistake, inadvertence, surprise, or other excusable neglect
2. Under the new Constitution, application to a Judge is the more appropriate remedy, as he finds the facts and the Supreme Court only reviews his legal conclusions; whereas, in applications for *certiorari* the Court must find the facts. And although it may not come within the prohibition that the "Supreme Court shall not try issues of fact," yet the Court prefers not to try "questions of fact," as contra distinguished from "issues of fact," when it can be avoided.

APPLICATION for *certiorari,* made at January Term, 1872, of the SUPREME COURT.

The petition of plaintiff stated, that a certain civil action had been brought by him against the defendants, in Halifax Superior Court, in which said action he sought to cancel, upon the ground of fraud, among other things, a certain deed made by himself to one of the defendants,

C. C. Shield, and a deed made by him to the other defendant, W. H. Shield. That action was tried in Halifax Superior Court, at a special Term, in December, 1871, before his Honor S. W. Watts, and that the jury did "find, that the deeds above mentioned be set aside and that plaintiff pay to the defendant the sum of $165 and interest, being the purchase money paid by said defendant;" that the petitioner thereupon, through his counsel, prayed judgment that an account be taken of the rents, etc., during the possession of the defendant. That the Court declared a purpose to order such account, and to that end a judgment or decree was prepared by petitioner's counsel, and was sent to his Honor S. W. Watts, for his signature. That about a week after the Court, a letter was written by the Judge to the Clerk, directing (236) him to enter up judgment for canceling the deeds, reconveying, etc., but refusing the order for an account. That petitioner's counsel was not informed of the decision of his Honor in time to appeal therefrom, and not of the refusal of his Honor to approve and sign the judgment or decree as proposed by his counsel until 10 February, 1872.

The defendants filed an answer to the petition, setting out a statement of facts very different from that made by petitioner. They alleged that petitioner, through his counsel, had notice of the formal judgment signed and filed by his Honor in time to take an appeal to the Supreme Court. The defendants further alleged, that the petitioner "allowed the time in which to appeal to pass away, through the hope and purpose of being able to induce the Judge, through his counsel, to revoke, alter or add to his first judgment." That the verdict of the jury, etc., did not, or would not, authorize the judgment claimed by the defendants, etc.

Upon the petition and answer, and after argument, the Court ordered the petition to be dismissed.

Clark & Mullen, and *Busbee & Busbee* for petitioner.
Moore & Gatling for defendants.

READE, J. The C. C. P., sec. 133, authorizes a Judge to "relieve a party from a judgment, order, or other proceedings taken against him through his mistake, inadvertence, surprise, or excusable neglect," etc. And upon application for such relief, the Judge finds the facts, and grants, or refuses the motion, and from his judgment an appeal lies by either party. This is much more convenient, expeditious, and less expensive than an application to the Supreme Court for a *certiorari,* as a substitute for an appeal. Under our new Constitution, it is much the

more appropriate remedy, as the Judge below finds the facts, and we only review his legal conclusions; whereas, in applications for *certiorari* we have to find the facts, and although it may not be within the provision, that we shall try no "issue" of fact; yet we prefer not (237) to try, when it can be avoided, any *"question"* of fact, as contradistinguished from an *issue* of fact.

In this case the facts are seriously disputed, and we think the petitioner ought to proceed by an application to the Judge below, under C. C. P., sec. 133.

Motion for *certiorari* refused.

PER CURIAM. Petition dismissed.

SAMUEL WOODLEY v. H. A. GILLIAM.

1. In the absence of fraud, the irregularity of a marshal in selling land under execution without due advertisement, although it might expose him to an action at the suit of the party injured, does not vitiate the sale.
2. Where executions, issued from different courts, are placed in the hands of different officers, and under these executions, giving equal power, the same land is levied upon, and sold by each one of those officers: *Held*, that the first sale passes the title of the defendant in the execution.
3. The priority of the lien of executions, as between creditors, is of no moment as respects the title of a purchaser. Such matters only govern the application of the proceeds of the sale.

APPEAL from *Watts, J.*, at Spring Term, 1872, of WASHINGTON.

Plaintiff declared for two tracts of land in possession of the defendant, and formerly the property of Charles Pettigrew. (238)

At February Term, 1869, plaintiff obtained judgment in Tyrrell Superior Court against Charles Pettigrew, and took a transcript of said judgment, and docketed it in Washington County, 5 February, 1869. Upon this judgment execution was issued to the Sheriff of Washington County, who sold said land on 1 May, 1869.

At Fall Term, 1868, of the Circuit Court of the United States, Williams, Bee & Co. obtained judgment against Pettigrew, and execution was issued to the Marshal, returnable to June Term, 1869, of said Court. This execution was levied 30 March, 1869. The Marshal and Sheriff sold the land on the same day, but the Marshal's sale was made first. The Marshal did not advertise thirty days, and did not go into the county of Washington until after the plaintiff's judgment was docketed.

Upon this statement of facts, judgment was rendered for the defendant, from which plaintiff appealed to the Supreme Court.

No counsel for plaintiff.

Smith & Strong for the defendant.

RODMAN, J. By the Act of Congress of 29 September, 1789, 1 Stat., 93 (Brightly Dig. U. S. Stat. 793, note b.), it was enacted that the forms of writs and executions from the Courts of the United States should be the same as were *then* used or allowed in the Courts of the States respectively. This provision was continued by the Act of 1792, 1 Stat. 275, 5, 2. (Brightly, *ubi sup.*)

Upon these Acts it has been held, that executions from a Court of the United States have not the form only, but also the force and *effect* of a similar execution from a Court of the State. *Koning v. Bayard,* 2 Paine, C. C., 252; *Bank v. Halstead,* 10 Wheat., 51; *Hurst v.* (239) *Hurst,* 2 Wash., C. C., 69; *Coughlan v. White,* 66 N. C., 102.

The practice of the State Courts in respect to the lien of an execution, has been altered by C. C. P.; but that of the United States Courts continues as it was in 1789.

As in this State lands were made liable to sale under *fi. fa.,* by 5 Geo. II, ch. 7, re-enacted in 1777 (Rev. Code, ch. 115, sec. 29), (Rev. Code, ch. 45, sec. 1), it can not be doubted that the *fi. fa.* from the Circuit Court gave to the Marshal equal power with what the Sheriff had under the *fi. fa.* from the State Court. See *Bell v. Hill.,* 2 N. C., 72.

The title of a defendant in execution passes to the purchaser by the sale, and from the time of the sale. It is of no importance at what time afterwards the deed is made, as the deed is merely evidence of the sale, and relates back to it. *Dobson v. Murphy,* 18 N. C., 586; *Davidson v. Frew,* 14 N. C., 3; *Picket v. Picket, Ib.,* 6; *Hoke v. Henderson, Ib.,* 12.

In the absence of fraud, the irregularity of the Marshal in selling without due advertisement, although it might expose him to an action at the suit of the party injured, would not vitiate a sale otherwise good. *Blount v. Mitchell,* 1 N. C., 131; *Brodie v. Sitgreaves,* 3 N. C., 144; *Mordecai v. Speight,* 14 N. C., 428; *Avery v. Rose,* 15 N. C., 549; *Reid v. Largent,* 49 N. C., 454; *Brooks v. Ratcliff,* 33 N. C., 321.

If, therefore, at the time of the sale by the marshal, there had been no execution in the hands of the sheriff, it could not be doubted that the sale by the marshal passed the title of the defendant in the execution, to the purchaser. Upon what principle or reason can it be maintained, that the holding by the sheriff of a power to sell, upon which he *afterwards* acted, can defeat the previous execution of a similar power? At the time of the sale by the sheriff, the estate of the defendant in execution had passed out of him, and nothing remained for the sheriff to

make sale of. In substance, it is just as if the owner himself had previously made a valid sale of his estate.

In the case of personal estate, where it has been levied on by one officer who does not take, or abandon the possession, a sale (240) by another, who afterwards seizes the property, is valid. *Barham v. Massey,* 27 N. C., 192, *Mangum v. Hamlet,* 30 N. C., 44.

But we think, that if it be conceded, as it must be, that the power of the marshall to sell was equal to that of the sheriff, the question of the title of the puchaser is conclusively settled by the case of *Ricks v. Blount,* 15 N. C., 128, where the subject is fully and ably discussed.

It will be seen from that case, that as respects the title of the purchaser, the priority of lien of the several creditors between each other is of no moment. Such matters would only govern the application of the proceeds of the sale, as they did in *Coughlan v. White,* 66 N. C., 102.

PER CURIAM. Affirmed.

Cited: Cowles v. Coffey, 88 N. C., 343; *McArtan v. McLaughlin, Ib.,* 394; *Burton v. Spiers,* 92 N. C., 508; *Alsop v. Moseley,* 104 N. C., 65; *Hooker v. Nichols,* 116 N. C., 159.

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OATES, WILLIAMS & CO. v. THOMAS W. KENDALL.

1. The distinction between forms of action having been abolished by the Constitution, it would defeat the purpose of that provision if a party were allowed to avail himself of an objection, founded upon such distinctions.
2. Therefore, when a plaintiff, in his complaint, alleged and set out a case in trover, and the proof showed that it should have been in the nature of an assumpsit for money had and received, *it was held,* that the plaintiff was entitled to recover, notwithstanding the variance.
3. When a witness for the plaintiff spoke of a compromise, which was in writing, of a lawsuit between the plaintiff and a third person, in regard to certain cotton in controversy, it was not erroneous to permit the witness, without producing the written agreement, to state that in the compromise the cotton was turned over to the plaintiff; that matter being wholly collateral and between other parties, and one in which defendant had no interest.

APPEAL from *Henry, J.,* at Special Term of MECKLENBURG.

The complaint alleged that plaintiffs were lawfully possessed of eighteen bales of cotton, and that on or about the — day of ————,

1866, the defendant unlawfully converted it to his own use, to their damage $25,000.

Defendant in his answer denied all the allegations in the complaint.

It was in evidence that in 1862, defendant sold to Parker and Hancock eighteen bales of cotton, which was paid for and delivered. The cotton was to remain in defendant's possession, but he was not to be responsible for it. Parker and Hancock sold to Davis in 1863, he sold to plaintiffs, and in 1863, or 1864, they sold to Overby. During these transactions and up to the end of the war, the cotton remained in defendant's possession. In 1865, the cotton was *raided* upon, and all carried off except five or six bales. Defendant apprehending that all (242) of the cotton would be carried off, sold the remainder in 1866.

One of the plaintiffs testified that Overby brought suit against them for the cotton in controversy, and that the compromise was in writing. Defendant's counsel objected to witness speaking of the compromise unless the writing was produced. The Court admitted the testimony; and witness stated that Overby, after the compromise, turned over his claim in the cotton to them, whereby they became the owners. Defendant's counsel asked the Court to charge the jury, that as the action was brought for the wrongful conversion of the cotton, and the testimony showed that plaintiffs were not the owners when the conversion took place, they could not sustain the action. The instructions were refused. Verdict for the plaintiffs. Judgment and appeal.

C. Dowd for plaintiff.

J. H. Wilson for defendant.

BOYDEN, J. In this case it is contended, that the plaintiff can not recover, for the reason that although this is a civil action, it is in the nature of an action of trover, and that at the time of the alleged conversion, the plaintiff was not the owner of the cotton alleged to have been converted. It is true, that to sustain an action of trover, according to the principles of the common law, the plaintiff must, as a general rule, be the owner of the property at the time of the alleged conversion, so that if this had been an action of trover, under our former system of pleading, the plaintiff could not recover; but this being a civil action, sec. 249, of the C. C. P., provides "that the relief granted to the plaintiff if there be no answer, can not exceed that which shall be demanded in his complaint; but in any other case, the Court may grant him any relief consistent with the case made by the complaint, and embraced within the issues." And sec. 132, of the C. C. P., provides, "The Court may, before, and the Judge may, after judgment, in furtherance

of justice, and in such terms as may be proper, amend any plead- (243)
ing process, or proceeding, by adding or striking out, the name of any party; or by correcting a mistake in the name of a party, or a mistake in any other respect; or by inserting other allegations material to the case; or when the amendment does not change substantially the claim or defense; by confirming the pleading or proceeding to the facts proved."

In *Ballard v. Johnson,* 65 N. C., 436, the Chief Justice, in delivering the opinion of the Court in that case, remarks that "it is the object of sec. 132 of C. C. P., and numerous other provisions of the C. C. P., to show that its purpose is to prevent actions from being defeated on grounds that do not affect the merits of the controversy whenever it can be done by amendment, the prevailing idea being to settle the controversy by one action," etc.

In our case it is not even pretended that there is any substantial defense to this action, the main objection to the recovery being, that the plaintiff, in his complaint, has alleged and set out a case in trover, when the case, as proved on the trial, shows that it should have been in the nature of an assumpsit for money had and received. It would be in violation of one of the most important provisions of the New Code, to permit a party to defeat a recovery, upon the sole ground that the form of the complaint is not just as it should have been, from the facts established by the proofs in the case. To allow such an objection now to avail a party would be to defeat that great and vital principle of the Code and Constitution, which declares that there shall be but one form of action and it would incorporate into our new system all the mischief and intricacies touching the form of action intended to be obviated by that provision. No such objection can be permitted to defeat a recovery. The 135th section of the C. C. P. enacts that "the Court and the Judge thereof, shall in every stage of the action disre- (244)
gard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party."

We think the other objection can not avail the defendant. The compromise of the suit of Overby against the plaintiffs for the cotton, although reduced to writing, being wholly collateral, and between other parties, and in which the defendant had no interest, his Honor did not err in permitting the witness Oates, without the production of the writing, to state that in the compromise of the said suit the cotton was

turned over to the plaintiffs. See 1 *Greenleaf on Evidence,* sec. 81, and 1 *Phillips Ev.* 221.

PER CURIAM. No Error.

Cited: Brem v. Allison, 68 N. C., 414; *Jones v. Mial,* 82 N. C., 258; *Dail v. Sugg,* 85 N. C., 106; *Hill v. Buxton,* 88 N. C., 29; *Kiff v. Weaver,* 94 N. C., 278; *Stokes v. Taylor,* 104 N. C., 397.

(245)

J. E. BROWN, Adm'r. of W. H. SNEED v. W. M. SMITH.

1. Where an agent is authorized to sell property, he must sell for money, unless otherwise specially instructed.
2. Therefore, when an agent, without instructions, sold the property of his principal for seven-thirty bonds, when such bonds were not circulating as money; *Held,* that he exceeded his authority, and his principal was not bound by the contract, unless ratified by him.
3. Where such bonds were received by the principal in exchange for his property, and he intended to repudiate the contract, it was his duty to return the bonds if he could do so, or give notice to the parties interested. Acquiesence, without a sufficient excuse or explanation, would amount to ratification.
4. When the owner of property and his agent are in different localities, it is competent, in order to negative the idea of acquiescence in a sale, to show that telegraphic communication between the two points was cut off, and that the wife of the principal, who was confined by sickness, endeavored to send a telegram repudiating the sale on the part of her husband.

This was an action of detinue, instituted in the Superior Court of MECKLENBURG, by order of the Supreme Court in the case of Stenhouse & McCauley against the plaintiffs and defendant. Plaintiff was directed to bring an action and the defendant was required to admit the service and demand, etc. The cause was tried at a Special Term of Mecklenburg, *Moore J.,* presiding.

The action was brought for the detention of a large number of books, some 1,200 volumes, which plaintiff alleged was the property of his intestate. Defendant claimed title under an alleged sale made by one Latta, as agent of plaintiff's intestate.

It was in evidence that W. H. Sneed, plaintiff's intestate, was the owner of a large number of books—law and miscellaneous; that he was a resident of the city of Knoxville, Tennessee, and that during the war

(246) he left his home and took up a temporary residence in the town of Salem, N. C. One Latta testified, that in August, 1864, he received a letter from Colonel Sneed written from Salem, N. C., instructing him to take charge of his books, which had been shipped to Augusta, Ga., and placed in care of a gentleman in that place, to sell

them at auction, if he could do so without too great a sacrifice. He wrote another letter, 16 August, urging a sale, if it could be made without too great a sacrifice, and further instructing him to "do what he thought best." In October, 1864, Colonel Sneed was at Hamburg, S. C., wanted to borrow money and told deponent he must sell the books, and to do with them as if *"they were his own."* Another letter was written, advising witness to store the books in a garret, or other safe place in Augusta, Ga., and requesting a sale "if possible." Witness stated, that before any sale could be made, Augusta was threatened, and defendant shipped the books to Columbia, and fearing their safety there, shipped them again to Charlotte, N. C., and stored them with Stenhouse & McCauley, merchants in Charlotte. Witness further stated that the removal from Augusta to Columbia was in December, 1864, and to Charlotte in January, 1865. During the time the books were in Columbia, having notified Colonel Sneed of the move, he wrote witness a long letter, which is lost, in which he complained of the expense of moving the books, and instructed witness to put them in the hands of some reliable commission or auction house in Columbia for sale. Witness endeavored to comply with the request, but owing to the excitement and clamor of the people, he was unable to make the arrangement.

Soon after they were removed to Charlotte, witness had an offer for them, and after consultation with two friends he concluded to take the offer, which was made by the defendant, and was $25,000, in "seven thirty bonds of the Confederate States," with $1,800 of interest due. Witness accepted the offer. There were 1,200 volumes, as was supposed, but in case they fell short of that number, a *pro rata* deduction was to be made. An order was given to the defendant on Stenhouse & McCauley. Afterwards, it was agreed that the books should be (247) taken at 1,200 volumes without a count, and about 18 February witness gave to Dr. Ramsey, to express to Sneed the sum of $22,000 in Confederate bonds. Witness, upon cross-examination, stated that he could not state the precise limit stated in Colonel Sneed's letter, but thinks it averaged about $16 per volume. He did receive a communication from Colonel Sneed, asking him not to close at the price offered; does not remember that he wrote any letter after 17 January, 1865; thinks seven-thirty bonds worth about sixty-three per cent in Confederate money, when the trade was made, in February, 1865.

It was in evidence that the books were sold just before the fire in Charlotte, which was in February, 1865; that seven-thirty bonds did not pass as currency for some months before the surrender. They were held

as bonds, and as stock changed hands, probably ceased to circulate as currency six months before the war closed.

It was in evidence that Sneed in the Winter of 1863-'64 asked $30,000 for the books. That all mail communication between Augusta and Virginia were broken up as early as February, 1865. From depositions and testimony offered by defendant, it appeared that in the Spring of 1865, defendant gave to one of the witnesses an order on Stenhouse & McCauley for a library of books, contained in boxes. Witness did not remove the books, but left them in the store house, and went to Virginia. He returned to Charlotte and remained some time, and he considered the books delivered to him. After the surrender, witness wrote to Stenhouse & McCauley to hold the books subject to the order of defendant. Dr. Ramsey stated that he was requested to count the books, but did not do so; that at the time Latta asked him to express to Colonel Sneed, who was then at Liberty, in Virginia, a package of money, he went to Greensboro and expressed a package to Colonel Sneed containing about $22,000 in seven-thirty bonds. A witness testified that
(248) he became acquainted with Colonel Sneed at Liberty, Virginia, where he resided in December, 1864, and in January, 1865, his health began to fail and continued to do so until witness left in May. He returned in June and found him prostrated, and for six weeks he was not himself. Witness stated that the mail stopped conveying letters to Liberty the latter part of March, 1865, and it must have stopped before that time to Charlotte. Telegraphic communication was not in use, for several months, from Liberty, Virginia. There was other testimony, that communication by mail between Charlotte and Lynchburg, Virginia, was stopped in the Spring of 1865, and were not re-established until September of that year. The deposition of a witness was offered by plaintiff, for the purpose of proving that Mrs. Sneed sent him a dispatch to be telegraphed to Latta, at Charlotte, N. C., in the early part of the year, 1865, repudiating the contract for sale of the books. Objection was made by defendant, and the testimony was rejected by the Court. Another deposition was offered, and rejected by the Court for want of sufficient notice. The notice was twenty-four days. The deposition was to be taken in Knoxville, Tennessee, a distance of 231 1-2 miles.

The Court explained to the jury the difference between a general and a special agency, and the difference between authority and instructions; that the burden of proof was on the defendant to establish the agency, and that done, it rested on the plaintiff to show a revocation; that if the agency was special, with limited powers, the agent must keep within his limits; but that the directions to sell *en masse* if he could,

and if he could not, to open the boxes and sell in small quantities, was not a limitation of the agency; that the directions to store the books in some isolated place in Augusta was not a revocation of the agency, nor was it a revocation when Latta was directed to store the books with some responsible commission merchant in Columbia, to sell; that if Sneed repudiated the sale as soon as he heard of it, that made no difference if Latta was his agent and the repudiation came after (249) the sale was complete; that if Sneed received the bonds and did not offer to return them, that it was a ratification of the sales; that if Latta sold the books for $25,000 of Confederate bonds, worth only $300 in gold, it made no difference, if the defendant bought in good faith, and the jury is not called upon to make a bargain for the parties. These facts are only to be considered as evidence of collusion, or bad faith of the purchaser.

There was a verdict for the defendant; Motion for a new trial; Motion overruled; Judgment according to verdict; Appeal to the Supreme Court.

Wilson and *Guion* for the plaintiff.
Vance and *Dowd* for the defendant.

READE, J. We see no error in the instructions as to what was necessary to constitute Latta the agent of Sneed to sell the books, nor as to the revocation of his agency. From the verdict of the jury, therefore, we are to understand that Latta was authorized to sell the books; but still it does not follow that he was authorized to make *such* a sale as he did make. We must, therefore, consider this question.

When an agent is authorized to sell property he must sell for money, unless special instructions take it out of the general rule. He can not barter or exchange one commodity for another. And if he does so it does not bind the principal, unless he ratified it. This position is sustained by the authorities cited by plaintiff's counsel. There is nothing, in so much of the evidence that is stated, to take this case out of the general rule. It is true that Sneed frequently urged a sale and expressed anxiety as to the safety of the books:—at one time saying to Latta, "do with them as you think best;" at another "do with them as if they were your own;" and at another, "I leave them to your discretion." But these expressions seem to have been with reference to the *price* at which he might sell them, and to the *place* which he might (250) keep them. And there is nothing to authorize the inference that he might dispose of them for anything but money; on the contrary, he was urging his want of money as a reason for the sale. We must take

it, therefore, that Latta had power to sell the books at such price as he pleased, but he had no right to sell them for Confederate bonds, unless they were circulating as money. And of this the defendant was obliged to take notice. The validity of the sale, and how far Sneed was bound by it, depends, therefore, upon the question, whether Sneed ratified it. That was a question for the jury, under proper instructions as to what would amount to such ratification. In regard to that, his Honor charged, that "if Sneed received the seven-thirty bonds and did not offer to return them, it was a ratification." This, although true in the general, might have misled the jury. If, as was alleged, the telegraph line was down, and the mail stopped, and other ways of communication cut off, it might have been out of his power to return them, or, in terms, to repudiate the contract. These considerations ought to have been left to the jury. It certainly was the duty of Sneed to return the bonds, if he could, if he did not mean to ratify the contract; and a failure to return them, without a sufficient excuse, would have been a ratification. And, in this connection, we think the fact that Sneed's wife went to the telegraph office to send a telegram to Latta, that the contract was repudiated, was competent evidence. It was competent to show, that telegraph communciation was cut off; and if she was Sneed's agent, then it was competent to show, also, that he did not ratify the contract. But still, in this connection, it ought to have been considered whether, if there had been notice given to Latta, that would have been sufficient—whether notice ought not to have been given to the defendant as well: for, although an agency may be revoked at the pleasure of the principal, and simply by notice to the agent, yet that is subject to the exception, that if

(251) the agent has begun to execute his power and his incurred risk or expense, he must be saved harmless; and if the interest of a third person has become involved, such interest can not be disregarded.

It ought, therefore, to have been a subject of inquiry, whether Sneed had been informed that the books had been sold to the defendant and had been informed of the terms of sale, and, especially that they were sold for Confederate bonds. If he was not so informed, then his want of information was of itself a sufficient excuse why he did not immediately communicate with the defendant, as well as with Latta. If he was informed of it, then he was thereby put in relation with the defendant, and his conduct ought to be construed with reference to the defendant as well as Latta.

His Honor also charged the jury, "that Sneed had no right to repudiate the contract of his agent, Latta, after it was completed." That would be true if Latta had made such a contract as he was authorized

to make, *i. e.*, sold for money, or something that was passing as money currency. But here, upon the supposition that seven-thirty Confederate bonds were not current as money, he had made a contract which was not binding upon Sneed until and unless Sneed ratified it. So that, it was incumbent upon the defendant to show that Sneed ratified it, and not upon the plaintiff to show, that Sneed repudiated it. But still this must be understood with the qualification, that it was the duty of Sneed to repudiate it; and that acquiescence, without excuse or explanation, would amount to ratification.

PER CURIAM. *Venire de novo.*

Cited: Brittain v. Westhall, 135 N. C., 497; *Winders v. Hill,* 141 N. C., 706, 707.

(252)

REUBEN HOYLE *et al.* v. R. M. WHITENER *et al.*

1. In construing a will where it is not punctuated, and is very ungrammatical, it ought to be so read as to make it consistent and sensible;
2. Therefore, where a clause of a will is in these words: "Also all my live stock to be divided between my wife, Amy Blandina, Maria and Michael; all my land and plantation, with all the buildings, I give and bequeath unto the above named Michael Whitener; all my vessels and stands and my windmill or fan, all dues by note or book account I also give to my son Michael Whitener." *It was held,* that by a proper construction of the clause the land was devised to Michael Whitener.

ACTION to recover possession of land, tried before *Mitchell, J.,* at Spring Term, 1872, of CATAWBA.

The plaintiff and defendant R. M. Whitener are heirs at law of David Whitener. Plaintiffs claim, as heirs at law, two-thirds of the land. R. M. Whitener claims the whole under the will of his father David Whitener. The question submitted to the Court was, whether under a proper construction of the will the defendant was entitled to the whole or his portion as heir at law. The clause of the will alleged to embrace the lands is as follows: "Also all my live stock to be divided between my wife Amy Blandina Maria and Michael; all my land and plantation with all the buildings thereon I give and bequeath unto the above named Michael Whitener; all my vessels and stands and my wind mill or fan, all dues by note or book account I also give and bequeath unto my son Michael Whitener." The Court held that under the will the defendant was entitled to the whole of the land. Plaintiff excepted.

Verdict for defendant. Judgment and appeal.

Hoke, Bynum and *Dupre* for plaintiffs.
No counsel for defendants.

READE, J. The question is whether the land in dispute is given in the will to the defendant Michael Whitener. The difficulty in
(253) construing the will grows out of the fact, that it is not punctuated and is ungrammatical. Reading the will so as to make it consistent and sensible, we are of the opinion that the land in dispute is given to the defendant Michael Whitener.

PER CURIAM. No Error.

JOHN H. MORRISON, Collector, etc., v. DAVID WHITE, Ex'r. of D. WHITE, deceased.

1. When a marriage contract is in these words, viz: "That the said J. H. is to have the entire disposal of her own property, as her own judgment may see proper, at her death. If she should die before the said D. W., then she doth give and allow him to hold for his benefit all my estate, real and personal his lifetime, and at his death the said property to be delivered up, as I, J. H. had directed it to be done, at my death. This obligation to be kept in good faith by both parties." *It was held*, that the legal effect of the contract was to give to D. W., (the husband) the use of the property during his life, and after his death to revert to his wife, the said J. H.
2. When a testator directed, in his will, that "the marriage contract be carried fully into effect," and in addition gives to his wife other legacies; *Held*, that a case of election is not presented, as the wife does not claim under and against the will, but under the will and the contract, which is made a part of it.
3. When receipts are given for specific things, they do not operate as a release of any right, though under seal, but must be confined to the subjects of such receipts.

APPEAL from *Logan, J.*, at Spring Term, 1872, of CABARRUS.

The complaint alleged that (orginal) plaintiff was the wife of
(254) one John Hine, who died in 1856, having made his last will and testament, in which he appointed the plaintiff and one David White executrix and executor.

That by said will she was to have all the household and kitchen furniture and one-half the personal estate of every kind, amounting in value to some three or four thousand dollars, and she and the said David White qualified as executrix and executor.

That about 17 July she (plaintiff) and the said David White, in contemplation of marriage, entered into a contract, which in substance is as follows, viz: "That the said Jane Hine is to have the entire disposal

of her own property, as her own judgment may see proper, at her death. If in case she should die before the said David White, then she doth give and allow him to hold for his benefit all my estate both real and personal his life time, and at his death the said property to be delivered up as I, Jane Hine, had directed it to be done; at my death.

This obligation to be kept in good faith by both parties.

DAVID WHITE,
JANE HINE."

That, shortly after this agreement was made, the plaintiff and David White were married, and there came into his hands, to be held under the contract, money, notes and other personal property of considerable value.

That it was the intention of the contracting parties that all the property of the plaintiff should vest in herself, and not become the property of her husband.

That David White died in 1867, having made his will in which was contained the following clause, viz:

"Item. I direct that the existing marriage contract between myself and my present wife, signed by us respectively, be carried fully into effect."

The defendant was appointed executor of David White's will and was qualified as such, during the pending of the case in the (255) Superior Court.

The plaintiff Jane Hine died and the present plaintiff as collector was made party in her stead.

Judgment was demanded for a reformation of the contract, and for an account, etc.

Defendant admits the execution of the marriage articles referred to in the complaint, but insist that they are of no force or effect, in *fact or in law*. He denies several allegations in the complaint, and especially that his testator received into his hands the assets of the estate of Hine and the estate of plaintiff claimed under the will of said Hine. He claims that receipts were given by plaintiff to his testator before their marriage, viz: in 1857 for $4,456.85; 1858, $800; December, 1872, $325.65. He denies that the estate is accountable for $1,420 in cash.

Defendant insists that plaintiff disposed of most of the specific articles willed to her by her former husband. He says that under the will of his testator certain legacies were given her, and among other things certain notes belonging to Hine's estate, that certain other property

was likewise given her. That she executed receipts, which are exhibited, to him as executor, for the legacies of specific articles given to her under the will, and that she is estopped thereby, and should be compelled to elect. He denies his liability to account as demanded in the complaint, and insists upon various acts of the plaintiff, indicting an approval and an acquiescence in defendant's construction of the will.

His Honor delivered a written opinion, viz: "The Court declares its opinion to be that the contract entered into between Jane Hine and David White was intended by them as an ante-nuptial contract in regard to the estate owned by the said Jane Hine, and that David White was entitled to the use of the estate during his life, and that upon his death such portion thereof as was not consumed in its use, such as wheat, corn, etc., should revert to said Jane Hine as her separate estate, for her own exclusive use and benefit.

It is therefore ordered and decreed, that plaintiff recover, of (256) the defendant, that portion of the estate of said Jane which was received by said David White, with the exception of that consumed in the use, or was lost by death as aforesaid, and to this end that the matter be and is hereby declared to be referred to John A. McDonald, to take an account of the estate of said Jane," etc.

From this judgment defendant appealed.

J. H. Wilson for the plaintiff.
R. Barringer for the defendant.

PEARSON, C. J. 1. His Honor does not undertake to reform the marriage contract, but puts a construction upon it. We concur in the view taken by him as to the legal effect of the contract.

2. The testator directs "the marriage contract to be carried fully into effect," and, in addition to what his wife is entitled to under the contract, gives her certain legacies. So a case for election is not presented; the wife does not claim under and against the will, but derives her title, under the will, and the contract, which is incorporated and made a part of the will.

3. The receipts although under seal, do not have the legal effect of "a lease" or any right, but being specific, must be confined to the subject of the receipts, and can have no further effect. In this point of view they are treated in the order for an account "as credits" for payments made by defendant, under the will. Decretal order affirmed.

PER CURIAM. Affirmed.

(257)

CHARLES SKINNER v. D. G. MAXWELL.

1. If a party is deprived of an appeal without his laches, he is entitled to a *certiorari*, as a substitute for an appeal.
2. An appeal may be taken without the sanction of a Judge, if the parties can make out the case by agreement, and without his intervention. But whether they can perfect an appeal, not only without the sanction but in spite of the prohibition of the Judge. *Quaere?*
3. Though an appeal may be brought up in spite of the prohibition of a Judge, yet, as the practice has been so uniformly the other way, the Court would not feel at liberty to refuse a party a *certiorari*, as a substitute for the remedy of which he had been deprived.

APPLICATION for *certiorari* made before this Court at the present term, as a substitute for an appeal.

D. G. Maxwell, the defendant in a suit of Charles Skinner, by his next friend, etc., against him, made affidavit stating, in substance, that a motion was made by plaintiff's counsel in the above stated case, at a recent term of Mecklenburg Superior Court, for the appointment of a receiver. This motion was opposed by defendant's counsel, upon the ground that since the commencement of the suit he had purchased the interest of the plaintiff in the goods in controversy, and was owner of the entire stock. The motion was allowed by the Judge below, and the counsel for affiant asked for an appeal to this Court, which was refused by the presiding Judge.

Bynum, for Skinner.
C. Dowd, for Maxwell.

READE, J. The defendant had the right to appeal from the order appointing a receiver, and if he was deprived of that right without his laches he is entitled to a *certiorari*, as a substitute for an appeal. The question then is, was he deprived of his right to appeal without his laches? The facts are, that he asked for an appeal and his (258) Honor refused to grant it.

Our attention was called for the first time to the fact, that a party may appeal without the sanction of the Judge, C. C. P., secs. 299, 300, 301, 302. We do not mean that we had not before noticed the said sections of the Code, but we have had no occasion for their practical application to a case like the one before us, because we have had no case in which an appeal was refused. It is true that an appeal may be taken without the sanction of the Judge, if the parties can make out the case by agreement, without his intervention; but it is a different question whether the parties can perfect an appeal, not only without the sanction,

but in spite of the *prohibition* of the Judge. It may be that both the parties and the clerk, in certifying the record, would be in contempt. But we do not think it necessary to decide that, because taking it to be that the defendant might, in spite of the prohibition of the Judge, have brought up his case by appeal, yet as the practice has been uniformly the other way, and as it was commendably respectful to the Court to forbear, we do not feel at liberty to refuse him a *certiorari* as a substitute for the remedy of which he was deprived.

Let a *certiorari* issue, etc.

PER CURIAM. Order accordingly.

Cited: Wiley v. Lineberry, 88 N. C., 70; *Graves v. Hines,* 106 N. C., 324; *Guilford v. Georgia,* 109 N. C., 312.

(259)

STATE *ex rel.* DOBBINS v. OSBORNE, Adm'r, *et al.*

1. Where a guardian received from the administrator, as a part of his ward's distributive share, in 1864, a bond made by himself in 1862, he must account for the value of the bond as of the date it was given.
2. A plaintiff is not a competent witness to prove any transaction between himself and his deceased guardian; but he is competent to prove any other transaction of his guardian; *e. g.*, a sale of his property by his guardian.

ACTION on a guardian bond, tried before *Mitchell, J.,* at Fall Term, 1871, of IREDELL.

The action was brought against the defendant Osborne, as administrator of W. W. Foote, guardian of the relator, and the other defendants as sureties on the bond. There was a reference to the clerk to state the account of the guardian. The clerk made a report to Fall Term, 1871, of the Superior Court, at which time exceptions were filed by the defendants. Upon the hearing of the exceptions before Mitchell, J., he overruled exceptions 1 and 3, and the second exception was admitted by the plaintiff. The facts found by his Honor on the 1st exception were as follows: "One Simmons was the administrator of Miles Dobbins, father of the relator. Miles Dobbins died in April, 1863, and Simmons qualified as his administrator in May, 1863. In May, 1862, W. W. Foote gave his note to the intestate for $300 in Confederate money. This note came into the hands of the administrator of Miles Dobbins, who transferred it to Foote, the guardian of the relator, and took his receipt and in these words, viz: "Receiver of W. D. Sim-

mons, adm'r, etc., three hundred and thirty-two dollars in cash notes, 24 February, 1864.

W. W. FOOTE, Guardian of A. A. DOBBINS."

The Clerk, upon these facts, charged the guardian with the value of the note at the time it was given, in 1862. Defendant excepted to this part of the report. Exception overruled. The facts under the (260) 3d exception are these, as found by his Honor: Plaintiff was examined as a witness, and swore that his guardian took from him 62 gallons of brandy, and sold the same, in 1864, for $1,250 in Confederate money. Defendant's counsel objected to this evidence, as incompetent. The objection was overruled. They excepted to this part of the Clerk's report, which was likewise overruled.

The exception was made upon the ground, as stated in the case, that the money derived from the sale of the brandy was not trust funds, and if it was that it was received at a time (1864) when it could not be lent, and that there was no evidence that the guardian had used it. His Honor overruled this exception.

There was a judgment for the plaintiff, and the defendant appealed to the Supreme Court.

Armfield and *Batchelor* for plaintiff.
W. P. Caldwell for defendant.

READE, J. The first exception on the part of the defendants was properly overruled. The value of the bond of Foote, at the time he received it as guardian, in 1864, was its value at the time it was given in 1862, according to the Legislative scale applied to Confederate money; and with that value and interest, he was properly chargeable as guardian.

The third exception was also properly overruled. The plaintiff, it is true, was not competent to prove any *transaction between himself and his deceased guardian:* but he was competent to prove any other transaction of his guardian. The transaction, in this case, was a sale of the property of the plaintiff by his guardian to a third person. *Halliburton v. Dobson,* 65 N. C., 88, and the cases there cited. And *Isenhour v. Isenhour,* 64 N. C., 640.

PER CURIAM. Affirmed.

Cited: March v. Verble, 79 N. C., 23; *Wetherington v. Williams,* 134 N. C., 280; *Johnson v. Cameron,* 136 N. C., 244.

(261)

JOHN W. PELLETIER, Adm'r, v. E. W. SAUNDERS, Adm'r, *et al.*

1. Under the act of 1868-69, chapter 113, sub chapter 5, sec. 1, enacting that "When the personal estate of a decedent is insufficient to pay debts, etc., the executor or administrator *may* apply to the Superior Court, by petition, to sell the real property of the decedent for the payment of debts," *it was held*, that the word *may*, in this, as in every cat imposing a duty, means *shall*, and that by Superior Court is meant the Clerk of said Court.
2. When the personal estate of a decedent is insufficient to pay his debts, and an administrator or executor refuses, or unduly delays, to apply to the Court for the sale of the real estate, the Clerk of the Superior Court as Probate Judge has jurisdiction, and may, at the instance of a creditor, compel such person to perform his duty.

This was a proceeding commenced before the Clerk of the Superior Court of Carteret County, to compel the defendant Saunders to sell real estate of his intestate for the payment of debts.

This summons was made returnable before the Clerk, and the plaintiff filed a complaint alleging, among other things, that the defendant's intestate was indebted to him by judgment obtained in the lifetime of the intestate, and that said intestate had conveyed lands to the other defendants, his daughters, for the purpose of defrauding creditors; that the personal estate is exhausted, and the administrator refuses to sell the land for the payment of his debts. Prays judgment that defendant be compelled to sell land for the purpose above set forth. Defendant demurred specially for want of jurisdiction, and the Clerk forwarded the pleadings to his Honor, Judge Clarke, who after considering the same sustained the demurrer; from which judgment plaintiff appealed.

(262) *Haughton,* for the plaintiff.
Faircloth for the defendants.

RODMAN, J. The question presented in this case is, whether a Probate Court, at the instance of a creditor, can compel the administrator of the debtor to sell his lands, for the payment of his debts, after the personal estate has been exhausted.

Laws 1868-'69, ch. 113, sub-ch. 5, sec. 1, p. 267, provides that in such a case the administrator *may* apply, to the *Superior Court,* for an order to sell the real property; but it makes no express provision for the relief of the creditor when the administrator refuses or unduly delays to apply.

The word *may,* here, as in every act imposing a duty, means *shall.* By *Superior Court* is meant the Clerk of the Court, as appears by

section 48, of the same chapter, and from sec. 9, C. C. P., where that is defined to be the meaning of the phrase, in every case, except when some act is required to be done during Term time, or the Judge of the Court is otherwise expressly indicated.

So there is no difficulty about the right of the creditor to have the order made, or the duty of the administrator to apply for it, or the jurisdiction of the Court on his application.

The question then is reduced to this: Is there anything in the Act referred to, or in the Constitution and limited powers of the Probate Court, to disable it from making the order at the instance of a creditor? The Act prescribes who are the parties necessary, in all cases, to a proceeding for the sale of the lands. The creditors are not *necessary* parties. Nevertheless, as they have an interest, as well in the taking of the administration account, as in the terms on which the land shall be sold, and the application of the proceeds, they must have a right to become parties at some stage of the proceeding (C. C. P., sec. 61; *ex parte Moore,* 64 N. C., 90), and we cannot see that any inconvenience, or injury to any interest, can arise by allowing them to come in at the beginning, by commencing the proceeding. Mere matters of practice and form, unless expressly regulated by statute, are entirely under the control of the Courts, and every mode of proceeding is al- (263) lowed, by which rightful relief may be obtained without injury or inconvenience. It is suggested, however, that if the Clerk shall, at the hearing, order the administrator to sell, he will have no power to enforce obedience, in case the administrator refuses. The same may be said in case of disobedience to an order to sell made on the application of the administrator. So that if the want of power were conceded, it would be no more an argument against the jurisdiction in the former case, than in the latter, where it is not disputed. But the want of power is not conceded. It is unnecessary for us to say how the order might be enforced. Perhaps the administrator might be removed for the misconduct, althought not exactly of the nature specified in secs. 89-91, of sub-chapter VII of the Act of 1868-'9. And no reason occurs to us at present why disobedience could not be treated as a contempt under Laws 1870-'71, ch. 216. At all events, if it should be found that the process of the Probate Court was inadequate to enforce its orders, application could be made to the Judge of the Superior Court for aid, by an order in the nature of an injunction. *Sprinkle v. Hutchison,* 66 N. C., 450.

The judgment of the Superior Court is reversed, and the demurrer overruled. The case is remanded, to be proceeded in according to law.

PER CURIAM. Reversed.

Cited: *Ballard v. Kilpatrick,* 71 N. C., 282; *Hawkins v. Carpenter,* 88 N. C., 407; *Smith v. Brown,* 101 N. C., 352; *Mfg. Co. v. Brower,* 105 N. C., 445; *Clement v. Cozart,* 109 N. C., 181; *Lee v. McKoy,* 118 N. C., 525; *Yarborough v. Moore,* 151 N. C., 119.

(264)

BANK OF CHARLOTTE v. M. W. HART *et al.*

The act of 1869-'70, requiring bank bills to be received in payment of judgments, rendered in favor of banks chartered prior to 1 May, 1865, is constitutional. The statute is merely an extension of the principles upon which the statute of set-off is based, and in adjusting the balances according to equitable principles, interest on the bank bills, tendered in payment, should be allowed from the date of the demand and protest.

Rule upon plaintiff, to show cause why it should not accept its bills in satisfaction of a judgment, heard before *Logan, J.,* at Spring Term, 1872, of MECKLENBURG.

The plaintiff had obtained judgment against one Taylor and defendant Hart for $3,400 and execution was in the hands of the Sheriff. Defendant was the owner of a large amount of the bills of the plaintiff (Bank of Charlotte), payment of which had been demanded and the bills protested for nonpayment. The rule was to show cause why these bills should not be received in satisfaction of the judgment, allowing interest on the bills. Plaintiff objected to the allowance of interest. His Honor being of opinion with the plaintiff discharged the rule.

J. H. Wilson for plaintiff.

Jones N *Johnston* for defendants.

PEARSON, C. J. The objection, that the Act of 1869-'70, under which the defendant makes his motion, to be allowed to apply the bills of the bank in satisfaction of the judgment against him, is unconstitutional, in that it makes bank bills a legal tender in the payment of debts, cannot be maintained. The same objection might be made to the statute which allows the plea of set-off; for the statute under consideration is merely an extension of the application of the principle on which the statute of set-off is based, that is to say, the reasonable and equitable principle, that a court will not command A to pay money to B, if
(265) at the time of the payment, B has a legal right to require A to pay it back to him; in other words, in the eye of a court of justice, the difference between the debts, due by the one to the other, is

the *true debt,* and is the only amount that a court of justice, as between the parties, should require to be paid.

In adjusting the balance according to the equitable principle, there can be no doubt that the defendant is entitled to be allowed interest from the date of the demand. Interest is a mere incident which the law attaches to a debt, which is not paid at the time it falls due, and ought to be paid; and the calculation of interest on specific sums due to the plaintiff, or to the defendant, is a matter for the Clerk, and does not require the intervention of a jury, or fall under the head of a writ of inquiry of damages. The plaintiff's judgment was drawing interest, and it is no more than fair that the bank bills of which the defendant demanded payment, with a view to have them applied in satisfaction of the judgment, should also bear interest, from the time at which the plaintiff was put in default by refusing to accept them in satisfaction. There is no error.

This will be certified to the end that the defendant may take his motion, and be allowed interest on the bills from time of demand.

PER CURIAM. Order reversed.

Cited: Bank v. Twitty, ante 174; *Blount v. Windley,* 68 N. C., 2, 6.

(266)

STATE v. OWEN MERCER.

1. Where upon a trial for a capital offense a juror was challenged, and the question was asked, "whether or not he was opposed to capital punishment, and he answered that he preferred sending a man to the penitentiary for murder, and thought the law ought to be changed": *Held,* that this was a challenge *propter affectum.*
2. When a challenge is made for unindifferency, the Court tries the fact, unless one of the parties demands triers, and of the fact found, either by the Court or the triers, there is no review.

Indictment for murder, tried before *Watts, J.,* at Spring Term, 1872, of EDGECOMBE.

A juror was challenged by the State for cause, as the case states, and asked if he was opposed to capital punishment. He replied, that he preferred to send a man to the penitentiary instead of hanging him—thought the law ought to be changed, and send all to the penitentiary for murder instead of hanging them. When questioned by prisoner's counsel, whether or not he would give the prisoner a fair and impartial trial, he said he would. When questioned by the Court, made the same reply; said he preferred penitentiary to hanging. Whereupon the

Court sustained the challenge. Prisoner's counsel excepted. There was a verdict of guilty. Rule for new trial. Rule discharged. Judgment and appeal.

Attorney General for the State.
No counsel for the prisoner.

BOYDEN, J. The only question raised in the record is, as to the challenge of a juror on the part of the State, which challenge was allowed, and the defendant excepted.

The record states that a juror was challenged for cause, and was asked if he was opposed to capital punishment; the juror replied, "that he preferred to send a man to the penitentiary, instead of hang-
(267) ing him. Thought the law ought to be changed and send all to the penitentiary for murder instead of hanging them." When questioned by the Court, he made the same reply—said he preferred the penitentiary to hanging. This decision of his Honor cannot avail the prisoner for several reasons. First, that this was a challenge *propter affectum,* although the case states that it was a challenge for cause. When a challenge is made for unindifferency, the Court tries the fact, unless one of the parties demands triers, and of the fact found, either by the Court, or the triers there is no review. *State v. Benton,* 19 N. C., 196.

Again, it does not appear, whether this juror was one of the original panel or of the special *venire,* nor does it appear that the State had made any peremptory challenge, nor that the prisoner had exhausted his challenges. So that the State had first the right to direct this juror to stand aside until the pannel was perused, and the State likewise had the right to challenge this juror peremptorily. So that his Honor, having allowed the challenge for unindifferency, could have done the prisoner no injury, as the State, in case the challenge had been disallowed might have challenged the juror peremptorily. *State v. Benton, supra.*

PER CURIAM. No error.

(268)

W. H. McCANDLESS v. W. H. REYNOLDS.

In an action to recover possession of land, or other property, where both parties claim under the same person, one under an execution sale, and the other by deed made prior to said sale, it is competent, in order to establish the *bona fides* of the deed, to prove declarations of the vendor, made *ante motam* and before the contract of sale admitting an indebtedness to the vendee.

McCANDLESS *v.* REYNOLDS.

APPEAL from *Cannon, J.*, at a Special Term of STOKES, February, 1872.

This action was to recover possession of a tract of land in Stokes County. The plaintiff claimed the land under a judgment and execution against Richard Cox, a sheriff's sale and deed made in 1867.

Defendant claimed under the defendant in the execution, Richard Cox, by deed bearing date of 1866, and prior to the teste of the execution and sale by the sheriff to plaintiff.

There was no difficulty as to the identity of the land, or defendant's possession. Plaintiff introduced evidence to show that the purchase by the defendant was fraudulent and void as to creditors. Many witnesses were examined as to the point. Defendant in reply examined testimony to show the *bona fides* of his purchase, and among other things proposed to ask a witness this question. "Whether Cox did not confess, in 1861 or 1862, an indebtedness to defendant of some $900."

This question was objected to, and ruled out by the Court. Defendant excepted. There were other rulings of his Honor excepted to, but as this is the only one discussed by the Court it is unnecessary to state the exceptions. Under instructions from the Court to which no exceptions were taken, there was a verdict for the plaintiff. Judgment and appeal by the defendant.

Phillips & Merrimon for the plaintiff. (269)
Smith & Strong for the defendants.

BOYDEN, J. In this case, numerous objections were taken to the ruling of his Honor, but as one objection disposes of the case in this Court, we deem it unnecessary to notice any of the remaining questions.

In this case both parties claimed under Richard Cox, the plaintiff under a sale by the sheriff under an execution; the defendant under a deed of bargain and sale, from said Cox, to defendant, made prior to the teste of the execution under which the plaintiff purchased; and one of the questions in the trial was, as to the *bona fides* of the sale of the defendant. To show the *bona fides* of the sale to the defendant, and that a full and fair price was paid for the land, the defendant proposed to prove, by a witness, a confession of Cox, under whom both parties claimed, made several years before the commencement of this suit, and before the sale by the sheriff and the purchase by the defendant, of an indebtedness to the defendant of some nine hundred dollars. To the reception of this evidence the plaintiff objected, and it was rejected by his Honor. In this there was error. *Patton v. Dyke*, 33 N. C., 237, *Satterwhite v. Hicks*, 44 N. C., 105, and *Pearce v. Jenkins*, 32 N. C.,

355, are full authorities for the defendant, to show that the evidence rejected ought to have been received. In the first case his Honor, Judge Nash, says: "The declaration of parties, made before the time of sale, admitting that indebtedness to the plaintiff, being made *ante litem* and before any movement was made, or, as far as the case discloses, was thought of, towards the sale of the goods to the plaintiff, in a question impeaching the fairness of that transaction, was certainly evidence of the fact, it being against their interest, at the time it was made." In *Satterwhite v. Hicks,* Judge Nash, then Chief Justice, says: "That hearsay is not admitted as evidence, is a rule as old as the com-
(270) mon law. To it however there are exceptions coeval with it. Among the modern exceptions to this rule (says the Chief Justice), is that class of hearsay, admissible upon the sole ground that it proceeds from the person owning the property at the time, and would be evidence against him, if he were a party to the suit. His estate or interest in the property coming to another, by any kind of transfer, the successor is said to claim under the former owner, and whatever he may have said concerning his own rights while owner, is evidence against his successor. This rule applies equally to real and personal property, whether in possession or in action."

In this last case, the party, to show the *bona fides,* and that he had paid a fair price, set up a large debt owing by the vendee, former owner of the property, to the defendant; and to rebut this evidence, the plaintiff was permitted to prove that the said vendee, before the sale, had said that he was not embarrassed, and did not owe more than $250. It follows from this authority, that if the plaintiff in that case could prove that the vendee said he was not embarrassed and owed but $250, then in our case the grantee could prove, that his grantor admitted that he owed the defendant some $900. But the case of *Pearce v. Jenkins* is still more to the point, as in that case the evidence admitted, and which this Court approved, was almost identical with that rejected in this case.

PER. CURIAM. *Venire de novo.*

Cited: Smith v. Moore, 142 N. C., 290.

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(271)

W. R. ALBRIGHT v. JOHN G. ALBRIGHT.

When a defendant in a civil action offered in evidence, as a counterclaim to plaintiff's demand, a note bearing date in October, 1852, and tendered himself as a witness to rebut the presumption of payment: *Held,* that under the act of 1866, he was a competent witness for that purpose.

APPEAL from *Tourgee, J.*, at Spring Term, 1872, of ALAMANCE.

The action was brought upon a bond for the recovery of money. The defendant in his answer, by way of counterclaim, set up a bond executed by plaintiff on 21 October, 1852, for $61.50. Plaintiff insisted upon the presumption of payment of said bond.

The defendant offered to prove by his own oath, that said bond had been delivered to him on the date thereof and had been constantly in his possession, and his sole property, from that date to the present, and that it had not been paid in whole or in part. His Honor held the evidence to be inadmissible, and that the defendant could not prove by his own oath that the bond in question had been in his possession, and had never been paid, either to himself or any one authorized by him to receive payment thereof.

Defendant excepted to this ruling. Verdict and judgment for plaintiff. Appeal by defendant.

Dillard & Gilmer for plaintiff.
Parker for defendant.

BOYDEN, J. The only question, in this case, is upon the rejection of the evidence, offered on the part of the plaintiff, to prove by his own oath, that the bond for $61.50, payable one day after date, and dated 21 October, 1852, had not been paid in whole or in part.

His Honor rejected the evidence, upon what ground his Honor does not inform us, nor does the counsel for the defendant. (272)

It is true, that when the bond was given, and until the Act of 1866, to improve the law of evidence, the defendant was an incompetent witness, on account of interest, but that statute abolished the law excluding witness on account of interest, and made parties as well as other interested witnesses competent to testify, leaving the jury to give such weight to the testimony of such witnesses as they believed it entitled to. Under the statute the testimony offered was competent, and there is error.

PER CURIAM. *Venire de novo.*

(273)

C. DOWD, Trustee v. B. and G. M. COATES and R. A. SPRINGS.

When a party conveys by deed certain real estate in trust to secure the creditors therein named, and afterwards makes another deed conveying the said real estate, with other property, in trust to secure a number of creditors whose names are set forth in a schedule attached, with this further proviso: "Being desirous of placing all the creditors of the said party of the first part upon a basis of equality, so far as their rights are concerned, and in case it should turn out that any creditors of said party have been omitted in said scehdule, it is hereby expressly declared that such creditors, so omitted, shall be allowed to share equally in the benefits of this trust with those expressly named": *Held*, that upon a fair construction of the latter deed, creditors named in the first are entitled to no part of the fund raised under the second deed:

1. An intention to make a further provision for the former class of creditors, at the expense of the latter class, is very improbable, and by the rules of construction, which are merely deductions of common sense, a construction to give effect to an intention which is improbable and unreasonable must be excluded, unless such intention is expressed in plain and direct words.
2. The words "in case it shall turn out that any creditor has been omitted in said schedule, such creditor or creditors so omitted shall share equally with those expressly named," are appropriate to express an intention to include one or more creditors whose names had been accidentally omitted, but inappropriate to include a large number whose debts had already been provided for.
3. The provision, that all the creditors should be on a basis of equality, would be a mockery, if the creditors of the first class were to come in, without accounting for the amounts received under the first deed.

Case agreed, submitted to his Honor, *Logan, J.*, at Spring Term, 1872, of MECKLENBURG.

The following are the facts agreed and submitted to his Honor: The Rock Island Manufacturing Company executed an assignment in trust to T. W. Dewey, attached to the complaint, marked "B," and another marked "C," in both of which it secured certain creditors (274) represented by defendant Springs. Another assignment was made, marked "A," and there is a fund of several thousand dollars in plaintiff's hands, to be distributed. It is further agreed, that the property embraced in B and C has been sold, and failed to pay the debts therein provided for in full. That the debts of Coates & Coates are mentioned in the schedule attached to A, and the debts provided for in B and C are not mentioned in said schedule.

The question presented to the Court is, whether the creditors secured in deeds B and C can participate in the distribution of of the funds in plaintiff's hands. His Honor rendered this decision: "It is clear, that by the terms of deeds B and C the creditors therein named,

would not be entitled to any part of the fund, arising from the sale of the property or collections secured in deed A. Therefore, it depends upon deed A. It is the opinion of the Court that the proper construction of deed A is, that the creditors mentioned in the schedules marked 'A,' 'B,' 'C,' and 'D,' as well as all the creditors *not provided* for in B and C, shall share equally in the benefits of the trust fund mentioned in deed A."

From this ruling the defendants B. & G. Coates appealed to the Supreme Court.

Inasmuch as the deeds mentioned are simply referred to as exhibits B, C and D, it may be proper to set out their substance. Deed B conveys to the trustee, Dewey, certain real estate in the town of Charlotte, including a lot upon which is situated a factory for the manufacture of woolen goods, machinery, etc. Another town lot is also embraced. This conveyance is in trust for the purpose of securing a loan of $40,000, which the company had effected by issuing bonds to that amount, in sums of five hundred and one hundred dollars, payable to the trustee, or bearer. The trustee had a power of sale upon noncompliance with the condition of the deed. The second deed conveyed the same property in trust, with the addition of other real estate not included in the first deed, to secure an additional loan of $20,000, subject to the first mortgage of $40,000. (275)

The deed marked and referred to as exhibit A, conveys to the plaintiff as trustee, "all the estate of the corporation, consisting of realty, personalty and choses in action;" the real estate, subject to the first and second mortgages, previously mentioned as Exhibits B and C. This deed, after setting out the names of a large number of creditors and the amounts due in the schedules attached, marked "A," "B," "C," and "D," has this clause: "Being desirous of placing all of the creditors of said party of the first part upon a basis of equality, so far as their rights are concerned, and, in case it should turn out that any creditors of said party have been omitted in said schedules, it is expressly declared that such creditors so omitted shall be allowed to share equally in the benefit of this trust with those expressly named." This deed also conveys the residuary interest in the property conveyed by deeds B and C, after satisfying the creditors thereby secured.

C. Dowd for plaintiff.
Bailey for B. and G. M. Coates.
J. H. Wilson for Springs.

PEARSON, C. J. Our conclusion is, that the creditors secured by the deeds B and C are not included among the creditors secured by deed A,

and consequently that the creditors embraced in deeds B and C are entitled to no part of the fund raised under deed A.

The clause under which it is insisted that the deed A embraces the creditors secured by deeds B and C is as follows: After setting out the names of a large numer of creditors and the amounts due in the schedule attached, marked A, B, C and D, it proceeds, and (the party of the first part) "being desirous of placing all of the creditors of said party of the first part upon a basis of equality, so far as their rights (276) are concerned, and in case it should turn out that any creditors of said party have been omitted in said schedule, it is hereby expressly declared, that such creditor or creditors so omitted shall be allowed to share equally, in the benefits of the trust, with those expressly named." We think the words, "and *in case it should turn out that any creditors of said party have been omitted in said schedule,* etc.," have no reference whatever to the creditors who had been secured by the deeds B and C. This conclusion in regard to the construction of deed A is based upon three considrations:

1. Deed A was made for the purpose of closing up the corporation, known as the Rock Island Manufacturing Co. It conveys everything that the company owned either in possession or in action, and among other things it sets out, and assigns the residuary interest of the corporation in the property conveyed by deeds B and C, after satisfying the creditors thereby secured. So it appears that the trustor was confident that the creditors secured by deeds B and C were not only fully provided for, but that there would be an excess of the fund under both deeds, to go in aid of the payment of the debts secured by deed A, in regard to the sufficiency of which fund some doubt seems to have been entertained; so an intention to make a further provision for the former class of creditors, at the expense of the latter class, is very improbable, and by the rules of construction, which are merely the deductions of good sense, a construction, to give effect to an intention which is improbable and unreasonable, must be excluded, unless such intention is expressed in plain and direct words.

2. The words, "in case it shall turn out that any creditor has been omitted in said schedule, such creditor or creditors so omitted shall share equally with those expressly named," are appropriate to express an intention to include any one or more of the creditors, whose debts had not been presented and whose names had been overlooked or accidentally omitted in making out the lists A, B, C and D, but are altogether (277) inappropriate, to express an intention to include a very large number of creditors, whose debts had been already provided for by the deeds B and C, and whose names could not have been over-

looked or accidentally omitted; for, in another part of the deed, these creditors are expressly referred to, and were in the mind of the maker of the deed at the time of its excution. Had such been the intention instead of introducing it by the words, "in case it shall turn out, etc.," as some small matter that might have accidentally occurred and would not make much difference, it would naturally have been ushered in by the announcement of the fact, that a large number of creditors, set out in deeds B and C, may not have been sufficiently provided for, and it was the intention to let them share equally with the creditors named in the schedule attached to deed A.

3. It is expressly set out in deed A, that it was the intention of the corporation to provide, that all of its creditors should share equally in the distribution of the funds of the corporation, and if there should be a loss that it should be shared *pro rata.*

To effect this purpose, had it been the intention to include in deed A the creditors who had been already provided for, at all events by a very large fund, it would have been necessary and proper to insert a provision, that in the distribution of the fund realized under deed A, the creditors secured under deeds B and C should not be let in until the creditors secured only by deed A had received the same per centum of their debts as had been received by the other creditors under deeds B and C. Without a provision to this effect, the idea of a purpose that all of the creditors of the corporation should share equally, would be a mockery.

It is not necessary to enter into the view taken of the case, on the supposition that deed A did include the creditors secured by deeds B and C.

There will be an order that the fund be distributed among the creditors secured by deed A, and that the creditors secured by deeds B and C take no part of that fund.

PER CURIAM. Judgment accordingly.

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(278)

JAMES McINTIRE and wife v. WESTERN N. C. RAILROAD COMPANY.

Where the owner of land seeks to recover damages for the injury resulting from the location of a railroad on his land, he must pursue the remedy prescribed by the charter of the railroad company, as this statutory provision takes away, by implication, the common law remedy by action of trespass on the case.

APPEAL from *Henry, J.,* at Fall Term, 1871, of McDOWELL.

The plaintiffs, through whose land the defendant's railroad passes,

brought an action sounding in damages, under the C. C. P., for the injury sustained by the location of defendant's railroad on his land. His Honor below held, that as the charter of the railroad company prescribes a summary remedy by petition to recover damages of the defendants, the plaintiffs could not bring an action as at common law, or under the C. C. P. Other points were raised, which it is unnecessary to state, as the opinion of the Supreme Court proceeds entirely on the main question.

From this ruling of his Honor below the plaintiffs appealed.

Ovide Dupre for the plaintiffs.
W. H. Bailey for the defendant.

RODMAN, J. The only question presented in this case is, whether the common law remedy of an owner of land, by an action of trespass, against a railroad company which has entered on his lands for the purpose of building its road, is taken away by Rev. Code, ch. 61, (279) secs. 9 to 21; or whether the remedy thereby given is cumulative.

We are of opinion that the intention of the act was, to deprive the owner of his common law remedy, and to give him the one provided by the act in lieu of it. We come to this conclusion from the analogy between the policy of the act mentioned, and the act of 1809 on the subject of mills; Rev. Code, ch. 74. We admit that the language of the latter act more clearly excludes a resort to the common law remedy, than that of the one in question. But the decisions (*Gillet v. Jones,* 18 N. C., 339; *Gilliam v. Canady,* 33 N. C., 106) do not go so much on the words of the act as upon its evident policy. If the owner of land overflowed by a mill dam could bring his action on the case for damages every day, no public mill could be established. In like manner if the owner of land taken by a railroad for its track, could bring his action of trespass every day, no railroad could be built. In such case the law considers the property though taken for an individual, or for a private corporation, as taken for the public use. *R. R. v. Davis,* 19 N. C., 451. It is not forbidden by the Constitution, if compensation be made; and compensation is provided for. The mode of obtaining it may not be so easy or satisfactory to the owner, but it is not illusory; a substantial and just compensation may be obtained. There can be no doubt that the Legislature had the right to take away the common law remedy; the only question possible, is, as to their intention.

It is suggested, however, that the act only intended to furnish the company with a means of acquiring a title to the land needed, and not to deprive the owner of any remedy unless the company availed itself

of the means furnished. But the act says *either* party may proceed by petition to have the damages assessed. If the officers of the company cannot enter on lands and make surveys without a trespass, they could never locate the road. And if the road were located, and (280) its construction delayed until the damages to all the land owners on the route were ascertained under the act, the delay would be indefinite, and of no benefit to any one. To hold that during the pendency of a proceeding by the company to have the lands condemned, it could not prosecute its works without being exposed daily to an action of trespass, would effectually defeat the policy of the act. The act intended to allow the company to enter and construct its road at once, leaving the question of damages (if the parties could not agree on them) to be settled afterwards. The company was not obliged to initiate proceedings. It is not obliged to know that the owner claims damages, until he claims them in the mode provided.

There is a view of the act which seems conclusive. What could be the sense or policy of giving to the landowner the comparatively feeble remedy provided by the act, unless it was intended or supposed, that he would thereby lose the one already possessed, so much more potent, and adequate for every occasion.

PER CURIAM. Affirmed.

Cited: Johnston v. Rankin, 70 N. C., 557; *R. R. v. McCaskill,* 94 N. C., 752; *S. v. Lyle,* 100 N. C., 503; *R. R. v. Parker,* 105 N. C., 248; *Hilliard v. Asheville,* 118 N. C., 853; *Jones v. Comrs.,* 130 N. C., 453; *Jones v. Comrs., Ib.,* 467; *Dargan v. R. R.,* 131 N. C., 625; *Teeter v. Wallace,* 138 N. C., 268; *S. v. Jones,* 139 N. C., 622, 624, 638; *Beasley v. R. R.,* 147 N. C., 365; *Jeffries v. Greenville,* 154 N. C., 494, 495.

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STATE v. CHANEY WISE.

1. Where judgment can not be pronounced against a prisoner, on account of the ambiguity in an indictment, in omitting to aver under what statute it was framed, there being two in reference to the same subject, such omission can not be supplied by a plea to the further prosecution of the case, filed by the prisoner's counsel, admitting the time when the offense was committed.
2. No such effect can be allowed to the action of counsel. A record cannot be aided by matter *in pais.* Sufficient matter must appear on the record to enable the Court to proceed to judgment.

The prisoner was convicted of arson at Fall Term, 1871, of CRAVEN Superior Court. Judgment of death was pronounced. Prisoner ap-

pealed to the Supreme Court. At January Term, 1872, the judgment was arrested and the case remanded. At Spring Term, 1872, the case being called, the Solicitor moved for judgment according to the Act of 1869. The prisoner moved for his discharge, and filed the following plea, to wit: The said Chaney Wise saith that the State ought not further to prosecute the indictment against him, and ought not to hear judgment, because heretofore, at Fall Term, 1871, of this Court, he was indicted for the crime of arson, in an indictment as follows: (The plea here sets out a copy of the indictment, which is the same as heretofore given in the case reported 66 N. C., p. 120, and proceeds): that in support of said charge one Mason was examined as a witness, and testified that the prisoner did set fire to and burn his dwelling house on 1 August, 1871; that he was convicted on said indictment and judgment of death pronounced, from which he appealed to the Supreme Court. At said Court judgment was arrested. This he is ready to verify. Whereupon he prays that he be dismissed. J. H. HAUGHTON, Atto., etc.

The facts stated in the plea were admitted to be true by the Solicitor.

Whereupon the Court ordered the prisoner to be discharged. (282) The State appealed.

Attorney-General, Battle & Sons, Dupre, for the State.
Haughton, Smith & Strong, for the defendant.

PEARSON, C. J. When this case was before us, 66 N. C., 120, the motion for judgment of death was disallowed on the ground that it could not be seen by the record that the prisoner had been charged and convicted under the act of 1871. On the argument of the present motion it was conceded by the Attorney General that the motion for judgment—confinement in the penitentiary, could not be allowed on the ground that it can not be seen by the record that the prisoner had been convicted under the act of 1869, and so no judgment can be pronounced, unless the plea (as it is termed) against the further prosecution of the indictment, filed on the part of the prisoner by his counsel, in which the fact is set out that upon the trial Mason testified that the house was burnt on 1 August, 1871, which fact was admitted by the Solicitor for the State, has the legal effect to aid the indictment, and show that the prisoner was charged and convicted for a violation of the act of 1871, and thus to remove the ambiguity in respect to whether the prisoner was charged and convicted for a violation of the act of 1871, or of the act of 1869. In which case it is insisted that judgment of death shall not be pro-

nounced, as upon a conviction under the act of 1871, although such judgment was not entered on the record, as it then appeared. No such effect can be allowed to the action of counsel. A record can not be aided by matter *in pais*. Sufficient matter must appear on the record to enable the Court to proceed to judgment. Rev. Code, ch. 35, sec. 14.

PER CURIAM. Affirmed.

Cited: S. v. Long, 78 N. C., 573; *S. v. Watkins,* 101 N. C., 704.

(283)

STATE v. JOHN BRAY *et al.*

When a verdict, in a case subjecting a party to a punishment in the penitentiary, is rendered out of Court, to a Judge at his chambers, in the absence of the prisoner and his counsel, and is entered on the record on the next day, in the absence of the jury and the prisoner; *Held,* that such verdict can not be sustained.

INDICTMENT for larceny, with a count for receiving stolen goods, tried before *Pool, J.,* at Spring Term, 1872, of BERTIE.

The case was submitted to the jury at about 11 o'clock a. m., and the prisoner was committed to jail to await the verdict. About 10 o'clock at night the sheriff brought the jury to the Judge's room. His Honor asked them if they had agreed upon a verdict. The foreman replied that the jury found the prisoner guilty of receiving stolen goods, knowing them to be stolen. His Honor asked the other jurors if such was their verdict; they all replied in the affirmative. The jury was then discharged until 10 o'clock the next morning, at which time the Court directed the clerk to enter the verdict. The defendant's counsel moved for a new trial upon the ground that neither the defendant nor their counsel were present at the rendition of the verdict.

The Court overruled the motion and pronounced judgment. Defendants appealed.

Attorney General, for the State.
Smith & Strong, for the defendants.

BOYDEN, J. Whether the verdict in this case could have been sustained had the jury, on the next morning, in court, the prisoners being present, been asked if they agreed upon a verdict, and they had made the same response as that given to the Judge at his room on the (284) previous evening, it is unnecessary to decide, as the record does

not show that either the jury or the prisoners were present when his Honor directed the verdict to be entered.

So that the only question is whether a verdict in a case which is now subject to punishment in the penitentiary can be sustained, when rendered out of court, to the Judge at chambers, in the absence of the prisoners and their counsel, and entered on the record on the next day, in the absence of the jury and the prisoners.

We think that *S. v. Creighton,* 28 N. C., 104, and *S. v. Blackwelder,* 61 N. C., 38, particularly the last, decisive of this case.

It is true that both of the above cases were capital, but the reasons for the decision in the latter case apply equally to a case like the present; and besides we believe the practice has been uniform to receive such a verdict only in open court, and in the presence of the prisoner.

PER CURIAM. *Venire de novo.*

Cited: *S. v. Jenkins,* 84 N. C., 814; *S. v. Kelly,* 97 N. C., 405, 409.

(285)

STATE v. W. H. JONES.

1. It has been accepted as the proper construction and meaning of the act of 1796, Rev., ch. 31, sec. 30, though it goes beyond the words: that a Judge in charging a jury shall state the evidence fairly and impartiality, and that he shall express no opinion on the weight of evidence.
2. Wherever there is an exception to the charge of a Judge for violating the act, it will not be sufficient to show, that what he did or said *might* have had an unfair influence, or that his words, critically examined and detached from the context and the incidents of the trial, were *capable* of a construction, from which his opinion on the weight of testimony might be *inferred;* but it must appear, with ordinary certainty, that his manner of arraying and presenting the evidence was unfair, and likely to be prejudicial, or that his language, when fairly interpreted, was likely to convey to the jury his opinion on the weight of the testimony.
3. It is not error to keep a jury together, in case of disagreement, until the end of the term. It is the duty of the Judge to keep them together as long as there is a reasonable prospect of agreement.

This was an indictment for larceny tried before *Cloud, J.,* at Spring Term, 1872, of FORSYTH. The charge was that the defendant had stolen a horse. In the progress of the trial a witness for the State was asked if he had not been indicted for stealing plank, and if he had not left the

country in consequence of it. He answered that he had been indicted for taking plank, but did not steal it and did not run away. The Solicitor testified that the witness had been indicted for defacing and taking plank from a public school house. The record showed that the indictment was for a misdemeanor. The defendant's counsel argued that whether the indictment was for trespass or larceny it was the same in its effect upon the character and credibility of the witness. His Honor charged the jury that it was not larceny in law. The same witness stated that about two years before he was at Smith Grove, in (286) the county of Davie, about twenty miles from Salem, from which place the horse had been taken on Sunday night; that in the morning, about nine oc'clock, he saw two men ride up from the direction of Salem with the horse in question; that the horse was much jaded. He thought the mail had just come in, and there was a crowd about the postoffice. Upon cross-examination witness said he was not certain what day it was; did not know whether the mail had come in or not; thought it had. It was in evidence that there was a mail line from Salisbury to Huntsville, by way of Smith's Grove, that the mail would arrive at the latter place on Mondays, Wednesdays, and Fridays, about two or three o'clock in the afternoon, and returning on Tuesdays, Thursdays, and Saturdays, would arrive at that place about nine o'clock in the morning. The defendant's counsel argued that from all the attending circumstances the day of which the witness had spoken must have been Monday.

His Honor in charging the jury told them that it was not in *proof* what day it was. His Honor after summing up, as he said, the substance of the testimony, repeated that portion which was most unfavorable to the defendant, and stated to the jury twice, that these were the parts, taken all together, upon which the State relied for a conviction, but failed at that time to report that portion of the testimony which was most favorable to the defendant, and did not call the attention of the jury to the facts upon which the defendant relied for his argument, but told the jury that they must be fully satisfied, that they must consider all the testimony in the cause, and that the testimony offered on the part of the State must be of such a character as to satisfy them beyond a reasonable doubt of the defendant's guilt, before they would be warranted in returning a verdict of guilty.

The jury, after being out about twenty-four hours, reported that they could not agree, but desired no instruction from the Court. His Honor told them they *must* agree, and that they must try again, (287) that in another county he had kept a jury from Saturday until the following Wednesday, when they agreed; that it was important to

the county that they should agree. This was said on Saturday evening. The jury retired and soon thereafter applied to the sheriff to know how long he thought the Judge would detain them if they did not agree; the sheriff replied that they have heard what the Court said. Very soon thereafter the jury returned a verdict against the defendant. The Solicitor argued to the jury that it was very important to the country that the prisoner should be convicted. The language of his Honor "that it was important to the country that the jury should agree," when taken in connection with the argument made by the Solicitor, was excepted to by the defendant. There was a verdict of guilty; Rule for a new trial; Rule discharged. Judgment and appeal.

Attorney General, for the State.
Scales & Scales, for the defendant.

RODMAN, J. The following is the act on which all the exceptions of the prisoner are founded:

"No Judge, in giving a charge to the petit jury, shall give an opinion whether a fact is fully or sufficiently proven: such matter being the true office and province of the jury, but he shall state, in a plain and correct manner, the evidence given in the case, and declare and explain the law arising thereon." C. C. P., sec. 237. This section is but a renewal of an act, Rev. Stat., ch. 31, sec. 136. (Rev. Code, ch. 31, sec. 30.)

This has been held to mean that the Judge shall state the evidence fairly and impartially; and that he shall express no opinion on the weight of the evidence. This construction, in the last particular, goes beyond the words of the act, but it is accepted as a proper one. Whenever it appears that a Judge has arrayed and presented the evidence unfairly and partially to the prejudice of a party, or has intimated his opinion as to the weight of the evidence, this Court will not hesitate to grant a new trial for the irregularity. But when an exception is for that he did either one or the other, it would not only be unfair to him but unreasonable and prejudicial to justice to presume that he was unfair or meant to violate the act. In such a case it will not be sufficient to show that he did or said what *might* have had an unfair influence, or that his words, when critically examined and detached from the context and from the incidents of the trial, are capable of an interpretation from which his opinion on the weight of the testimony may be inferred; but it must appear with ordinary certainty that his manner of arraying and presenting the testimony was unfair, and likely to be prejudicial to the defendant, or that his language, when

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fairly interpreted, in connection with so much of the context as is set out in the record, was likely to convey to the jury his opinion of the weight of the testimony.

We will now proceed to test the exceptions by this rule:

1. "In the progress of the trial a witness for the State was asked the question if he had not been indicted and convicted for stealing plank, and if he had not left the country in consequence. He answered he was indicted for taking plank, but did not steal it, and did not run away. The solicitor testified that he was indicted for defacing and taking plank from a public schoolhouse, under the statute, and the record showed he was indicted for a misdemeanor. The defendant's counsel argued that whether the offense was in law trespass or larceny it was the same in its effect upon the character and credibility of the witness. His Honor charged the jury that it was not larceny in law."

We are unable to see that in this the Judge intimated any opinion as to the credit of the witness, or did anything more than his duty. It was due to the witness and to the jury to say that the offense was not larceny, while he permitted the counsel for the prisoner to argue that it was as bad, and left the question of credit entirely to the jury. (289)

2. The same witness testified that about nine o'clock on a morning about two years ago he was at Smith's Grove and saw two men ride up with the stolen horse; that he thought the mail had just come in, etc. The defendant's counsel argued from the usual time for the arrival of the mails, that the day spoken of by the witness was Monday. His Honor charging the jury told them it was not *in proof* what day it was. The words "in proof" are ambiguous. They may mean that there was no evidence tending to prove that the day was Monday; in which case we can only say that none is set out in this record; or that there was no direct evidence to that effect; and it is admitted there was not. If the counsel for the prisoner had desired a more unequivocal ruling he should have asked for it. We do not see any error here.

3. His Honor, after summing up as he said the substance of the testimony, repeated that portion of it which was most unfavorable to the prisoner and stated to the jury twice that these were the *facts* taken altogether upon which the State relied for a conviction, but failed *at that time to repeat* that portion of the testimony which was most favorable to the prisoner, and failed to call the attention of the jury to the facts taken altogether upon which the prisoner relied for his acquittal, but told the jury that they must be fully satisfied, that they must consider all the testimony in the cause, etc.

We must understand from this that the Judge *once* stated fairly the

substance of the testimony on both sides, and afterwards repeated that on the part of the State, massing it altogether. From this and from his omitting to repeat and mass together the testimony for the prisoner he would have us infer that the Judge was unfair, and intimated his opinion to the jury. The most that we can say is that *it is possible* that the Judge's manner of arraying and presenting the testimony was unfair, but we can not see that it was so. We can not prescribe how many
(290) times the Judge shall go over the testimony, or in what order or style he shall state it. Each adopts that which is most natural to him. There must be some clear proof that an unfair effect was likely to be produced by the mode adopted before it can be censured.

4. It is also complained that the Judge used the words "facts," when he ought to have said "circumstances in evidence," or "alleged facts," or other expression implying that it was for the jury to decide whether they were facts or not. It must be conceded that the phrase suggested would have been more correct, but there is no reason to think that the incorrect word misled the jury or was understood by them as taking away their power to say whether the matters in evidence were facts or not; for the Judge immediately proceeds to say that they are to consider all the testimony, and be fully satisfied, etc.

5. The jury, after having been out about twenty-four hours, reported that they could not agree. "His Honor told them they must agree, and that they must try again; that in another county he had kept a jury from Saturday until the following Wednesday, after which time they had agreed." Very soon after this they returned their verdict against the prisoner.

It can not be questioned that the Judge has a right to keep a jury together to the end of the term, and that it is his duty to keep them together as long as there is a reasonable prospect for their agreement. Formerly, jurors were deprived of meat and drink to compel an agreement. The practice is not so harsh now. But it has never been supposed prejudicial to justice to put jurors under that slight pressure to an agreement, which results from keeping them away from their homes and accustomed comforts. We see no impropriety in the Judge reminding the jury of his power and duty in this particular, nor that it had any tendency unfavorable to the prisoner; for the jury might have released themselves by a verdict for, as well as by one against him.

6. "The counsel for the State argued to the jury that it was
(291) very important to the country that the prisoner should be convicted; and the language of his Honor that it was important to

the country that the jury should agree, when viewed in connection with this argument, was excepted to by the prisoner."

We think it impossible for a jury to have misunderstood his Honor's language, legitimate and proper as it was, in the way suggested.

PER CURIAM. No Error.

Cited: S. v. Laxton, 78 N. C., 569; *S. v. Jenkins,* 85 N. C., 546; *S. v. Jones,* 97 N. C., 474; *S. v. Jacobs,* 106 N. C., 696; *S. v. Robertson,* 121 N. C., 555; *Davis v. Blevins,* 125 N. C., 434; *S. v. Howard,* 129 N. C., 661, 674; *Meadows v. Tel. Co.,* 131 N. C., 77; *Withers v. Lane,* 144 N. C., 188.

ISABELLA ROWARK v. D. D. GASTON.

Under the act of 1868-'69, section 1, chapter 96, according to its proper construction, a Judge or Clerk of the Superior Court may, in cases within the jurisdiction of said Court, make an order authorizing any person complying with the provisions of the said act to sue *in forma pauperis.* A Justice of the Peace has like power, in cases within the jurisdiction of his Court.

MOTION to dismiss for want of a prosecution bond, heard before *Logan, J.,* at Spring Term, 1872, of CLEVELAND.

The facts and the point in controversy are stated in the opinion of the Court.

Hoke, Busbee & Busbee, for the plaintiff.

Bynum, for the defendant.

BOYDEN, J. Chapter 96, Laws 1869, is in these words: "Any Judge, Justice of the Peace, or Clerk of the Superior Court, may (292) authorize any person to sue as a pauper in their respective courts, when he shall prove by one or more witnesses that he has a good cause of action, and shall make affidavit that he is unable to comply with the provisions of section 71 of The Code." The only question in this court is whether after the Clerk had made an order that the plaintiff might sue as a pauper, his Honor was right in dismissing the suit for the want of a prosecution bond.

On the part of the defendant it is contended that the act does not authorize the Clerk of the Superior Court to make the order in an action returnable to the Superior Court, to be there tried before the Judge; and that the Clerk can only make such order in cases to be determined

by him as Judge of Probate. At first we were inclined to adopt that construction. But as the Constitution, Art. 4, sec. 4, provides but two courts for the trial of such causes in the first instance, we think the act must be construed to mean that the Judge and the Clerk of the Superior Court, they being both officers of that court, and authorized to make the order in cases within the jurisdiction of that Court; and that a justice of the peace is authorized to make the like order, in cases within his jurisdiction. So that the act must be construed as if written: the Judge and Clerk of the Superior Court and the Justice of the Peace in his Court, may make such order in their respective courts.

There was error in dismissing the suit for want of a prosecution bond.

PER CURIAM. Reversed.

Cited: Brendle v. Heron, 68 N. C., 496; *Summer v. Candler,* 74 N. C., 266.

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LEWIS MARTIN, Assignee v. THOMAS H. HUGHES.

1. Under article 10 of the Constitution, and the act of 1868-'69, ch. 137, a homestead may be laid off in two tracts of land not contiguous. The two not exceeding $1,000 in value.
2. There is nothing in the Constitution forbidding the General Assembly from enlarging the homestead. It cannot reduce what the Constitution provides, but any General Assembly has the same power which the constitutional convention had, to exempt a homestead, and has absolute power to enlarge the homestead given by the Constitution in the matter of value or duration of estate, subject only to the restriction in the Constitution of the United States, that it shall not thereby impair the obligation of contracts.

APPEAL from *Tourgee, J.,* at Spring Term of ORANGE, to recover from the defendant, the Sheriff of Orange County, the penalty of $100 for not selling certain lands, the property of William W. Allison.

The facts stated in the complaint and admitted in the answer of the defendant appear to be as follows:

At Spring Term, 1867, of Person Superior Court, plaintiff obtained a judgment against John J. Allison and William W. Allison, for the sum of $400, with interest from 1 May, 1862. This judgment was properly docketed in Orange County in January, 1870, and execution was issued thereon 18 July, 1871. When the execution was placed in the hands of the Sheriff he received the following special instructions: "Levy this execution on a tract of land known as Piney Woods, the property of William W. Allison, and sell the same, as this tract does not adjoin the

homestead of Allison and he is not entitled to have this tract assigned to him as part of his homestead."

Other executions had been issued upon judgments obtained by other creditors prior to the docketing of plaintiff's judgment, and were made returnable to Spring Term, 1870, of Orange. (294)

Under these executions, William W. Allison had laid off and assigned to him, as a homestead, a tract of land on which he resided called Cedar Grove, and another tract called Piney Woods, which was not contiguous to the former tract, but three miles distant therefrom. The two tracts were valued at $1,000. The defendant (sheriff) levied plaintiff's execution upon the Piney Woods tract, but returned the execution to Court without a sale of the land. A *venditioni exponas* was placed in the hands of the sheriff with instructions to sell the land called Piney Woods. He did not sell but made return: "No sale of the land levied on, as defendant William W. Allison claims the same as a part of his homestead, allowed to him heretofore and guaranteed by Laws 1868-'69, ch. 137, sec. 15."

Upon this statement of facts, his Honor gave judgment against the defendant for the sum of $100, "as for a contempt of Court in not executing the process in his hands." From this judgment the defendant appealed to the Supreme Court.

J. W. Graham and *Moore & Gatling* for plaintiff.
Phillips & Merrimon for defendant.

RODMAN, J. This is an action to recover from a sheriff the penalty of $100 for not selling certain lands, the property of William W. Allison. The plaintiff in 1867, recovered judgment against Allison upon a debt contracted in 1862, and having duly docketed his judgment issued a *fieri facias* to the sheriff with special instructions to levy on and sell the land called Piney Woods. The sheriff levied, but did not sell. Afterwards a *ven. ex.* was duly issued with instructions to sell, but the sheriff refused to sell, and returned that the land was claimed by Allison as a part of his homestead. It appears from the pleadings that previously to the issuing of the plaintiff's *fi. fa.*, some other creditor of Allison (295) had obtained execution against his property, and that thereupon a homestead had been laid off for him consisting of a piece of land called Cedar Grove, upon which he resided, and of this piece called Piney Woods, which was three miles distant from the first piece. It does not appear whether or not Allison occupied Piney Woods. Occupancy may be different from residence: one may occupy a piece of land by cultivat-

ing it in some annual crop, or by continuously getting timber or fuel, or making turpentine upon it. Numerous cases have held that such occupancy is a possession which will ripen a colorable title.

Probably it was not material to state this; but certainly good pleading would have required the present defendant to set forth the record of the assignment of Allison's homestead, upon which he justified, so that the Court could see whether or not it was a justification. As the judgment of the Judge went upon a general ground we pass that over. We pass over also the question which may admit of some doubt, whether a *penalty* can be recovered against a public officer who obeys an Act of the Legisture which turns out to be unconstitutional; and proceed at once to meet the question made in the Court below, and upon which his Honor passed. His opinion was that inasmuch as Allison resided on Cedar Grove, and Piney Woods was not contiguous, but three miles distant, the assignment of the latter tract as a part of his homestead was void as to the latter tract against a debt contracted prior to the ratification of the Laws 1868-'69, ch. 137.

The act referred to in sec. 1, enacts, that whenever the real estate of any resident of the State shall be levied on by virtue of an execution obtained on any debt, such portion thereof as may be occupied by the owner as an actual homestead, and which he may then elect to regard as such, including the dwelling and buildings thereon, shall be exempt
(296) from such levy, except under an execution issued for the collection of a debt contracted, etc.

Section 15, enacts: "Different tracts or parcels of land not contiguous may be included in the same homestead, when a homestead of contiguous lands is not of the value of $1,000."

There does seem to be some variance in the ideas which are contained in these two sections; but there is no absolute contradictions such as will compel the sacrifice of one to the other. Section 1, relates to the case where the homestead value is reached in one in several contiguous tracts. Section 15, to a case where it is not so reached, then non-contiguous tracts may be included to make up the value, and the act of course implies that one of the tracts need not be actually resided on, and it does not require that it shall be occupied otherwise than by construction from the ownership which implies a possession in the absence of an actual adverse one.

The opinion of his Honor, however, seems to be that Section 15 is void only as to debts contracted before its ratification. He seems to have thought that the provision of the Constitution (Art. X, sec. 2), which exempts a homestead "with the dwellings and buildings used thereon,

and occupied by any resident of this State, and not exceeding the value of $1,000," contemplated a homestead in a single tract or in contiguous tracts only. Suppose that it did; there is nothing in that, or in any other section of the Constitution, to forbid the Legislature from exempting a larger homestead. It can not reduce what the Constitution provides, but any General Assembly had the same power which the Constitutional Convention had to exempt a homestead, and has now absolute power to enlarge the homestead given by the Constitution in the matter of value or duration of estate, subject only to the restriction in the Constitution of the United States that it shall not thereby impair the obligation of contracts. That restriction applies with the same force to the Convention that it does to the General Assembly, and the home- (297) stead article in the State Constitution would undoubtedly have been held void as to prior contracts, if it had been supposed to have impaired their obligation. It was earnestly contended that it did, but this Court, in *Hill v. Kesler,* 63 N. C., 437, came to the conclusion that it did not, either in intention or effect.

This decision has since received general acquiescence, and Congress has recently adopted its principle by an amendment to the bankrupt law, which gives to the bankrupt all the exemptions allowed by the State law in force in 1870. The same course of reasoning which sustained the exemption in the Constitution against debts prior to it, would sustain the additional exemption (if we admit it to be an additional one) made by Laws 1868-'69, against debts prior to it. Supposing the meaning of the Constitution to be what his Honor seems to have supposed it, Laws 1868-'69 seems rather to be a legislative construction of it, and, by no means, a forced one, than an addition to the exemption if allowed. The value still can not exceed $1,000, and if it be admitted, as upon authority it must be, that the creditor is not injured by an exemption in contiguous tracts, what reason can there be for holding that he is injured by allowing one to no greater value in tracts not contiguous? The policy of the law can hardly be made to depend on the debtor's owning to the value of $1,000 in a single tract, or in several detached ones, and certainly the injury to the creditor must be the value exempted, and not by the land being aggregate or detached.

We do not mean to be understood as saying that the principle established in *Hill v. Kesler* would sanction any great extension by the Legislature of the present exemption, either in value or in the duration and quality of the estate. It might be seen that such an extension was manifestly intended to, and did in effect, impair the obligation of

(298) contracts, in which case it would be void. We only mention this to avoid being misunderstood.

We think the justification sufficient.

Judgment reversed, and judgment in this Court in favor of defendant.

PER CURIAM. Reversed.

Overruled as to 2d head note: Wharton v. Taylor, 88 N. C., 230; *VanStory v. Thornton,* 112 N. C., 220.

Cited: Adrian v. Shaw, 84 N. C., 832; *VanStory v. Thornton,* 112 N. C., 220.

JAMES W. TOWE v. THOMAS O. TOWE and others.

1. Where two witnesses were examined as to the condition and capacity of a supposed testator, neither of whom spoke positively as to the facts, and the Judge, in charging the jury, said: "When two witnesses of equal respectability and opportunities testify as to a fact, the one positively and the other uncertainly, the law gives the greater weight to the positive testimony." *Held,* that although this charge was not strictly applicable to the case, yet as it was a repetition of a *truism,* it was not *calculated* to mislead a jury.
2. If a Judge should intimate an opinion upon the facts, in favor of one of the parties to a suit, that party has no reason to complain.
3. When a jury returns a verdict which is insensible and irresponsive to the issues, the Judge may, in his discretion, allow them to reform the same.

ISSUE of *devistavit vel non* tried before *Pool, J.,* at Fall Term, 1871, of PASQUOTANK.

A paper writing purporting to be the last will and testament of William Towe was offered for probate in solemn form. A caveat was entered, issues made up and tried in the Superior Court.

A subscribing witness, Godfrey, was examined, who testified that he was sent for and wrote the will, that while writing, William Towe fell asleep, that he was aroused, the will was finished, read over to (299) him and attested by himself and another person. Witness could not say with certainty that William Towe was awake at the time when the attestation took place, thought he was. That he believed he was of good mind and memory. Markham, the other witness, testified that he did not believe the supposed testator was of sound mind and had capacity to make a will; that when he witnessed the will he *thought* the "decedent" was asleep. Much testimony was introduced on each side as to the capacity of the testator.

The Judge charged the jury "that when two witnesses of equal credibility, with equal opportunities, testify as to any particular fact, and one speaks positively and the other is uncertain, the law gives the greater weight to the positive testimony." Propounder excepted.

Caveators requested the Court to charge, "that a will must be attested in the presence of the maker, that presence meant not merely bodily presence, but that the party is in a conscious state and must be so situated that he could see the witness if he desired to do so. The Court so charged and counsel for propounder excepted. The jury retired, and after a short time returned and asked the Court if Godfrey swore positively that the decedent was of sound mind when he witnessed the will, or whether he said he was under that impression. The Judge stated that counsel differed as to the language of the witness, and as his notes did not show the exact language, it was a question of fact for them to determine. The jury retired and in a few minutes returned the following verdict: "They find that they do not think William Towe was in a condition to dispose judiciously or properly of his property." The Clerk wrote the verdict upon his docket and read it to the Court and to the counsel, the counsel for the caveators immediately, and before the jury separated, asked that the jury might be permitted to reform their verdict and make it responsive to the issues. The Court told the jury that they might reform their verdict. The foreman said, they found that the paper writing propounded was not the last will and testament of (300) William Towe; to this the whole jury assented. The Court allowed the amendment to be made. Propounder excepted. Rule for new trial. Rule discharged. Judgment and appeal.

Busbee & Busbee for propounder.
Smith & Strong for caveators.

READE, J. One of the subscribing witnesses to the will, Godfrey, testified, "that he could not say with certainty that the testator was awake when the will was witnessed, but thought he was."

The other subscribing witness testified, "that the testator was asleep, he thought."

It would be difficult to determine which of these witnesses was most in doubt, and, certainly, neither of them was positive.

His Honor charged, "that when two witnesses of equal respectability, with equal opportunities, testify as to any particular fact, and one testifies positively, and the other is uncertain, the law gives the greater weight to the positive testimony."

This truism, although not precisely applicable, was not calculated to mislead, and we can not see that it did mislead the jury, in regard to the fact of the testator's being awake at the time the will was attested.

One of the subscribing witnesses (Godfrey) testified also, "that he believed the testator was of sound and disposing mind and memory, and knew what he was doing."

The other subscribing witness testified "that he thought the testator was not of sound mind, and did not have capacity to make a will."

Here again the witnesses, both alike, express only their opinion; and neither is more positive than the other. So that his Honor's charge could not have misled.

(301) After the jury had retired for deliberation, they returned into Court, and asked his Honor, "whether the witness, Godfrey, testified positively that the testator was of sound mind, or whether he said he was under that impression?" His Honor answered, that the counsel differed as to the language of Godfrey, and he had not taken a note of it, and left it with the jury to determine what he said.

The plaintiff insists that it appears from this, that the jury supposed that his Honor meant by his former charge to tell them that Godfrey had sworn positively. We do not see clearly that it does so appear; yet we think it probable that he did. Grant that he did, and then how stands the case? His Honor charged that the plaintiff's witness swore positively, and is to be believed rather than the defendant's witness, who swore dubiously; and the plaintiff objects to the charge. If it had been supposed that the Judge had intimated that the other subscribing witness had sworn positively that testator was not of sound mind, the plaintiff might have excepted with reason.

It may be proper to say, that capacity is seldom a matter to swear positively about. It is only in very decided cases that a witness can do more than express his opinion. In most cases, and probably in this case, only a bold witness would be positive. It is seldom, therefore, that the doctrine of affirmation and negation, and of positive and doubtful evidence, can have any application in questions as to the capacity of a testator. It was inapplicable in this case but we do not see that it could have done the plaintiff any harm.

There was nothing improper in the manner of recording the verdict.

PER CURIAM. No Error.

(302)

J. N. CLEGG, Ex'r. v. THE NEW YORK WHITE SOAPSTONE COMPANY.

1. The Supreme Court has a right to review the ruling of a Judge below, upon a motion to set aside a judgment.
2. When a defendant moved to vacate a judgment, upon the ground of excusable neglect, and the excuse assigned was, that his counsel, by mistake, had misinformed him as to the time of holding the Court, whereby he failed to file an answer; *Held*, that the excuse for not filing the answer was not sufficient, when the facts show, that the defendant did not suffer harm by the mistake of his counsel.
3. When the Court below refused a party permission to file an answer at a term subsequent to the time allowed by a former order, the appellate Court must assume that the question of "excusable neglect" was passed upon. If the party was dissatisfied with the ruling, he had a right to appeal, and it was his duty to do so, for a motion to vacate is not a substitute for an appeal, but a relief against accidents.

This was a motion to vacate a judgment upon the ground of "excusable neglect" heard before *Tourgee, J.*, at Spring Term, 1872, of CHATHAM.

The motion in the cause was made at Fall Term, 1871, at which term his Honor denied the motion and refused to vacate the judgment. From this judgment there was an appeal to the Supreme Court, and the case was heard at January Term, 1872. See 66 N. C., 392.

The cause was remanded that the jury might find the facts upon which the judgment was based. At the last term of Chatham Superior Court, the motion was renewed. The facts were found by his Honor, and he again refused to set aside the judgment. From this judgment there was an appeal to the Supreme Court.

The facts found by the Judge below are sufficiently stated in the opinion of the Court.

London and *Phillips & Merrimon* for plaintiff. (303)
Manning and *B. & T. C. Fuller* for defendant.

READE, J. The facts found by his Honor are, that Fall Term, 1870, was the return term, and that the defendant appeared by counsel and moved for time to answer; and time was granted him until 4 March, 1871. That no answer was filed within the time, and that at Spring Term, May, 1871, the defendant appeared by counsel and requested a copy of the complaint, and immediately upon its being furnished, he offered to file the answer. The Court refused to allow the answer to be filed, and gave judgment for the plaintiff.

At Fall Term, 1871, there was a motion to vacate the judgment; for the reason that the neglect of the defendant to file his answer was excusable under C. C. P., 133. The excuse assigned was, that the counsel, by mistake, had misinformed his client as to the time when the Court would be held.

Suppose the facts were sufficient to excuse the defendant for not filing his answer at the return term, 1870, (if that was the term as to which he was misinformed), he did not suffer by it, because he was allowed time until 4 March, 1871. If Spring Term, 1871, was the term as to which he was misinformed (it is left uncertain which was the term), still his mistake did him no harm, because it was not at that term, but on 4 March previous that he was to file his answer. So that, we agree with his Honor that the neglect to file his answer on or before 4 March, 1871, has nothing to excuse it.

It is however insisted, that it was the duty of the plaintiff, not only to file his complaint, as he did do, at or before the return term, but it was also his duty to furnish the defendant with a *copy*. This is true; but still, we agree, with his Honor, that the defendant waived his advantage by not taking the objection at the appearance term, and by appearing and taking time to file his answer.

But there is another view which is fatal to the defendant's (304) motion. A Spring Term, 1871, when the Court refused to allow the answer to be filed, we are to assume that the question of "excusable neglect" was passed on. If the defendant was dissatisfied with the ruling, he had the right to appeal, and it was his duty to do so; for the motion to vacate, C. C. P. 133, is not a *substitute for an appeal*, but is a *relief against accident*. And as was said by us in *Waddell v. Wood*, 64 N. C., 624, it is not to be tolerated in the most liberal practice that a party is to lie by and let judgment pass, when he might appeal, and at a subsequent term move to vacate.

I take this occasion to remove a doubt which I expressed in a dictum in the case of *Waddell v. Wood, supra,* as to the power of this Court to review the ruling of a judge below upon a motion to vacate, whether it was not exclusively within the *discretion* of the Judge. We have since held that we can review him; and I regard it as settled.

PER CURIAM. Affirmed.

Cited: Keener v. Finger, 70 N. C., 43.

(305)

ELIZABETH A. MAXWELL v. WM. M. HOUSTON, Adm'r.

1. Where a horse was placed by A in the possession of B, with an understanding that he was to be worked for his food, and was to do the plowing and milling for A, and A was to use the horse when she wanted him; *Held*, that this is a contract of bailment, and is governed by the general principle that a bailee cannot dispute the title of his bailor.
2. When an administrator converts property he is a wrong doer, although he obtained possession by act of law; and he cannot be heard to dispute the title of the bailor of his intestate.

ACTION to recover damages for the conversion of a horse, etc., tried before *Buxton, J.*, at Fall Term, 1871, of UNION.

Elizabeth Maxwell, the plaintiff, was examined as a witness and testified that the horse in controversy was in the possession of Green W. Houston when he died; after his death, the defendant, who was administrator, told witness to come over to his house, and he would give up all her property in his possession. Witness went and *wanted* the horse, cow and calf he had taken home. He refused to give them up, but sold them in November, 1865. Witness forbade the sale. Upon cross-examination, she stated that she got the horse in 1854 or 1855 from Miles Lemmon; and that her son traded her horse for the one in controversy, when it was six months old. That her son died intestate and no one administered on his estate. Witness paid George W. Houston for wintering her colt. Mr. Houston got the horse from her when he was two years and a half old. He worked him for his food, and was to do the plowing and milling for the witness, and she was to use the horse when she wanted him.

Witness stated further, that her son claimed the colt as his own. That she never sold it or received anything for it. It was in proof that (306) George W. Houston, the intestate, admitted in 1865, that he was keeping the horse for its feed. Exception was taken to the examination of plaintiff as a witness. The exception was overruled by his Honor. The exception is not set out fully, as it is not noticed in the opinion of the Court. His Honor was asked to charge the jury, that plaintiff was not entitled to recover damages for the conversion of the horse, as she had proved that it belonged to her son, who had died intestate, and no one had administered on his estate. That the horse was the property of the administrator when such was appointed, and that until then the possession of plaintiff was not adverse. His Honor declined so to charge, and told the jury that if the plaintiff had obtained the horse in the manner stated by her, and had kept it, as she swore he had, that, for all the purposes of this action, it was her property and

she was entitled to recover damages for the conversion. Defendant's counsel excepted. There was a verdict for the plaintiff. Rule for new trial. Rule discharged. Judgment and appeal.

Phillips & Merrimon for plaintiff.
J. H. Wilson and *Blackmer & McCorkle* for defendant.

READE, J. The relation which subsisted between the plaintiff and the intestate of the defendant was that of bailor and bailee, and was governed by the general principle that a bailee is estopped from denying his bailor's title.

When the defendant converted the horse and other articles he became a wrong doer, although he came to the possession by law, and he can not be heard to dispute the title of the plaintiff. For this, the case of *Craig v. Miller,* 34 N. C., 375, is authority.

PER CURIAM. No Error.

Cited: Lain v. Gaither, 72 N. C., 235; *S. v. Colonial Club,* 154 N. C., 187.

(307)

MILES MITCHELL v. MARINA MITCHELL and her children.

1. The statute in reference to binding out apprentices, C. C. P., sec. 484, must be contrued as if it read, "All orphans, the profits of whose estates will not support them, and who are likely to become chargeable upon the County, or whose moral or physical condition requires it, shall be bound out."
2. When an application is made to a Probate Judge to bind out children as apprentices, *prudence* requires that they should be present, and it is his duty to observe such *prudence,* unless there be some sufficient excuse for omitting it.

This was a proceeding originally commenced before the Probate Judge of HERTFORD upon the application of Miles Mitchell to have apprenticed to him several minor children, viz., Alfred, Dick, Thomas and Catherine Mitchell, children of Marina Mitchell. They were born in slavery, the property of Miles Mitchell, the applicant. After the emancipation of the slaves, they were bound to him by an officer of the United States Government, and the County Court of Hertford, without notice to the mother. Previous to these proceedings they were discharged from custody by a writ of *habeas corpus,* and thereupon a motion was served upon the mother and the children, and these proceedings were instituted. The motion was signed by the Attorney of the applicant, and served by

the sheriff of the County. Upon the day set apart for the hearing, neither the mother nor the children were present, having been prevented from attending by the inclemency of the weather. The Probate Judge made an order apprenticing the children, above named, to Miles Mitchell, their former master. From this order there was an appeal to the Superior Court, and the matter was heard before *Pool, J.*, at Fall Term, 1871. It appears in evidence that the eldest of the children had been hired out by the mother, for the present year, for $60, and the youngest, a girl, was living in the family of a respectable gentle- (308) man, a member of the bar. The other two were living with the mother, aiding in cultivating a farm upon rented land, and with a hired team, and had made an average crop, for a person of her condition in life in that section of the country. She is as industrious and frugal, and takes as good care of her children, as colored mothers generally do. All of the children together could have been hired out at $12.50 per month. The mother had not sent any of them to school. The children were fatherless. It was in evidence that the mother was living on rented land, belonging to one William Mitchell, who furnished a horse and sold her provisions. The landlord was to have one-half of what was raised on the farm, and at the end of the year she would be in debt to the said Mitchell about $100 for provisions, which it would take the most of her part of the crop to satisfy. It was in evidence that Miles Mitchell was a kind and humane man, and in every respect a fit and suitable person for a master of apprentices. Upon this state of facts, his Honor affirmed the order of the Probate Judge, from which there was an appeal to the Supreme Court.

David A. Barnes and *Batchelor* for the appellants.
Smith for the appellee.

READE, J. In *ex parte* Ambrose, 61 N. C., 91, it is said that notice to persons to be bound out, or to their friends, is indispensable, and that it is prudent to have them present in person before the Court.

Notice was given in the case before us, but it is objected that the notice ought to have been issued by the Judge of Probate, and not by the person who was seeking to have the orphans bound to him; that they were not obliged to respond to such notice. There is certainly some force in the objection, but we do not think it controlling in this case; because it is stated that the notice was sued out of the Court of Probate, and that it was served by the sheriff. Holding the notice (309) to have been sufficient, still some reason ought to have been given

why the Judge of Probate did not observe the "prudence" of having the orphans actually present before him; for, it is not to be tolerated that an officer of the law shall fail to observe what is *prudent,* any more than what is *necessary,* without a sufficient excuse. Here the only excuse is, that they were notified and did not attend. But then the case states that both they and their counsel were prevented from attending by the inclemency of the weather. So the Judge of Probate ought, of his own motion, to have continued the case until he could have taken the necessary steps to have them before him. The children ought to be present in order that the Judge of Probate may, from personal inspection, as well as from testimony, judge of their condition and of their wants, and of their capacity for any particular service, and of the terms which he ought to make with the master on their behalf, and also in order that the public may see the children, so that there may be competition among applicants for their services, as no one would like to take an apprentice without seeing the person. There may be circumstances to excuse the binding in the absence of the children, but none appears in this case. In *habeas corpus* cases and inquisitions of lunacy, the person is required to be present.

But upon the supposition that the proceedings were regular, the main question is, were these children proper subjects to be bound out? If they were, then most of the fatherless children in the State, white and colored, are liable to be taken from their mothers and bound out.

The facts are, that the mother and her two youngest sons work rented lands and make average crops. "She is as industrious and frugal and takes as good care of her children as colored mothers generally do. Her youngest child, a daughter, had a good home with a respectable gentleman, and her oldest son was hired out at $60 a year. And all her (310) children would hire for $12.50 a month." And there is no allegation of misbehaviour of her or her children. There has been no presentment of the grand jury, and no complaint from any person except from him who wants their services. It is not surprising that he should want them bound, because thereby he would get services worth $150 a year *now,* and constantly increasing in value. For these services he would make no return to the mother, who had the burden of supporting them, and no return to the children, except such education as they can get at the public schools. This would seem to be great injustice to the mother and great hardship upon the children, to say nothing of the impolicy of breaking up the domestic relations when there is no public necessity for it.

The statute which is said to authorize this apparent evil is as follows:

"The Judges of Probate in their respective counties shall bind out as apprentices, all orphans whose estates are of so small value that no one will educate and maintain them for the profit thereof."

It must be admitted that the language of the statute is comprehensive, and if understood literally, will embrace almost all the orphan children in the State. Since the wreck of fortunes by the war, it is a rare case where a fatherless child can be educated and maintained out of the profits of its estate alone. But still, when the family is kept together and industry and economy are added to a small income from property, the children may be provided for in the domestic forum. The public does not become interested to break up these relations unless the children are likely to become chargeable upon the parish, or unless their moral or physical condition requires a change. This has been the spirit of all our former legislation upon the subject, and in this spirit we think our present statute, C. C. P., sec. 484, must be contrued. It must be construed as if it read, all orphans, the profits of whose estates will not support them and who are likely to become chargeable upon the county, or whose moral, mental or physical condition require it, (311) shall be bound out, etc. Such is not the case before us.

There is error. This will be certified to the end the children may be discharged.

PER CURIAM. Reversed.

Cited: Ashby v. Page, 106 N. C., 331; *In re Jones,* 153 N. C, 314.

GEO. C. McLARTY and wife v. G. D. BROOM, Exr. of W. D. HOWARD; R. P. BARRETT and wife, and J. W. McMURRAY and wife.

1. A testator, who died in 1864, gave the bulk of his real and personal estate to three sisters, equally to be divided between them, and directed his Executor to sell on twelve months' credit. The sale was made in November, 1864; the husbands of two of the sisters, one of whom was the guardian of the third, bought most of the property, a negro and a few articles of personal property being bought for the ward. By agreement, instead of giving their notes, they gave receipts to the Executor for the amounts of their respective purchases in part of their wives' shares, and, at the same time, the Executor passed over to one of them, whose purchases were less in value than the others, a considerable amount of solvent notes given to the testator, some before the war; *Held,* that notwithstanding there was no intent on the part of the Executor and said purchasers to defraud the infant sister, as the departure from the directions in the will, as to sale on credit,

resulted in loss to her, she is entitled now to be put in the situation she would have occupied had said directions been carried out literally, and to have an equal division of the testator's property.

2. In such case, receipts given by the ward, soon after she became of age, for the amount of her purchasers at the sale, and for her share of confederate money, received on the day of sale, will not have the effect to ratify the said dealings with the estate.

3. A sale by an Executor in November, 1864, of land, farming utensils, etc., directed to be sold on twelve months' credit for Confederate money
(312) is not an exercise of due prudence.

4. A guardian may concur, in behalf of his ward, in a partition of property in which the ward is a tenant in common, provided the partition be equal. But when the guardian was personally interested, he cannot insist upon a partition agreed to by him, by which his ward gets less than his share.

PETITION for settlement, heard before *Buxton, J.*, at Spring Term, 1872, of UNION, upon appeal from the Probate Court.

The material allegations in the petition or complaint are: that W. D. Howard, late of Union County, died, in 1864, leaving a will of which the defendant Broom qualified as executor at July Term, 1864, of Union County Court; that the testator left a large estate of realty and personalty, of which he gave by said will a tract of land to a brother, and small pecuniary legacies to some half-sisters, and then directed that all the remainder of his real and personal property should be sold by his said executor, the land on twelve months credit, and the proceeds, with all his notes and money, after the payment of his debts and said pecuniary legacies, should be equally divided between his three sisters, Sarah J. McMurray, wife of the defendant J. W. McMurray, Julia A. Howard, now the wife of the defendant Barrett and Mary Howard now the wife of plaintiff G. C. McLarty; that on 3 November, 1864, Broom, the executor, sold said real and personal property on a credit for a large sum of money; that of the realty sold were two tracts of land upon which were erected mills in which the testator owned a third interest, and the defendant, McMurray, became the purchaser at $9,100, and that the lands are worth $4,000 in good money; that the aggregate sales amounted to $35,000, and there were solvent ante-war debts amounting to several thousand dollars: that the *feme* plaintiff was then a minor, the defendant McMurray was her guardian, and she became of age 24 December, 1864; that the defendant Broom had in September, 1869, a pre-
(313) tended *ex parte* settlement with the Probate Judge; that from that settlement it appears, that after allowing him proper credits he was charged with $43,898.44, belonging to the *feme* plaintiff and the *feme* defendants, making the share of each $14,632.87; that of the share of the *feme* plaintiff, she was charged with a receipt dated 23 February,

1865, for $7,196.13, which was in fact the amount of a note given by S. B. Howard, for a negro bought at the sale, and which was handed over to her, with a receipt for $2,095.50, given by her guardian, 3 November, 1864, as if for Confederate money, but which was really part of the price of the land bid off by him, and with a receipt dated 4 January, 1865, for $1,675.63, the price of a negro and a few articles of small value bid off by her at the sale, leaving an apparent balance of $507.88, in Confederate money due her; that in said pretended settlement the share of the wife of the defendant McMurry is charged with the amount of his purchases at the sale, which includes the valuable realty aforesaid and other valuable property; that the defendant Barrett received valuable assets in ante-war notes, etc.; and that said pretended account still shows a large balance due them.

The petition asks for a discovery in relation to the receipts given by the *feme* plaintiffs, the purchases by McMurray, the value of the notes received by Barrett and wife, etc., and prays for an account and settlement of the testator's estate.

The answers of the defendants admit substantially most of the material allegations of the petition, but aver good faith and fairness in their dealings in connection with the estate of the testator.

The answer of defendant Broom says, that the receipt for $7,196.13, with which *feme* plaintiff is charged, was for the amount of a note given by S. B. Howard for purchases at the sale, of which $7,000 was for a negro, but that the note *was good* at the time it was transferred to *feme* plaintiff; that the $2,095.50, with which she is charged, was her one-third of a sum of Confederate money taken on the day of (314) sale; of which sum $1,800 was paid him by a Confederate impressing officer, in compensation for two mules he impressed, and the remainder was the price of 300 bushels of corn, which, under the direction of the legatees, the *feme* plaintiff being represented by McMurray, her guardian, he sold for cash, so that certain widows and poor people, who were present and unable to give security, might purchase for cash, and that the receipt for $1,675.63, was for a negro bid off by *feme* plaintiff at $800, and a gold watch and other articles bought by her. He says further, that McMurray bid off land and other property to the amount of $17,000, that the share of his wife in the estate was $14,632.81, and he settled the balance by transferring to him, Broom, a negro bid off at $1,500, and giving his note for the residue, which note was sued on and collected, according to the value of the property bought, to the amount of about $300, since the war; and that he had paid on the share of R. T. Barrett in right of his wife $10,286.36, which included his purchases at

the sale, one-third of said Confederate money and notes given to the testator before his death, some before and some during the war, amounting to about $2,000. He also says, that the property was not sold for any particular currency, but brought high Confederate prices; that he supposed the nominal amount of the notes taken by him would be collected, not anticipating the subsequent legislation relating to depreciated currency; that he settled with the legatees as far as he could in notes, none of them expressing any preference for ante-war notes, and took receipts of the legatees for purchases, in part payment of their legacies.

The answer of the defendant, J. W. McMurray, says, that what he received from the testator's estate was property purchased by him at the sale worth only about $2,500, that he accepted the account of the executor as correct and settled with him accordingly; that he received his own share of the Confederate money taken by the executor as (315) stated by him, and that of the *feme* plaintiff, his ward, and after she became of age, paid the amount to her, and took from her a receipt for the same, expressed to be "in full of all money which came into his hands as my guardian, from G. D. Broom, executor of W. D. Howard's estate," which receipt is dated 20 Febuary, 1865. He denies any responsibility for the official misconduct of the executor, or that he is liable to account for his guardianship in this action.

An account being taken and report made by the Judge of Probate, which were substantially in accordance with the settlement by the executor, the plaintiff filed exceptions thereto. The first exception, the only one necessary to understand the opinion of this Court, is as follows:

1. That the principle upon which the report is based is erroneous. That instead of charging Broom, as executor, with the assets and crediting him with his vouchers, according to his return, the Probate Judge should have held him responsible for the value of the estate, at the expiration of twelve months after the sale of the property, directed by the will to be sold on that credit; or he should have declared Broom and McMurray trustees, and charged them, as such, with the value of all the property purchased by McMurray at the sale, and charged Broom and Barrett, trustees, with the property purchased by the latter and the ante-war notes paid to him, Broom, and also charged the plaintiff and Broom, as trustees, with the property bought for *feme* plaintiff, so as to bring the whole into hotchpot, and apportion the same equally according to the intent of the testator.

The case having been taken up to the Superior Court by appeal, his Honor, Judge Buxton, overruled the first exception, and gave the following reason therefor: "The rule of accountability contended for in the first

branch of this exception, however correct in itself is inapplicable, as there is aboundant proof in the testimony, and the Court so finds that the rule was departed from with the full concurrence of all parties concerned, all of whom purchased property and gave receipts to (316) the executor. The mode of accountability suggested in the second branch of this exception, of holding the defendants responsible as trustees of the property purchased, could only be sustained in the event that fraud and combination injurious to the plaintiffs were alleged and proved. There is no such allegation or proof in this case. It was advantageous to the interests of the devisees to allow any of them disposed to do so, to bid for the property. The terms of sale are filed, and correspond with the requirements of the will, and were followed."

Of the other exceptions some were sustained and others overruled. The plaintiffs appealed.

J. H. Wilson for the plaintiffs.
Battle & Son for the defendants.

PEARSON, C. J. The result of the acting and doings of the defendants in regard to the estate, is very unfortunate for the plaintiff. Instead of receiving an equal share with her two sisters of their brother's bounty, she has received only his watch and a few other articles, whereas the husband of one of her sisters, in right of his wife, has secured to himself real estate of much value, and the husband of her other sister, in right of his wife, has realized a large sum out of the ante-war notes due to the testator. The question is, have the plaintiffs a legal or equitable right to complain of this result, and to demand that an equal division be now made? Or was this inequality of the division caused in a manner and under circumstances which puts it out of the power of the Court to grant relief under any known and recognized principle of law or equity?

The draftsman of the complaint seems not to have fixed in his mind any special head of equity, on which to rest his case, and was content to state the facts, and demand an account and settlement of the estate upon general principles of equity and fairness.

The first exception to the report is made specific, and puts the right of the plaintiff on two grounds. (317)

1. The executor was directed by the will to sell at public sale on a credit of at least twelve months, taking bond and security, with interest from date; and although it suited the convenience of the executor, and of the defendant McMurray, that McMurray's receipt for his wife's share of the estate should be taken in place of a note at twelve months credit, in discharge of his bid on the land, and of the defendant Barrett,

that he should take the ante-war notes, and give his receipt for the face of the notes in part of his wife's share. *On the supposition* (which may have been innocently entertained) that it could make no difference, whether McMurray gave a receipt or a note with security at twelve months, and that it could make no difference, that Barrett took all the ante-war notes and left a corresponding amount of Confederate treasury notes, to pass to the lot of his wife's sister, the *feme* plaintiff; yet, as by reason of subsequent events, it appears that, "the supposition" was not true, and that, in point of fact, it did make a very great difference, to the injury of one of the objects of the testator's bounty. The defendants can not, with a good conscience, avail themselves of a *mistake*, as to the fact that, giving a receipt would have the same effect as giving a note, at twelve months, and of a mistake as to the fact, that a Confederate note was as good as an ante-war note; and that the plaintiffs are entitled to be put in the same condition as if the defendants had not acted under this mistake; that is to say, charge the plaintiffs with the Confederate treasury notes according to the scale, and with the value of the watch and other articles as if she had given a note at twelve months; charge McMurray with the value of the land and other property, as if he had given a note at twelve months, and charge Barrett as if "the ante-war notes" had been divided into *three equal parts*.

His Honor rejected this view of the case, on the ground "that the rule," that is (as we understand him) the direction to sell at
(318) twelve month's credit, "was departed from with the full concurrence of all the parties concerned," etc.

The fact is found, that the *feme* plaintiff was at the time of these transactions under the age of 21 years, and that defendant McMurray was her guardian, so, as an inference of law, his Honor ruled, that a guardian who is a party interested in the fund can bind the ward, by his concurrence in a departure from the directions of a will, to sell at twelve month's credit; and on a sale made for the purpose of partition, may in behalf of the infant, give a concurrence to an arrangement by which he, one of the parties to the partition, may give a receipt, instead of a note, at twelve months, for his bids. We do not concur with his Honor in this ruling. A guardian may, in behalf of his ward, give his concurrence to a partition, and it will bind the ward, provided the partition be equal, for the co-tenants may compel partition. Bacon's Abridgment, Title Guardian and Ward, Head 5.

A guardian may assign dower and it will bind the ward, provided it be equal, otherwise not, for the widow may compel an assignment. Fitzherbert's Nat. Brev., Writ of Admeasurement of Dower. In our case

there was no necessity for making a sale for the purpose of partition at the time it was attempted. In *November*, 1864, no prudent man would have converted real estate into Confederate treasury notes; nor would he, without some special occasion, have converted stock, farming utensils, grain, etc., into Confederate treasury notes; as to slaves, it could not make much diffence whether they were converted or not, for the probability, amounting almost to certainty, was that in a few months neither slaves or Confederate treasury notes would be of any value. We are led to the conclusion that the executor would not have made the sale, except for the understanding between him and the defendants, McMurray and Barrett, that they were to buy the property, and that he would take their receipts, instead of notes at twelve months, and so effect a partition. In making this arrangement the interest of the infant, tenant in common, was overlooked. She did not have a (319) fair chance, and could not bid except by sufferance and a promise to ratify when she arrived at age; so there was no necessity for this proceeding, and the partition effected by it was unfair and unequal, and the concurrence of the guardian did not bind the ward; indeed, as the guardian was personally interested in the matter, he can not insist upon holding the ward bound by this partition, for, by doing so he abandons the ground that he was acting innocently, under a mistake as to fact, that it made no difference whether he gave a receipt or a note at twelve months, and subjects himself to an imputation of fraud and unfair dealing towards his ward. Where the supposition that a departure from the directions of the will could make no difference turned out to be a mistake, and it was found that it did in fact make a great difference, to the inquiry of the infant co-tenant, an attempt to retain the advantage of the mistake, and a refusal to redress the wrong was almost as bad as if the act had been done by design in the first instance.

2. This brings us to the second ground on which the exception is put. His Honor finds, that there is no allegation or proof of fraud and combination injurious to the plaintiff. There are two kinds of fraud. There is no proof or allegation of actual fraud. This is fixed by the finding of his Honor; but constructive fraud is an inference of law from the relation of the parties; as, if a guardian so manages as to acquire the property of his ward during his minority, or soon after he arrives at full age, the law will presume fraud, and the guardian can only hold the property as security for his advancements; this presumption is made on the ground of public policy, and the transfer is treated as a mere security, and may be avoided, unless the guardian proves that no advantage was taken of the influence acquired by the relation.

We have the fact found by his Honor, that McMurray was the guardian of the *feme* plaintiff; that there was an understanding that
(320) McMurray's receipt would be taken in place of a note at twelve months, and that the result was, that the interest of the ward was, very much to her injury, *converted* from a third part of valuable real and a third part of ante-war debts, into Confederate treasury notes. So, in this instance, the accuracy of the presumption of law, in regard to transactions between persons occupying certain relations, is fully verified.

The defendants, Broom and Barrett, take the ground that the plaintiffs should look to McMurray, who was the guardian of the *feme* plaintiff; but that does not serve their turn; for the transaction in selling the land, when there was no necessity for it, and in handing over to Barrett the ante-war notes, and the arrangements by which their receipts, instead of their notes at twelve months was to be taken can not. All of the defendants together, and the plaintiffs, have a right to insist, not on a settlement with her guardian alone, but on a settlement with the executor of her brother and with her two sisters and their husbands, in order that the direction of the testator, that there should be an "equal division between his three sisters, share and share alike," may be carried into effect.

The counsel of the defendant, on the argument here, took the position that the *feme* plaintiff had confirmed and ratified the partition and the action of the defendants, in respect to the estate, by giving two receipts, after she was of full age. The point seemed not to have been made in the Court below, but it is insisted that it is presented by the facts found by his Honor in respect to other exceptions, to-wit: The sale was made November, 1864, *feme* plaintiff came of age 25 December, 1864, married September, 1866, gave a receipt to the executor for the price of a negro woman, gold watch and other articles, $1,675.63, dated 4 January, 1865, and gave a receipt to her guardian for her share of the money received for two mules impressed and of the corn sold for cash in Confederate treasury notes, $2,075.50, dated 29 February, 1865. These receipts are evidence of the facts recited, but no further effect can be allowed
(321) to them. Such was the opinion of his Honor, and we concur with him.

We must assume that the young lady was a member of the family of her guardian, who was her brother-in-law, during her minority and for some time after she arrived at age. It is familiar learning—a settlement or dealing of a guardian with a ward, soon after the ward arrives at age, will be set aside, unless the guardian proves that the settlement

or dealing was fair, that the ward had full knowledge on the subject, intended to confirm what had been done, had the benefit of the advice of friends, and that no advantage was taken of the influence which it is presumed the relation gives to a guardian.

In our case, the receipts were signed within less than two months after arrival of age; there was no intention to confirm *all* that had been done. The recitals in the receipts are confined to the specific facts, which excludes any covert design to extend to a confirmation. The young lady had no knowledge in regard to her rights, and signed the receipts as a matter of course, because told to do so, and because she believed that what had been done by the executor and her two brothers-in-law was all right.

So far from having the aid of friends, she acted by the direction and advice of relatives whose interests were adverse to hers, and who were laboring under the mistaken impression that a departure from the directions of the will could make no difference. So the idea of a confirmation by which her rights are excluded is out of the question.

It is not necessary to notice the other exceptions.

There is error. This will be certified to the end that another reference may be ordered.

PER CURIAM. Reversed.

(322)

ELIAS BRYAN v. J. M. HECK.

1. There is a marked distinction between cases where notice is necessary as preliminary to the action, to enable the defendant to pay and save the costs of the action, and cases where notice is necessary to constitute a cause of action.
2. Where a Confederate State's bond was transferred in payment of a debt, and the assignor promised that if it was not right he would make it so or pay $10,000, if, in point of fact, the transfer was not valid, the promise was absolute, and the party was bound to pay.
3. When each of the parties to such a contract have equal knowledge of the validity of the transfer, according to the rules of the treasury department, and equal means of acquiring correct information in reference to the same, it was incumbent upon the party promising to pay to take such steps as were necessary to make the transfer valid if it were not so. A failure to do so leaves it to be inferred that he was content to be charged with the amount in money.

APPEAL from *Tourgee, J.*, Spring Term, 1872, of CHATHAM.

The plaintiff alleged that he sold to the defendant in 1863, certain valuable real estate in the county of Chatham, for about $30,000 in Confederate money; that in payment of the price, defendant gave him a bond

or certificate of indebtedness of the Confederate States; that the bond was originally the property of one Brodie, who has assigned it to the defendant; that when the payment for the land was made, the defendant erased the endorsement, and inserted the name of the plaintiff. Upon objection being made by plaintiff, defendant promised that he would make the bond *all right* if it was not right, or pay plaintiff $10,000 in Confederate money. That he applied to the Treasury Department at Richmond for payment of the interest due, and to have a transfer made to him (plaintiff) on the books of the Department, etc.; that he
(323) failed to obtain the interest due or to have the transfer made, etc.; that he notified defendant of the facts, and he again promised to pay.

Defendant admitted the erasure and took issue in his answer upon other facts.

At Spring Term, 1872, certain issues were submitted to a jury. The following are the material ones:

2. Did defendant, upon the erasure being objected to, promise to make the bond all right or pay plaintiff the sum of $10,000 in Confederate money?

3. Did defendant agree to make the assignment good, if it was not good?

4. Did defendant, after the transfer, receive notice or information from the plaintiff that the assignment was deficient, and if so, when?

His Honor, in response to a request for special instructions, told the jury that if they should find the second issue in the affirmative, they need not consider the others, as that would entitle the plaintiff to recover the value of the $10,000, with interest from November, 1863.

The jury found the said issue in the affirmative, and the Court rendered judgment accordingly.

Defendant then moved for a new trial on the ground that his Honor erred in instructing the jury, "that if they found the second issue in the affirmative they need not consider the others, for Bryan was not bound to notify defendant that he had been unable to procure payment of the bond."

His Honor granted the motion, set aside the verdict, and vacated the judgment, etc. Plaintiff appealed.

John Manning for plaintiff.
Phillips & Merrimon for defendant.

PEARSON, C. J. There is a marked distinction between cases where notice is necessary as a mere preliminary to the action, to enable the

defendant to pay and save the costs of the action, as when a surety pays the debt, he must give notice to a co-tenant to enable (324) him to pay his ratable part and save the costs of suit, *Linn v. McClelland*, 20 N. C., 458, and cases where notice is necessary in order to *constitute a cause of action*, as where the drawer of a bill of exchange fails to accept or to pay, notice to the drawer is required to be given in reasonable time, in order to constitute a cause of action, for the drawer is under no liability unless he has notice; in other words notice is a condition precedent to the promise to pay on the part of the drawer.

Our case involves the question, was notice necessary in order to constitute a cause of action? His Honor charged that notice was not necessary, and there was a verdict and judgment, accordingly. On a motion for a new trial his Honor set aside the verdict and judgment for error in law, and granted a new trial, from which ruling the plaintiff appealed, C. C. P., sec. 299.

We are of opinion that his Honor decided according to law in the first instance, and there was error in law in granting a new trial.

Upon a difference of opinion as to the valdity of the transfer of the bond, by erasing the name of the defendant and inserting the name of the plaintiff, the defendant agreed, that if the transfer was not all right he would make it so, or pay to the plaintiff the sum of $10,000, with interest, etc. In point of fact the transfer was not all right; so that it leaves the promise of the defendant to pay $10,000, absolute and without condition, unless upon the idea that it was the duty of the plaintiff to ascertain the fact, and give the defendant notice thereof within reasonable time.

Whether the transfer, in the manner in which the defendant made it, was valid or not, according to the regulations of the department, was a matter equally within the knowledge of both parties, and the means of acquiring correct information in regard to it was equally accessible to both parties; so there was nothing to be done that would (325) come peculiarly within the knowledge of the plaintiff. Under these circumstances we are of opinion, that as the defendant had agreed to pay the amount in money, and if the transfer was not right to make it all right, it behooved him specially to look to the matter and satisfy himself that the transfer was regular and valid, and if it was not, to take the steps necessary to make it so. It is to be inferred from his failing to do so, that he was content to be charged with the amount in money.

One accepts a deed upon the assurance on the part of the bargainor, that the privy examination of his wife is regular, and if it be not, he will have it made all right, or else pay back the purchase money. If in

fact, the examination is not regular, the promise to pay back the purchase money becomes absolute, unless he avails himself of the right reserved, and has it made "all right" within reasonable time.

There is error, the order granting a new trial is reversed, and judgment for plaintiff, as entered in the first instance.

PER CURIAM. Reversed.

Cited: Gay v. Nash, 84 N. C., 335; *Thomas v. Myers,* 87 N. C., 34; *Wood v. R. R.,* 131 N. C., 48; *Johnson v. Reformers,* 135 N. C., 387; *Oil Co. v. Grocery Co.,* 136 N. C., 356; *Abernethy v. Yount,* 138 N. C., 347.

(326)

STATE v. MAJOR PURDIE.

1. To avail himself of error in the rejection of evidence, a party must show distinctly what the evidence was, in order that the relevancy may appear, and that a prejudice has arisen to him on account of its rejection.
2. An indictment charging that the defendant "unlawfully, wilfully and maliciously, did enter upon the lands of R. B., there situate, and did then and there set fire to the woods on said land," is sufficient under 20th section, chapter 35, Revised Code.

INDICTMENT for setting fire to and burning the woods, etc.

The following statement was made out by the presiding Judge:

The defendant was indicted for maliciously setting fire to and burning the woods of one R. P. Booe, on 8 April, 1871. The prosecutor, about 11 o'clock, being at his residence discovered, rising from the woods on the next side of his plantation, volumes of smokes; the direction of the wind was from the west and southwest in a direction across his plantation, and towards that of the defendant, who lived less than a half mile from the prosecutor, and east of him; approaching the fires, he found that they had been started from three different points, about three hundred yards from each other. His neighbors rallied to his relief in considerable numbers, and the fires were suppressed with little damage, except the loss of about six hundred panels of fence. The defendant, who lived one-fourth or one-half mile distant, did not aid in extinguishing the fire, while several neighbors, from several miles distant, did aid. The defendant offered in evidence the testimony of one Armstrong, tending to show that defendant, about 9 o'clock a. m. of the day of the fire, stopped at his house, about three miles from the place of the fire

(327) and said he was unwell, and was on his way to Dr. Hampton's;

about two o'clock he returned to the house of the same witness, or to the blacksmith shop near by; at this time the neighbors were hurrying by him to aid in extinguishing the fire, but defendant did not go, but continued at the shop; it did not appear how long. Counsel proposed to give evidence of the defendant's declarations of the motive of his stopping. This evidence was rejected by the Court; defendants excepted.

From Dr. Hampton's to defendant's is about six miles. In the evening of the same day, after the fire, one of the neigbors, who was returning from the scene of the fire, stopped at defendant's house, he inquired whether Booe suffered much damage, and whom he suspected; next day he averred he could prove his family and himself clear. It was suggested that the fire was accidental, the Court called the attention of the jury to the suggestion, and told them to consider the circumstances, as proved, attending the beginning of the fires, their direction and progress, and see whether their recollection and application of the evidence enabled them to infer the probability that the fire was the result of accident. Counsel of defendant excepted. One Sprinkle was a witness called for the State. He was asked on cross-examination, if he had not heard his own character proven to be bad in Court; he answered the question that he had, by his enemies; he was also asked if an indictment for perjury had not been sent against him; he answered that it had been. The Court then interposed, and said he would not allow such an examination to be repeated. Defendant tendered himself as a witness, to rebut the threats sworn to by the prosecutor; his testimony for that purpose was rejected. Defendant excepted.

There was a verdict against the defendant. He moved for a new trial, which was refused. There was a motion in arrest of judgment because the indictment did not charge that the woods burnt were not the property of the defendant. Motion overruled. Defendant appealed.

Attorney-General for the State. (328)
No counsel for the defendant.

BOYDEN, J. There is no ground for a new trial. The defendant asked the witness, Sprinkle, "if he had not heard his own character proven in Court to be bad." This question was answered.

This witness was then asked if an indictment for perjury had not been sent to the grand jury of Wilkes against him. This question was answered by the witness. The Court then interposed, saying that he would not allow such an examination to be repeated. No further question was asked this witness. The defendant excepted. That this excep-

tion can not avail the defendant, has been repeatedly decided by this Court.

To avail himself of error in the rejection of evidence, the party must show, distinctly, what the evidence was, in order that its relevancy may appear, and that a prejudice has arisen to him from the rejection. In other words, the error must appear upon the record, as only such as do thus appear can be noticed by the Court. *Whitesides v. Purdy,* 30 N. C., 431; *S. v. Worthington,* 64 N. C., 594; *Bland v. O'Hagan, Ib.,* 471; *Street v. Bryant,* 65 N. C. 619, and *Overman v. Cable,* 35 N. C., 1.

It had been proved, that the defendant, about 9 o'clock a. m., of the day of the burning of the woods, had stopped at the house of one Armstrong, on his way to Jonesville, and that about 2 o'clock p. m., of the same day, on his return, he again stopped at the same house, or at a blacksmith shop near by, and at this time the neighbors were hurrying by, to aid in extinguishing the fire, but that the defendant did not do so; but remained at the shop, how long it did not appear. The defendant's counsel then proposed to offer evidence of his declaration of the motive for stopping; to the reception of this evidence objection was made, and it was rejected by the Court. This objection can not be sustained (329) for the same reason as the other.

When these declarations were made it does not appear, whether at the time of stopping, or how long after, nor does it appear what these declarations were. So this Court can neither see that they formed a part of the *res gestae* as insisted on, or that they were such declarations as could have served the defendant, or had any tendency to disprove, or in any way to modify or diminish the effect of his stopping at the shop, while all the other neighbors were hurrying forward to aid in extinguishing the fire. Therefore there was no error in rejecting the evidence offered.

The motion in arrest of judgment is one of more difficulty. The indictment does not charge, in so many words, that the fire was not set out on the defendant's own land.

But the Court thinks it does charge that which is equivalent, to-wit, that the defendant unlawfully, wilfully and maliciously, did enter upon the lands of one R. P. Booe, there situate, and did then and there wilfully and unlawfully set fire to, and burn the leaves, and stuff, and timber, on said lands, and did then and there unlawfully and wilfully set fire to burn, destroy, and consume the fences on said land, about and surrounding the cultivated fields of said Booe on said land, etc. This we think is equivalent to the allegation not on his own lands, and that,

after alleging that the fire was set on the land of the prosecutor, Booe, it be tautological to have added to this, not on the land of the defendant.

Whether before the Act, Rev. Code, ch. 35, sec. 20, this indictment would have been sufficient or not, it is unnecessary to decide, as since that act we think the indictment sufficient.

PER CURIAM. No Error.

Cited: Outlaw v. Farmer, 71 N. C., 33; *Knight v. Killebrew,* 86 N. C., 402; *Stout v. Turnpike Co.,* 157 N. C., 368.

(330)

S. B. ALEXANDER v. COMMISSIONERS OF McDOWELL.

1. If a note be made payable at a particular time and place, a demand at the time and place need not be averred and proved in an action by the holder against the maker. It is otherwise, if it is payable on *demand* at a particular time and place.
2. In an action, however, against the Board of Commissioners of a County a demand is necessary, without regard to the fact whether the claim is expressed to be payable at any particular time or place, and in a *mandamus,* "the writ should show expressly, by the averment of a demand and refusal, or an equivalent, that the prosecutor, before his application to the Court, did all in his power to obtain redress."
3. It would seem that in an action against the Commissioners of a county, the action should be brought in the county in which they are officers, C. C. P., sec. 67.

PETITION for mandamus against the County Commissioners of McDowell County, filed on 18 October, 1870, and heard before *Henry, J.,* at a Special Term, of MECKLENBURG.

The following facts were agreed upon:

That the suit was brought to compel the Commissioners of McDowell County, to levy a tax, for the payment of interest due upon bonds issued by the County Court, under authority of an act of the General Assembly, entitled an act amendatory of an act incorporating the Western North Carolina Railroad Company.

2. That said bonds were signed, but not delivered to the railroad company until after the war, and when the county courts had ceased.

3. That a tax had not been levied to pay the interest.

4. That no demand for payment of interest had been made before bringing this suit.

5. That the coupons or interest is made payable at Marion, McDowell County. (331)

Defendant's counsel insisted that the act of Assembly under which the bonds were issued was unconstitutional.

That the bonds, having been issued after the authority of the county courts ceased, were invalid.

That the Commissioners had no authority to levy a tax.

That a demand was necessary.

His Honor gave judgment for the plaintiff and directed a peremptory mandamus to issue.

Jones & Johnston for plaintiff.

J. H. Wilson for defendants.

READE, J. 1. As to whether a demand was necessary before action? In *Nichols v. Pool,* 47 N. C., 23, which is the leading case in our Court upon the subject, it is decided, that if a note be payable at a particular time and place, a demand at the time and place need not be averred or proved in an action by the holder against the maker. It is otherwise if the note be payable *on demand* at a particular time and place.

In our case, it is stated that the notes and coupons were payable at Marion; but it is not stated that they were payable *on demand* at Marion. It would seem, therefore, that if this were an ordinary action between individuals, no demand would be necessary against the maker. This brings us to the question whether we should hold the same in regard to actions against the Board of County Commissioners. In *Love v. Comrs.,* 64 N. C., 706, it is decided that a demand is necessary, before action brought, without regard to the fact whether the claim is expressed to be payable at any particular time or place. There is a manifest reason why the rule should be different between an individual and the Board of Commissioners. An individual acts for himself, is (332) supposed to know all his liabilities, and it is his duty to meet them. But a Board of Commissioners is a public agent, discharging many of its duties through other agents. There must often be claims against the county, contracted not under its immediate order, of which it knows nothing until they are presented to the Board to be allowed, and when claims are allowed, the Board does not hold the funds to pay them, but must give an order upon the proper officer. And it would greatly embarrass, if not destroy, the county governments, if every holder of a claim could sue the Board without a demand or notice. We are therefore of the opinion that a demand or notice is necessary before action against the Board of Commisisoners.

2. But suppose this were not so; still the question remains, whether a

mandamus should issue without a demand upon the defendant to do the thing required. We find it laid down generally, that "it should appear from the petition, that a demand has been made on the defendant to do the thing he is sought to be compelled to do." *Moses on Mandamus,* 204. And again: "In order to lay the foundation for issuing a writ of mandamus, there must have been a refusal to do that which it is the object of the mandamus to enforce, either in direct terms or by circumstances distinctly showing an intention in the party not to do the thing required." *Ib.* 18. And again: "The writ should show expressly, by the averment of a demand and refusal, or an equivalent, that the prosecutor, before his application to the Court, did all in his power to obtain redress." *Tappan on Mandamus,* 323. It is true that there are cases where a demand is dispensed with, as where it is apparent that the party has wholly neglected a plain duty. *Moses on Mandamus,* 102.

3. The act of the Legislature authorizing the issuing of the bonds is not unconstitutional, as we have decided in like cases at this term. *Hill v. Comrs.,* 367 *post,* and *Alexander v. R. R., ante* 198.

4. No point is made upon it, and it may be that the objection was waived by appearing and answering, but, we call attention to (333) the fact that the action is brought in Mecklenburg against the Board of Commissioners of McDowell County, whereas it would seem that the action ought to have been in the latter county. C. C. P., sec. 67.

There is error in his Honor's ruling that no demand was necessary, and for this error there must be a

PER CURIAM. *Venire de novo.*

Cited: Jones v. Comrs., 69 N. C., 415; *Dowd v. R. R.,* 70 N. C., 470; *Edwards v. Comrs., Ib.,* 572; *Hawley v. Comrs.,* 82 N. C., 24; *Jones v. Statesville,* 97 N. C., 88; *Horne v. Comrs.,* 122 N. C., 471.

Dist.: McLendon v. Comrs., 71 N. C., 41.

BENNETT ALSBROOK v. WILLIAM H. SHIELDS.

1. When the owner of property is deprived of possession, and regains the same, he may, in an action brought against him, and as full defense thereto, show his title to the property; notwithstanding that, in the recaption, he may have committed an act calculated to produce a breach of the peace.
2. Therefore, where a person is sued for the conversion of a bale of cotton, he may set up a lien under a subsisting lease and show his title as

landlord, and is not compelled to resort to an action for "claim and delivery," under the act of 1868-'69.

3. A plaintiff claiming such property is not restricted to the remedy of "claim and delivery," but may bring an action in the nature of trover.

APPEAL from *Watts, J.*, at a Special Court for HALIFAX, December, 1871.

The action was brought for the alleged conversion of a bale of cotton. The complaint alleged that in January, 1871, one Balaam Shields, a lessee of the defendant, delivered a bale of cotton, weight three hundred and sixty pounds, to the plaintiff, at the gin house of Lawrence & Savage, in part payment of merchandize sold and delivered, by the plaintiff, to said Shields, and that a few days thereafter the plaintiff noti-
(334) fied the defendant thereof, and that defendant claimed the cotton, as Balaam Shields had not paid the rent due defendant; that plaintiff and defendant agreed to submit the matter to arbitration, and before it was sumitted to arbitration, one C. C. Shields, agent of the defendant, took the cotton and converted it to the use of the defendant; that before the alleged conversion, Balaam Shields had paid the rent due to defendant. A demand was made and a refusal by the defendant. Plaintiff demanded judgment for $50.56 and interest. The cotton was alleged to be worth fourteen cents per pound.

Defendant denied that plaintiff was the owner, and that he was entitled to possession. He denies that the cotton was delivered to the plaintiff at the gin house of Lawrence & Savage, or that the rent had been paid to C. C. Shields as his agent, or that Shields was his agent. He admitted a demand, the price of the cotton, that he had been notified, etc., and he claimed the cotton because the rent had not been paid. Defendant alleged that C. C. Shields had leased for three years, to Balaam Shields, a tract of land reserving an annual rent in kind. That in April, 1870, C. C. Shields assigned by deed to defendant his reversion in the land, and his interest in the crop, and that the bale of cotton was part of the crop for 1870, and vested in the defendant as assignee. That the rent fell due after the assignment of the reversion, and that the crop had not been divided at the time of the alleged conversion; claimed a lien on the cotton, and alleged that the lien had not been discharged by writing.

Several witnesses were examined by each party, and the evidence was conflicting. The plaintiff's tending to show that the allegations in the complaint were true, and the defendants, tending to sustain his answer. The parties admitted that in 1870, C. C. Shields had assigned, by deed,

his interest in the land and rent to defendant, and also the lease to Balaam Shields.

The defendant's counsel argued to the jury that the plaintiff could not recover, because he had not alleged in his complaint (335) that he was the owner of the cotton, stating as a principle of law, that proof without an allegation was as fatal as an allegation without proof. The Court interrupted, and said that amendments could be allowed even after judgment. Defendant excepted. The counsel further argued that the possession of the whole crop was in the defendant, and he had a right to take the cotton, as there was no evidence in writing, or receipt showing that the rent was satisfied or discharged, and that the plaintiff did not show that C. C. Shields had authority from the defendant to take the cotton.

The Court charged the jury that if the defendant had not authorized the taking of the cotton, but ratified the act afterwards, he was as much responsible as if he had committed the act himself.

That possession would give the plaintiff the right to recover against a wrong doer, and if the jury found that the cotton was delivered to the plaintiff, and the defendant, by his agent, afterwards converted it, the plaintiff ought to recover.

That to divest the landlord of the possession of the crop, it was not necessary there should be writing. That a payment or satisfaction was sufficient, and that the words "satisfied or discharged" in the ninth line of sec. 13, ch. 156, laws of 1868-'69, had no connection with the words "by some writing signed, etc.," the disjunctive *or* being used.

That if the rent was not satisfied, and the defendant was entitled to the possession, he could not retake possession, because a recaption was calculated to lead to a breach of the peace.

That the only legal remedy in such cases was prescribed in sec. 13, ch. 156, Laws 1868-'69, and that the proper action was claim and delivery.

That if the plaintiff was entitled to recover, they should assess his damage at the value of the cotton at seventeen cents per pounds.

The jury found a verdict for the plaintiff, and assessed his dam- (336) age at $53.90.

Rule for new trial. Rule discharged. Judgment and appeal.

Clark & Mullen for the plaintiff.
Moore & Gatling for defendant.

BOYDEN, J. The case states that his Honor told the jury, that if the

plaintiff was entitled to recover they would assess his damages at the value of the cotton at seventeen cents per pound. This, we think, is a mistake of the clerk, as both parties had agreed that the cotton was worth fourteen cents per pound, and upon making a calculation it will be seen that the jury allowed only fourteen cents per pound, the price agreed upon by the parties.

It is not doubted that it would have been error if the Judge had so instructed the jury and they had so found.

His Honor also gave the following instructions to the jury: "That if they found that the rent was not satisfied and the defendant was entitled to the possession, he could not retake possession of the cotton, because a recaption was calculated to lead to a breach of the peace. That the only legal remedy, in such a case, for the defendant was prescribed in sec. 13, ch. 156, act 3, 1868-'69, and that he should have brought claim and delivery, and was confined to that remedy."

In these instructions we think his Honor erred in two particulars. We understand his Honor as instructing the jury that if the owner of property takes it out of the possession of another under circumstances calculated to produce a breach of the peace, he may be sued for such taking by the possessor, and the value of the property recovered.

This Court had supposed that it was familiar learning that the owner of property thus taken could not be sued for the property; and (337) that if the owner of real estate had taken possession under circumstances calculated to produce a breach of the peace, and even if he committed a breach of the peace by ousting the possessor, still, he could not sustain a suit for the land against the real owner, who had thus violently deprived him of the possession, and that a plea of *liberum tenementum,* if established, would bar the plaintiff's recovery.

We think his Honor was also in error in instructing the jury that the defendant's only remedy was claim and delivery, as provided in Laws 1868-'69, mentioned by his Honor. We hold, that if the defendant was the owner of the cotton, as alleged in his answer, that was a full defense to this action, if established to the satisfaction of the jury, and that his Honor should have so instructed the jury.

We also hold, that the plaintiff might have sustained a civil action for the cotton in the nature of an action of trover, and that he would not be restricted to the action of claim and delivery.

For the above errors there must be a

PER CURIAM. *Venire de novo.*

Cited: Livingston v. Farish, 89 N. C., 144; *Wilson v. Hughes,* 94 N. C., 186.

(338)

W. W. GRIER et al. v. MOSES H. RHYNE.

1. A levy on land, under an attachment issued by a Justice of the Peace is sufficient, if it gives such a description as will distinguish and identify the land.
2. Therefore, a levy in these words: "I did, on the 12th day of June, 1869, levy on a certain tract, whereon defendant lives, containing 197 acres; also another tract lying near the same, 70 acres more or less—no personal property, etc., to be found;" *was held*, to be sufficient.
3. A judgment of the Superior Court, upon a Justice's execution or attachment levied on land, under judgment there was an execution and sale of the land, precludes all collateral enquiry into the regularity of the previous proceedings.

ACTION to recover possession of a tract of land tried before *Logan, J.*, at Spring Term, 1872, of GASTON.

Plaintiff claimed under a sheriff's deed, and *ven. ex.* issued from the Superior Court. The evidence was, that an attachment was issued by a justice of the peace against one G. C. Rhyne for $175 due to the plaintiffs. This attachment was levied on the lands of the defendant in that action, and returned before the justice who gave judgment for the debt and returned the papers into Court. The levy was in these words, viz: "By virtue of an attachment I did on 12 June, 1869, levy on a certain tract of land whereon the defendant lives, containing 197 acres, and also on another tract near the same, 70 acres more or less. No personal property, etc. J. F. Long, D. S."

The judgment was regularly docketed on 6 August. A *venditioni exponas* was issued, and the land sold by the sheriff, and bought by plaintiffs, to whom the sheriff made a deed. (339)

The defendant claimed under a bond for title made by G. C. Rhyne, and also a deed conveying the 70 acres to M. H. Rhyne for the sum of $800. Several witnesses were examined by the defendant, touching the execution of the bond, deed, etc., but as the decision of the Court is confined to two points made in the case, it is unnecessary to state this evidence.

Defendant's counsel contended.

1. It did not appear that under the attachment any advertisement had been made, or any process actually served on the defendant, as required by the provisional remedy now known as attachment, which is different from an attachment as it existed before C. C. P.

2. That the levy was too vague, and not in compliance with law.

3. That G. C. Rhyne's interest was not the subject of levy.

His Honor after argument stated as his decided opinion, that plain-

tiff could not recover, and that he should so charge the jury. The plaintiffs submitted to a non-suit and appealed.

H. W. Guion for the plaintiff.
J. H. Wilson for the defendant.

BOYDEN, J. Upon what ground his Honor gave the decided opinion, that the plaintiffs could not recover, upon the evidence offered in the cause, without submitting to the jury the questions of fact raised by such evidence, we are not informed.

The counsel for the defendant in this Court relies upon two grounds to sustain the opinion of his Honor.

1. That the return of the levy is insufficient.

2. That there was no evidence that there had been any advertisement, or that the defendant in the attachment had any notice of the proceedings.

The first question is against the defendant, as is shown by the (340) authorities cited by plaintiff's counsel. *Huggins v. Ketchum,* 20 N. C., 414; *Smith v. Lowe,* 24 N. C., 457; *McLean v. Paul,* 27 N. C., 22; *Jackson v. Jackson,* 35 N. C., 159.

The other question is clearly against the defendant, as settled in this Court by several cases cited by plaintiff's counsel, to-wit: *McLean v. Moore,* 51 N. C., 520; *Skinner v. Moore,* 19 N. C., 138, and *Burke v. Elliott,* 26 N. C., 355. There was therefore error in the opinion of his Honor.

PER CURIAM. *Venire de novo.*

Cited: Spillman v. Williams, 91 N. C., 490; *Wright v. R. R.,* 141 N. C., 166.

LUKE BLACKMER v. A. J. PHILLIPS.

1. A *bona fide* endorsee of negotiable notes before maturity, takes them, according to the law merchant, free from all equities or drawbacks except endorsed payments.

2. Where the owner of land contracted to sell the same, and to secure the payment of the purchase money took negotiable notes, and afterwards and before maturity transferred said notes to a third person; *Held,* that the vendee, upon payment of said notes, was entitled to a conveyance of the land.

3. A creditor who buys at execution sale the interest of a vendor in a tract of land contracted to be sold, and the title of which is held as security for the purchase money, acquires only the legal title, subject to the equities of the vendee. He acquires no interest equitable or otherwise in the notes given as security for the purchase money.

BLACKMER *v.* PHILLIPS.

APPEAL from *Cloud, J.*, at Spring Term, 1872, of ROWAN.

The parties agree upon the facts as follows:

M. A. Smith was the owner in fee of a house and lot in Salisbury, and on 10 October, 1868, contracted to convey the same in fee to the defendant for $2,400; $800 was paid in cash, and defend- (341) ant executed two notes of $800 each, one payable in 12 months, and the other in 24 months, from 15 January, 1869, to secure the purchase money, and was let into possession. At Spring Term, 1869, plaintiff obtained judgment against Smith and had the same docketed 15 October, 1869; execution was issued and Smith's interest in the house and lot was sold, and plaintiff became the purchaser, and took a sheriff's deed; that thereafter, and before the docketing of the judgment, M. L. Holmes became the purchaser of the two outstanding notes of $800 for full value and before maturity. Holmes had no actual knowledge of the existence of the judgment, and he bought before the sheriff's sale. He demanded payment of the notes from the defendant, who paid off the same about the —— day of January, 1870, and defendant took a deed from Smith for the premises. After the rendition of the judgment plaintiff notified the defendant thereof, and notified him to pay the balance of the purchase money to him, and not to pay any part thereof to Smith. The defendant stated that he certainly would not pay any more of the purchase money to Smith, unless he would make him a sure title, and did not pay to Smith, but the whole to Holmes, as aforesaid. Holmes took a mortgage from the defendant on the premises 6 January, 1870, to secure payment of a loan, and, at the time, knew of the existence of said judgment.

The plaintiff asked for judgment against the defendant "for the sum of sixteen hundred dollars, with interest thereon from 15 January, 1869, being the amount due the said Smith at the time of filing the judgment roll aforesaid, to be paid by a day to be named, *when* plaintiff will execute a title to defendant for the premises, and in default thereof, that said house and lot be sold for the payment of said sum of money, and interest with costs, etc., etc."

Upon this state of facts his Honor was of opinion that plaintiff could not recover, and gave judgment for defendant.

McCorkle for plaintiff. (343)
Bailey for defendant.

PEARSON, C. J. On the case agreed, the plaintiff insists that he is entitled to judgment; that the defendant pay to him the amount of the

two notes, given by defendant to Smith, for balance of the purchase money, or else that the house and lot be sold to satisfy the same.

On the contrary, the defendant insists, that as he has paid the amount of the two notes to Holmes, who was a *bona fide* holder, for full value and without notice, by endorsement of the notes before maturity, he has performed the condition of the contract of sale on his part, and is entitled to judgment that the plaintiff convey to him the legal estate in the house and lot.

The two notes given by the defendant to Smith, for the balance of the purchase money, were negotiable, and we see no principle on which it can be contended that a *bona fide* holder, by endorsement before maturity, had not a right to receive payment of the same. The balance of the purchase money being thus paid, we can see no principle on which it can be contended that Phillips is not entitled to have a conveyance of the legal estate, according to the title bond executed to him by Smith.

It was urged by the plaintiff's counsel, that the effect of the sheriff's deed was not only to vest in Blackmer the legal title to the house and lot, but also to vest in him the ownership of the two notes, as an incident to the land, so that an endorsement by Smith, after his title in the notes was thus divested, is void and can have no legal effect.

The two notes were negotiable, and according to the law merchant, a *bona fide* endorsee, before maturity, took them free from all equities or drawbacks, except endorsed payments. This settles the question.

We are not to be understood as conceding the position that the (343) plaintiff, by the sale and sheriff's deed for the house and lot, acquired not only the legal estate in the house and lot, but also became the owner of the two notes, as "incident" thereto. We look upon it, in the view, of considering the two notes, as the principal or primary matter, to secure the payment of which the legal estate was retained by Smith, the vendor. So the legal title in the house and lot was retained as an *incident* to secure the payment of the two notes given for the balance of the purchase money.

The effect of the contract of sale—payment of a part of the purchase money—the two notes for the balance, and bond to make title, was to vest in the vendee (the defendant) an equitable estate in the land; in other words, in equity, Phillips thereby became the owner of the house and lot, subject to the incumbrance of paying the balance of the purchase money before he could call for a conveyance of the legal estate. So that Smith held the legal estate as a trustee, in the first place, to secure payment of the two notes, and then in trust to convey to Phillips.

As Smith held the legal estate, assuming that it was liable to sale un-

der execution; what did the purchaser acquire by the sale and sheriff's deed? The sheriff was only authorized to sell the lands and tenements of the defendant in the execution, that of course passed by his deed; but how could the sale of the house and lot have the effect of passing the title to the two notes? To this interrogatory, the learned counsel could only reply "it passed as an *incident* to the land," and the land was bound from the time of the "judgment docketed"; admit that the land was bound, how does it follow that the two notes passed by the sheriff's deed? The two notes were not the subject of exception. The sheriff did not sell them, and had no power to do so. According to *Giles v. Palmer,* 49 N. C., 386, the sheriff's sale passed the naked legal title, and the purchaser could get a judgment in an action of ejectment: but it is said in that case, "should the plaintiff attempt to deprive the trustee of the possession of the premises, the remedy of the *cestui que trust* will be in a Court of equity." This control which has been exercised (344) by Courts of equity, accounts for the fact that the legal title of trustees has been seldom ever interfered with. The widow of a trustee is entitled to dower, and yet it is never claimed; for the reason, that an injunction would issue. A mortgagee dies, the land descends to the heir, and the widow gets dower, but *the debt* belongs to the personal representative, and upon payment to him, the heirs and widow will be decreed to make title. This is a matter of every day's occurrence, no one has ever insisted that the *debt* passed with the land "as an *incident.*" In our case, if Smith had died, the land would have descended to the heir, but "the two notes" would have belonged to his personal representative, and on payment to him, Phillips would have been entitled to call upon the heir for a conveyance of the legal title, or accepted a deed from the administrator. The idea that by a purchase at sheriff's sale of the legal estate of Smith, the plaintiff (who held in trust to secure the payment of the two notes, and then in trust to make title to Phillips), not only got the legal estate, but also acquired a right to the two notes for the balance of the purchase money, is so "wide of the mark," especially when this right is asserted against a *bona fide* holder, that we would not seriously discuss it, except for the fact that the plaintiff is a member of the profession, and the learned counsel who argued the case for him, seemed to be much in earnest, although he did not cite any case, or give any reason in support of the position, that the two notes passed to the plaintiff, as incident to his purchase of the legal estate. The action is for the amount of the two notes, and not for the house and lot, except to have it sold, if necessary, to satisfy the two notes. So the gravamen is the right of the plaintiff to the two notes, and the matter is not complicated by an action to recover the land upon the legal title, and thus

force the defendant into equity under the old system; or to his equitable defense under the new mode of procedure; thus marching directly up to the question, and showing confidence in the position. The
(345) matter is too plain for further discussion. I will only ask a question by way of illustration. A deed is made to A, in trust to sell and pay certain creditors. A is one of the secured creditors. The estate of A in the property is sold at execution sale, does the purchaser of the sheriff's deed acquire title to the debt which is due to A, and is secured by the deed of trust?

PER CURIAM. Affirmed.

Cited: Stith v. Lookabill, 71 N. C., 29; *Tally v. Reed,* 74 N. C., 469; *Isler v. Koonce,* 81 N. C., 381; *Bank v. Michael,* 96 N. C., 58; *Vance v. Bryan,* 158 N. C., 504.

JOHN F. SEYMOUR & CO. v. S. COHEN et al.

Where a motion is made by a party to set aside a judgment, notice must be given to the adverse party.

MOTION to set aside a judgment, heard before *Clarke, J.,* at Chambers.

No notice was given by the defendant, against whom the judgment was rendered, to the plaintiff, of the motion to set aside and vacate the judgment. His Honor ordered the judgment to be vacated and that defendant be permitted to plead. From this order plaintiff appealed.

Faircloth for plaintiffs.
Busbee & Busbee for defendants.

READE, J. The only question necessary for us to consider, is, was notice to the adverse party of the motion to vacate the judgment, necessary. Notice was necessary, and the order vacating the judgment without notice was erroneous.

PER CURIAM. Reversed.

Cited: Sutton v. McMillan, 72 N. C., 103; *Fisher v. Mining Co.,* 105 N. C., 126.

(346)

Doe on Demise of SAMUEL H. TAYLOR v. JOHN D. ALLEN.

1. In selling lands for taxes, the Sheriff acts under a statutory power which must be strictly pursued, and he must not only do the acts which are required to bring his sale within the power, but he must do them within the time prescribed.
2. The Sheriff's power to sell land for taxes being given on the condition that it be exercised within a certain time, the Legislature cannot, by a private act, give him power to sell after the expiration of the time allowed by law.
3. If a sheriff fails to return lands sold for taxes according to the requirements of the statute, Rev., Code, ch. 19, sec. 91, the sale is imperfect, and cannot be perfected by his afterwards doing the act.
4. A sheriff who sells lands for taxes, and goes out of office before he makes a deed, cannot afterwards make such a deed.

EJECTMENT tried before *Cloud, J.*, Spring Term, 1872, of STOKES.

This was an action to recover possession of a tract of land in Stokes County. The action was commenced under the old system.

The facts were: that the land had been granted, and that in 1858, one John G. Smith, then residing on the land in Stokes County, "was due for the taxes of that year (1858), $5.40," and a tax list, properly made out and certified, came into the hands of John Martin, then Sheriff of Stokes County, and who continued to be Sheriff during the year 1859. The Sheriff failed to collect the taxes, but accounted for them himself when they were to be paid.

On 23 February, 1861, an act was passed by the General Assembly, giving John Martin, late Sheriff of Stokes County, power to collect arrears of taxes, but limiting him to the collection of taxes due for the three years immediately preceding 1 October, 1860. Under this act the ex-Sheriff made a list of the lands of delinquents, includ- (347) ing a tract of one hundred and fifty acres, as the property of John G. Smith, and therein charged said Smith as owing $5.40 for the taxes of 1858. This list was returned to the County Court of Stokes at March Term, 1862, was recorded on the minutes of that term, read aloud, posted as required by law, and all other things, in respect to that return, were done as required by law. Afterwards, to-wit: at September Term, 1862, of the County Court, the lessor of the plaintiff proved by oral testimony, that the lands of said Smith were sold at public auction by John Martin, ex-Sheriff, when the lessor became the purchaser at the sum of $6.15, taxes and costs.

The plaintiff read in evidence, a deed from John Martin, former Sheriff, purporting to convey said 150 acres; said deed was dated

August, 1864. Plaintiff stopped his case. Defendant moved that plaintiff be non-suited, on the ground that no return of sales was made to the County Court, and recorded, and read, and posted, as required by law, and for want thereof that the sale of the land and the deed made in pursuance thereof passed no title. The Court overruled the motion. It was found as a fact, that John G. Smith sold and conveyed the said tract of land to the defendant, John D. Allen, on 15 October, 1858, and at that time Smith removed from the place to another county, and defendant took possession, and has remainded in possession ever since.

Upon this state of facts defendant asked the Court to charge the jury,

1. That the deed of John Martin passed no title, for the reason that no list of the sales was made at September Term, 1862, and returned, read, and recorded as required by law.

2. That under the act of February, 1861, the authority to collect arrears of taxes for three years before 1 October, 1860, was an authority to collect, with power to distrain the property then owned by Smith, and did not extend to the property in controversy, which Smith (348) had sold to the defendant 15 October, 1858, and the sale and deed by Martin, under these circumstances, passed no title.

3. That the deed of John Martin, former Sheriff, and made in 1864, instead of being made by the existing Sheriff, was void.

The Court charged:

1. That the failure to return a list of sales to the Court as referred to in the first request by the defendant was not material, and that the deed of the ex-sheriff was sufficient without such return.

2. That under the act of 1861, John Martin, former sheriff, had authority to collect the taxes due from Smith for 1858, and a right to distrain the land in controversy, notwithstanding the sale to the defendant.

3. That the former sheriff was the proper person to make the deed.

Defendant excepted to the charge of the Court. There was a verdict for the plaintiff. Judgment. Defendant appealed to the Supreme Court.

Morehead and *Graves* for the plaintiff.

Dillard & Gilmer, Smith & Strong for the defendants.

RODMAN, J. The following is a brief of so much of the Act for selling land for taxes (Rev. Code, ch. 99) as is material to the present case:

Sec. 33. At the first County Court after the first day of April in each year, the Court shall appoint a Justice in each district, to take the list of taxable property.

Sec. 55. The Justice shall advertise when and where he will attend to take the lists.

Sec. 66. Having taken them, he shall return them to the term of the County Court next thereafter.

Sec. 69. The clerk, on or before the first day of April next after the return to him, shall return an abstract of the lists to the Comptroller. (349)

Sec. 81. The clerk, on or before the first day of April in the year ensuing the taking of the lists, shall deliver to the sheriff a copy thereof.

Sec. 82. The sheriff shall forthwith proceed to collect the taxes.

Sec. 87. Till the first day of October in the next year, the sheriff may distrain and sell.

Sec. 91. Under the following rules:

1. He shall return to the term of the County Court held next after the first day of January, a list of the lands he proposes to sell for taxes, which shall be read aloud, recorded on the minutes and a copy put up in the courthouse.

2. Notice shall be issued to every person whose land is returned as aforesaid.

3. The sale shall be made within two terms next succeeding the term when the list is returned.

4. The whole of a tract shall be put up for sale, and struck off to him who will pay the taxes and expenses for the least part of the land.

5. At the second term next succeeding the term when returns are made of lands to be sold, the sheriff shall return a list of the tracts actually sold.

Sec. 93. The owner may redeem within a year after the sale.

Sec. 94. If not redeemed within the year, the purchaser may select the quantity of land bid off by him.

Sec. 95. And may within a year after the time of redemption has expired, have it surveyed and a plot made.

Sec. 96. The sheriff, on being presented with a certified plot within the year after the time of redemption is passed, shall convey to the purchaser the land therein contained.

97. When any sheriff or officer other than the one who made the sale shall be authorized to execute the conveyance, the purchaser shall apply to the County Court, which, on certain facts being proved, shall direct the present sheriff to convey. (350)

In the present case, it is not stated with certainty whether the taxes, for which the land was sold, were assessed in 1857 or 1858. It

says: "In 1858, one Smith, then residing on the land, was due for the taxes of that year $5.40."

We understand that the taxes were payable in 1858; consequently the sheriff could distrain and sell up to 1 October, 1859. (Sec. 87.) He did not sell, however, until September, 1862.

It will be convenient to defer for a while considering the effect of the act of 23 February, 1861.

Sec. 3 of the chapter of the Rev. Code above cited says: "If any person shall sell his real property, and have no estate within reach of the sheriff to satisfy the taxes imposed thereon, at the time when they become demandable, the land shall be bound for the same, as well as the property of the then owner." Under this we think the sheriff might have sold the land up to 1 October, 1859, notwithstanding the sale to the defendant. At least we may without injustice to him assume this to be so in the present case. But we think *Avery v. Rose,* 15 N. C., 549, establishes that he could not have sold afterwards. It is held in that case that in selling for taxes the sheriff acts under a statutory power which must be strictly pursued, and that not only must he do the acts which are required to bring his sale within the power, but he must do them within the time prescribed. (*Avery v. Rose,* p. 559.) It can not have been intended that the lien under sec. 3, should have been enforceable at any indefinite time, and no time is fixed for its expiration other than 1 October, till which time the sheriff is allowed to sell. If we regard the sheriff's power to sell as a power given on the condition that it be exercised within a certain time, which failed to be acquired by not selling within the time, it would seem clear that the Legislature could not by the private act of February, 1861, give the sheriff a power to sell the land of the defendant. It would be to take his
(351) property without process of law. And if we consider the requirement to sell by 1 October as only a statute of limitations, yet, although a Legislature may prolong a period of limitation, or suspend the running of the statute before the remedy is wholly barred, yet it can not lawfully do so afterwards. *Cooley Cons. Lim.,* 365, and cases cited. It may be said that no statute of limitations runs against the State, unless it be expressly so declared. But here the State ceased to be a creditor by the payment of the tax by the sheriff in October, 1858; so as was said in *Avery v. Rose,* the additional year within which the sheriff was allowed to sell, was for his benefit, and to allow him to reimburse himself.

Our conclusion on this point might relieve us from considering the

other propositions of the defendant, but as they embrace important matters of practice, we proceed nevertheless to consider them.

The first is, that the sale is void by reason that the sheriff failed to return a list of the tracts sold by him, as required by subsection 5 of section 91. We think it is decided in favor of defendant by *Avery v. Rose,* p. 559, where it is held, that unless the survey is made and presented to the sheriff within the time prescribed by sections 95 and 96, the sale is imperfect and can not be perfected by afterwards doing the act. The reason, or at last one reason, why the time for the return is material, is that the owner may have notice of the sale and be enabled to exercise his power of redemption within a year thereafter. In *Register v. Bryan,* 9 N. C., 17, it was said that the Sheriff's deed would be invalid by matter subsequent, such as a failure to register it within the time prescribed. This, however, was only a dictum and not the point decided.

The third proposition of the defendant is, that the sheriff who made the sale in 1862, having gone out of office before 1864, had no power to make a deed in that year. In this we concur with him for reasons drawn from the provisions of sections 96 and 97. Section 96 contemplates that the deed shall be made within a year after the (352) time for redemption has expired, and no provision is anywhere made that we have seen (except indirectly by section 97), for the case of the sheriff who sold, dying or going out of the office in the meantime, or for a deed being made at any time after the expiration of the year. For the reasons given in *Avery v. Rose,* we think it could not be made afterwards by any one. Only a part of the land is sold, but the title does not pass by the sale merely, except for certain purposes, and it is important to the original owner, and to the public, that the share which he retains should be known in order that it may be occupied by him, and subjected to its due private and public burdens. And this can not be done until it is severed from the part sold by the Sheriff's deed.

As we have said, we have not found any provision expressly authorizing the deed to be made by any one except the sheriff who sells, even though he should die or go out of office before the year succeeding that for redemption has passed. Sec. 30, ch. 37, Rev. Code, which authorizes sheriffs to execute deeds after they have gone out of office, expressly excepts deeds for lands sold for taxes.

Sec. 97, however, implies a case as possible, in which some other officer than the sheriff who sold may make the deed. We conceive that this must be confined to the case of the sheriff who sold dying or going out of office before the expiration of the year succeeding that allowed for re-

demption, in the first of which cases, at least, the deed must necessarily be executed by some one else.

PER CURIAM. *Venire de novo.*

Cited: Johnson v. Royster, 88 N. C., 196; *Morrison v. McLaughlin, Ib.,* 253; *Fox v. Stafford,* 90 N. C., 298; *Shew v. Call,* 119 N. C., 453; *Stewart v. Pergusson,* 133 N. C., 281.

Overruled: In part, *Wilmington v. Cronly,* 122 N. C., 386; *Jones v. Arrington,* 91 N. C., 129.

(353)

A. H. SUDDERTH, Guardian, v. R. D. McCOMBS and D. S. SUDDERTH, Adm'rs.

1. In cases of appeal from the Probate Court to the Superior Court, the Judge has the same right to allow amendments as if the case had been constituted in his Court.
2. Amendments, which promote justice and a trial on the merits, are in general liberally allowed; but in all cases the application should be made in due time, or sufficient reason be shown for the delay.
3. It is the right and duty of an appellant, subject to the provisions of the Code, to direct what part of the record shall be sent up; only so much shall be sent up as will show that there was a case duly constituted in Court, and the verdict, judgment, and such portions of the proceedings, evidence and instructions of the Judge, as will enable the Court to pass on the exception.

MOTION to amend pleadings, heard before *Cannon, J.,* at Spring Term, 1872, of CHEROKEE.

This was a special proceeding, commenced in the Probate Court of Cherokee, by the plaintiff as guardian against the defendants, as administrators of A. Sudderth, former guardian of A. McD., and Ann Elizabeth Harshaw.

The Judge of Probate stated the account, and defendants filed exceptions, which were overruled, and judgment was rendered in favor of the plaintiff, and defendants appealed.

The cause coming on to be heard before his Honor, defendants asked leave to add to their answer, by way of plea: "That they have administered the estate of their intestate, and have not assets applicable to this demand." The Judge was of opinion that, "he had not authority to amend the pleadings on this appeal, but for the purposes of Justices the case is remanded to the Probate Judge to make such amendments

as may be necessary to obtain justice." The plaintiff excepted to this order, remanding the cause, and prayed an appeal to the Supreme Court.

J. C. L. Gudger for the plaintiff. (354)
No counsel for the defendants.

RODMAN, J. No reason has been suggested, or occurs to us, why the Judge should have doubted his power to pass on the amendment moved for. He had the same right to allow amendments, as he would have had if the case had been commenced in his Court. We think he ought to have decided on the motion of the defendants, and to have allowed or refused it. So far as the circumstances appear to us, it was in his discretion to allow or refuse it, according as in his opinion the interests of justice required. Amendments which promote justice and a trial on the merits are in general liberally allowed, but in all cases the applications should be made in due time, or sufficient reason be shown for the delay. The Judge may impose proper terms as conditions on allowing an amendment, and if the opposite party has incurred expenses or costs by the delay, it would seem only reasonable that he should be indemnified. These observations are made in a general sense, and with no wish to influence the discretion of his Honor. The effect of the proposed amendment, however, if it shall be allowed, will be a matter of law.

The judgment remanding the case to the Probate Court is reversed, and the case is remanded to the Superior Court to be proceeded in, etc.

The record sent up here contains a great deal of matter which is irrelevant to the question presented by the appeal, and which ought not to have been sent up. It is the right and duty of an appellant, subject to the provisions of the Code for settling a case on appeal, to direct what part of the record shall be sent up. This should always be stated in the case. Only so much should be sent up as will show that there was a case duly constituted in Court, the verdict and judgment and such portions of the proceedings, evidence and instructions of the Judge as will enable the Court to pass on the exceptions. It is impossible, by a general rule, to say, in detail, what should be sent up or not, as that de- (355) pends upon the nature and circumstances of each case. But it is easy to say in any given case what is clearly immaterial. We feel it our duty to suppress, as far as we can, the unnecessary costs arising from sending up voluminous transcripts of immaterial records and papers. In this case the report of the Probate Judge and the evidence accompanying it, and the exceptions to it were clearly immaterial. The appellant will recover his costs of this Court except the costs of such transcripts, and the Judge below will decide upon any question of costs,

arising out of such unnecessary matter between the appellant and the Clerk of the Superior Court.

PER CURIAM. Affirmed.

Cited: Cheek v. Watson, 90 N. C., 303; *S. v. Butts,* 91 N. C., 525; *Bryan v. Moring,* 99 N. C., 18; *Faison v. Williams,* 121 N. C., 153.

C. B. OGBURN v. CHARLES TEAGUE.

1. In an action on a note given in 1862, for the purchase of property the statute makes the *value* of the property the guide for the verdict of the jury, and it is competent to show what estimate was put upon the property by the parties themselves, at the time of the sale.
2. A Judge may, in his discretion, permit a blank endorsement, on a note to be filled up at any time during the trial, and even after verdict.

ACTION of assumpsit, tried before *Cloud, J.,* at Spring Term, 1872, of FORSYTH.

The plaintiff declared against the defendant as assignor of a note given in 1862, for the sum of $946.75.

Defendant pleaded general issue, tender, failure of consideration, scale, etc.

The consideration of the note was a quantity of tobacco and borrowed Confederate money. The note was endorsed by the payee, in (356) blank. The defendant endorsed it to the plaintiff. It was in evidence, that the note was given for about 800 pounds of manufactured tobacco and $140 in Confederate money. The payee of the note and one of the obligors were examined as to the value of the tobacco, and stated that, in the trade, it was rated from ninety cents to a dollar per pound, and that at the time it was worth from twelve and a half to fifteen cents per pound, in good money. That there was no agreement that the tobacco should be paid for in any specific currency, but that the vendor expected to receive, and the vendee to pay, in Confederate money.

His Honor instructed the jury, that they should apply the scale to the Confederate currency loaned and included in the note, and add the *per centum* for the depreciation of the national currency; that they should ascertain the value of the tobacco in good money at the time of the sale, and that in this connection they might look to the price agreed to be paid by the purchasers at the time and to all other facts in the case; that the jury must look to all the testimony. Defendant excepted.

The jury returned a verdict for the plaintiff, valuing the tobacco at

33 1-3 cents in gold, and added the preminum, etc., making altogether $559.65.

After the jury returned their verdict, and before judgment, defendant moved to non-suit, on the ground that the endorsements on the note were in blank. His Honor allowed the blank to be filled up and the defendant excepted.

Judgment according to the verdict, and appeal to the Supreme Court.

Blackmer & McCorkle for the plaintiff.
Scales & Scales and *Dillard & Gilmer* for the defendant.

READE, J. The statute makes the value of the property the guide for the verdict of the jury. The estimate put upon it by the parties at the time of the sale was, to say the least, *some* evidence of its value and was properly left to the jury, with the other evidence in the (357) case.

The objection, that his Honor allowed the blank endorsement to be filled up, is without force. It was within the discretion of his Honor, and is usually treated as a matter of course.

PER CURIAM. No Error.

STATE v. WILLIAM SLOAN.

1. If an indictment be clearly defective, the Court upon motion will quash, whether the charge be for a felony or a less offense.
2. An indictment need not be certain "to a certain intent in every particular;" but it is indisputable, that when a statute enacts, that any of a class of persons who shall do or omit to do an act under certain circumstances shall be guilty of a crime, the indictment under that statute must describe the person indicted as one of that class, and aver that he did or omitted to do the act charged, under circumstances which make it a crime.
3. Therefore, where an indictment framed under chapter 38, Laws 1869-'70, failed to aver that the accused was the President of a Railroad Company, in which the State had an interest, and also failed to aver that he had received the State bonds under some act of the Legislature or ordinance of the Convention, passed since May, A. D. 1865; *it was held*, that such an indictment was fatally defective, and should be quashed.

MOTION to quash, heard before *Watts, J.*, at Fall Term, 1871, of WAKE.

This was an indictment against the defendant founded upon a supposed violation of chapter 38, Laws 1869-'70. Such parts and sections

of the act as are material to the case are set out in the opinion of
(358) the Judge. The charges in the indictment were also stated in an abbreviated form in the opinion. This was a motion to quash. The motion was sustained and the indictment quashed. The State appealed to the Supreme Court.

Attorney-General and *Battle & Son* for the State.
Fowle and *Bailey* for the defendant.

RODMAN, J. We think there is no difficulty as to the rule, which Courts will in general observe, as to quashing indictments. If one be clearly defective, and would not support a conviction, the Court will quash it whether it be for a felony or for a less offence. Because in such a case it is useless to the State, and oppressive to the accused, to proceed to a trial which can amount to nothing. As by quashing, the recognizance of the prisoner is discharged, the Court, if the offense charged be a heinous one, and especially if there be danger that the prisoner will flee from justice, may in its discretion delay its decision for a reasonable time, to give the grand jury an opportunity to find a new bill. And whether the charge be of a felony or of a misdemeanor, if the motion shall require the decision of a difficult and important question of law, inasmuch as a refusal to quash does not amount to a final decision, and the question of law will still remain open on a motion in arrest of *judgment*, the Court will refuse to decide the question upon a state of facts which is only hypothetical; as the accused may be acquitted, and so a decision become unnecessary. This is in conformity with the general practice of Courts, not to decide such a question until it shall be necessary to do so. This is about all that is meant, when it is said the Court has a discretion to quash.

The only question, therefore, is, does the present indictment so clearly fail to charge an offence that, no matter what may be proved,
(359) all proceedings under it must end in the discharge of the accused?

The indictment is founded on a supposed violation of ch. 38, Laws 1869-'70, p. 78.

That act enacts, Sec. 1, "It shall be the duty of the several Presidents or other officers of railroads who have *secured* bonds or other securities of the State for the construction of *any road in which the State is interested, under an act of the General Assembly, or ordinance of a Convention passed since May, year of our Lord,* 1865," to file before the Governor and Superintendent of Public Works a certain statement.

It will be noticed that the word "secured," in this section, is senseless

in the connection in which it is found. It may not unfairly or improperly for the present purpose, be supposed that the true word is "received." But if any thing turned upon it finally, it would be necessary to consult the original act as enrolled in the Secretary's office before accepting the substituted word.

Sec. 3, to some extent changes the phraseology of Sec. 1. It enacts, "It shall be further the duty of every President or other officer of a railroad, as *provided in section first of this act,* and every *such* President or other officer is hereby required, to return to the public Treasurer subject to the joint order of the Governor and Superintendent of Public Works, as hereinafter prescribed, *all bonds of the State which have been issued, under any authority of law* and which remain in the hands of any such President or other officer unsold or undisposed of," etc.

Section 4 requires the Governor to have notice served on every such President, etc.

Section 5 prescribes, that the time within which such President, etc., shall comply with the provisions of the first three sections of the act, shall be twenty days from the personal service above provided for.

Section 9 is in these words, "If the President or other officer of any railroad company, *in which the State is interested within* (360) *the purview of the first five sections of this act,* shall wilfully refuse or fail to comply with the said provisions thereof, every such President or other office shall be deemed guilty of felony, and upon conviction shall suffer imprisonment in the State prison for not less than five years."

The other sections contain nothing material for the present purpose.

The counsel for the accused contends, that the indictment is clearly defective and fails to charge any offense, in this: 1. That the act, upon which the indictment is founded, relates only to Presidents, etc., of railroads in which the State is interested, and the indictment does not anywhere charge that the accused was President of a road in which the State was interested.

The indictment, abbreviated by omitting every thing not material to the present question charges:

1. That the accused, on a day after the ratification of the act was, and continued to be President of the Wilmington, Charlotte and Rutherford Railroad Company.

2. That it became his duty, under the act aforesaid, to make a statement to the Governor, etc., and after being notified, etc., to return to the Public Treasurer "all bonds of the State which were issued under

authority of law, and which remained in the hands of said William Sloan as President," etc.

3. That he was duly notified to report as aforesaid, and to return the bonds, etc.

4. "That notwithstanding a large amount of bonds, money and securities, to-wit: two millions of dollars in bonds, had come into the hands of said William Sloan, a large portion of which bonds, moneys and securities, were on 2 March, still in the hands of him, the said William Sloan, on the second day of March, in the year last aforesaid, unlawfully and wilfully refused, neglected and failed to return to the Public Treasurer," etc.

It will be seen that the indictment does not expressly aver that
(361) the accused was President of a railroad in which the State was interested, and that the statute only embraces Presidents of such railroad as the State had an interest in.

The learned counsel for the State, however, contend that, inasmuch as the act incorporating the Wilmington, Charlotte and Rutherford Railroad Company is a public act, and the act, ch. 20, Laws 1868-'69, ratified 29 January, 1869, under which the State gave a certain amount of its bonds to that company in exchange for shares of its stock, is also a public act, of which the Court is bound to take cognizance, the Court must know that the State had an interest in that road. And inasmuch as the indictment avers, that the accused was President of the Wilmington, Charlotte and Rutherford Railroad Company, the Court must know that he was President of a railroad in which the State had an interest, and the averment, that he was President of the Wilmington, Charlotte and Rutherford Railroad Company, was equivalent to a direct and express averment that he was President of a railroad in which the State had an interest.

We concede that the acts referred to are public acts, of which the Courts takes judicial cognizance, and that the Court knows that the State is interested in a company called the Wilmington, Charlotte and Rutherford Railroad Company. But notwithstanding this, it does not appear from the indictment, and the Court can not know, that the accused is President of that identical Wilmington, Charlotte and Rutherford Railroad Company in which the State is interested. Mere similarity of name is not equivalent to an averment of identity. For aught that appears he may be President of some other company of the same name, but in which the State is not interested. No one contends that an indictment must be "certain to a certain intent in every particular," that would require it to anticipate and exclude every possible defense of

the accused. But it is undisputed law, that when a statute enacts that any one of a certain class of persons, who shall do or omit a certain act under certain circumstances, shall be guilty of a crime; (362) the indictment must describe the person indicted as one of that class, and aver that he did or omitted the act under the circumstances which made it a crime. Every one of these things is an essential constituent of the crime.

In this case, the act makes it a crime, in a President of a railroad in which the State is interested, to fail to do a certain thing, and it is not charged that the accused was President of such a road. Clearly no crime is charged.

2. That section 1, Laws 1869-'70, imposes only on the President, etc., of railroads, "who have received bonds or other securities of the State, etc., under an act of the General Assembly or ordinance of a Convention, passed since May, 1865," the duty to return such bonds to the Treasurer, etc. And this is not altered by section 3, which expressly refers to section 1.

Now the indictment nowhere charges that the defendant had received bonds, etc., under an act, etc., passed since May, 1865. It only says "that notwithstanding a large amount of bonds, etc., had come into the hands of said W. S., etc., he refused, etc.."

We think the indictment is clearly defective in this respect also. It does not aver that defendant ever received any of the bonds, etc., the failure to return which is made an offense; the bonds, which he had, may have been purchased by the company in the market, and not received under any act, etc.

The counsel also took a third exception, which it is unnecessary to consider.

We concur with the Judge below that the indictment should be quashed.

PER CURIAM. Affirmed.

Cited: S. v. Chambers, 93 N. C., 604; *S. v. Watkins,* 101 N. C., 705.

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E. P. COVINGTON, Guardian, v. LEAK & WALL, Ex'rs, and others.

1. The highest degree of good faith is exacted of guardian, but only ordinary diligence, certainly not infalliable judgment.
2. Therefore, where a judgment was rendered in favor of a guardian in 1863, and he refused to receive Confederate money in payment therefor, and omitted the collection of the same during the war, and even up to the time of his death in 1868; *it was held*, that under the peculiar circumstances of the country he was not guilty of such negligence as to charge his estate. *It was further held*, that, considering the circumstances, in connection with the fact that the sureties on the administration bond were solvent, and still continue apparently so, he was not guilty of negligence in omitting to sue them.

APPEAL from *Buxton, J.*, at Spring Term, 1872, of RICHMOND.

This was a special proceeding instituted by plaintiffs against the defendants, as executors of Mial Wall, deceased. A reference was had and report made by the Clerk, exceptions were filed and passed upon, and an appeal taken to the Supreme Court at June Term, 1871.

At that Term the exceptions were debated and the cause remanded, in order that matters connected with the first exception might be enquired into. In addition to the facts stated in the reported case, 65 N. C. R., the Judge found these additional facts, viz., "That James A. Covington qualified as administrator of John P. Covington, deceased, father of the plaintiffs, Bascombe, John P., and Virginia Covington, in 1857, and entered into bond in the sum of $30,000 with W. L. Covington, J. W. Leah and B. B. McKenzie, as sureties, which bond was then sufficient and solvent, and is now solvent for an amount greater than the amount reported in favor of Mial Wall, guardian of the minor children, in October, 1863, viz: $3,830.63; that at October Term, 1863, of the County Court of Richmond, the report of the commissioners to audit and settle the accounts of J. A. Cov-
(364) ington, deceased, was in all things confirmed and ordered to be recorded. Upon this finding the Judge entered this judgment, viz: "These facts taken in connection with the facts heretofore found by the Court in reference to said exception No. 1, satisfy the Court that said exception ought to be overruled and it is so overruled, and the estate of Mial Wall charged with the item embraced therein, $3,830.63, with compound interest from 20 October, 1863, in National currency." Defendants appealed.

J. D. Shaw for the plaintiffs.

Smith & Strong for the defendants.

RODMAN, J. After the decision made in this Court at June Term, 1871 (65 N. C., 594), the Judge below referred it to the Clerk of his Court, to take testimony and report on the facts connected with exception No. 1. Whatever the referee did beyond this order was unauthorized, and was properly disregarded by the Judge.

The only question, which we conceive to be presented by the present appeal, is, as to the charge against the executors of Mial Wall, of the amount of the judgment recovered by him as guardian of the infant plaintiffs against the administrator of John P. Covington, in Richmond County Court, in October, 1863.

We agree with his Honor that the merits of this judgment can not be inquired into, unless it be alleged and shown to have been procured by fraud and collusion between the parties to it.

Was Wall guilty of such negligence as to charge his estate, in omitting to make any effort to collect that judgment prior to his death in the Spring of 1868?

We think that under the circumstances he was not. Certainly his refusal to receive Confederate currency in 1863 can not be so considered. Neither can his omission to enforce the judgment up to the close of the war, or until the Courts were opened again, at, or about (365) the end of 1865.

The delay from this period only remains to be considered.

It is common knowledge (in which we must be allowed to participate), that at the close of the war, there was very little national currency in the State, and that it could only be gradually increased by the sale of our productions or property at the North. If summary judgments and executions could have been obtained against all debtors, the money could not have been made out of their property, except at a loss to both debtor and creditor, if at all. Besides this, there were embarassments in the collection of debts, arising from military orders and stay laws, and if the guardian had collected the money during the two years before his death, he would have been troubled where to invest it in safety, when the standing of most men was uncertain, and as Lord Bacon says of England after the passage of the statute of uses, "men's estates were like barks on a stormy sea, and it was doubtful which would get safe to shore." Considering these circumstances, in connection with the fact that the sureties to the administration bond were, and still continue, at least apparently solvent, we can not say that the guardian was guilty of culpable negligence in omitting to sue them. But it is said that, admitting that the principal is safe, by the delay of the guardian

to collect, the wards will receive only simple, instead of compound interest, to which they are entitled.

There may be a loss to the wards in this respect. Occasional losses are inevitable, even to the most diligent. Every loss does not carry with it a presumption of culpability. The highest degree of good faith is exacted of a guardian, but only ordinary diligence, and certainly not infallible judgment. In difficult circumstances, when there is no reasonable suspicion of his good faith, and when, so far as appears, he has acted honestly according to his judgment in the emergency, the law requires no more. No one would become a trustee if the law were
(366) otherwise; if his conduct, instead of being judged by the lights before him at the time, was to be scrutinized by the light of subsequent events. Such a rule would require not only the utmost of human diligence, but prophetic foresight. The circumstances here are not such as those in *Whitford v. Foy,* 65 N. C., 265, where the guardian was charged with the difference between simple and compound interest.

If it be necessary, the infants by their guardian can prosecute the action upon the administration bond of James A. Covington, and can, if necessary, use the names of the executors of Mial Wall, upon giving an indemnity against costs.

We think the Judge erred in his decision on this exception. His judgment is reversed, with costs in this Court against the appellee, and the case is remanded.

PER CURIAM. Reversed.

Cited: Harris v. Harrison, 78 N. C., 218; *Luton v. Wilcox,* 83 N. C., 26; *Moore v. Eure,* 101 N. C., 16; *Duffie v. Williams,* 148 N. C., 532.

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(367)

JOHN G. HILL et al. v. THE COMMISSIONERS OF FORSYTH COUNTY.

An act of the General Assembly, authorizing the people of a county to take stock in a Railroad Company, and to determine the question by a popular vote, and tax themselves to pay for it, is constitutional.

MOTION to vacate an injunction, heard before *Cloud, J.,* at Spring Term of FORSYTH.

This was an application on the part of the plaintiffs, who represented themselves as tax payers and property holders of the county of Forsyth,

NOTE.—The case of *Simonton v. The Commissioners of Burke,* involving the same question, was decided at this term, and for the same reasons judgment was given for the plaintiff.

in behalf of themselves and others, asking for an injunction against the defendants, to restrain them from the imposition and collection of certain taxes, to pay instalments due upon a subscription made by the county of Forsyth to the North Western North Carolina Railroad Company. The following facts were found by the presiding Judge: "A majority of the justices of the peace were present at the courthouse in Winston on 25 March, 1868, and made an order to submit the question of subscription to the qualified voters of the county, on 4 April, 1868, and directed the sheriff to open the polls on that day.

That notice of this election was published in two newspapers, printed and circulated in that county; that said election was held at the time appointed, and at the usual place for holding elections in said county, and due return of the result of the voting was made to June Term of the County Court; that a majority of the justices of the county were present, and on the bench at the said June Term, concurring (368) in the orders made; that a large majority of the qualified voters of the county did vote on the question of subscription, and that a majority of the said votes were cast in favor of subscription; that a subscription of 1,000 shares of stock was made, by the agent of the county appointed for that purpose on — June, 1868; that the defendants have laid taxes to pay the instalments due upon the subscription made to the North Western North Carolina Railroad Company for the years 1870-'71.

Upon the foregoing state of facts the injunction, therefore granted, was vacated by his Honor. Whereupon the plaintiffs appealed to the Supreme Court.

Several errors were assigned. The chief one and the only one discussed by the Court is, "That the injunction was dissolved, and defendants allowed to collect the taxes, without any constitutional power in the legislature to authorize the subscription, and without a sufficient compliance with the acts of the General Assembly in that case made and provided."

Scales & Scales and *Dillard & Gilmer* for plaintiffs.
Clement, Masten and *Batchelor* for defendant.

READE, J. The main question is, whether the Legislature has the power to authorize the people of a county to take stock in a railroad, and to determine the question by a popular vote, and to tax themselves to pay for it. The Legislature in 1852 authorized the town of Newbern to take stock in the Neuse River Navigation Company, for the use of the town, and to issue bonds, and to levy a tax upon the property holders

of the town to pay them. One of the tax payers filed a bill to enjoin the collection of the tax, upon the ground that the act of the Legislature was unconstitutional. The question was fully argued and well considered, and the decision was in favor of the constitutionality of the act. *Taylor v. Comrs.,* 55 N. C., 141.

(369) And again, in 1855, the Legislature chartered the Western North Carolina Railroad Company, and authorized any county through which the road might pass to take stock, if a majority of the justices of the peace and a majority of the voters should so determine, and to issue bonds and to levy a tax, etc. The county of Burke took stock, one of the tax payers filed a bill to enjoin, upon the ground that the act was unconstitutional. But this Court decided in favor of the constitutionality of the act, and, in the opinion, it is said: "In accordance with these views, is the case of *Taylor v. Newbern (supra)*; so that the question may be said to be settled here." *Caldwell v. Justices of Burke,* 57 N. C., 323. The defendant's counsel cited also decisions in most of our sister States to the same effect. So that we repeat, what was said in *Caldwell v. Justices of Burke,* that the question is settled. We suppose that the plaintiffs' counsel felt at liberty to treat it as an open question, because, in *Caldwell v. Justices of Burke,* there was a dissenting opinion by the present Chief Justice; but the Court was unanimous upon this point. The dissenting opinion was only as to the power of a second vote of the people, after they had rejected the proposition by a former vote.

There are divers other points in the complaint which seem to be unfounded, and besides they are unimportant. The main thing, the people's will, seems to have been fairly obtained. The stock was taken; bonds were issued; rights have vested; taxes have been levied and a portion of the installments have been paid, and taxes are now laid to pay other installments. The Board of Commissioners, who may be supposed to represent the popular will, are anxious to meet the obligations incurred and the Court will not allow technical and frivolous objections, calculated to impair the public faith, to avail a *few,* who are indulged with the privilege of suing for a *class.* Only their substantial rights will be considered.

We agree with his Honor, that the injunction ought to have (370) been dissolved.

PER CURIAM. Affirmed.

Cited: Alexander v. Comrs. ante, 332; *Street v. Comrs,* 70 N. C., 648; *Evans v. Comrs.,* 89 N. C., 158; *McCormac v. Comrs.,* 90 N. C., 445; *Comrs. v. Call,* 123 N. C., 318, 328.

J. L. PHILLIPS v. W. H. TREZEVANT.

When one partner, who is insolvent or in failing circumstances, without the consent and against the will of the other partner, is disposing of the effects of the partnership, and appropriating them to his own use, the other partner has the right to an injunction, and to have a receiver appointed.

MOTION for the appointment of a receiver, heard before *Logan, J.*, at Spring Term, 1872, of MECKLENBURG.

Plaintiff alleged that in September, 1870, he and the defendant formed a partnership in the city of Charlotte, N. C., for the purpose of conducting the business of merchant tailoring; that defendant was to furnish $5,000, and plaintiff was to use his skill and experience as a set-off to such capital; that extensive purchases of material, etc., were made in the northern cities, and the business was conducted profitably until January, 1872, when it was dissolved by mutual consent; that at the time of the dissolution it was agreed that all the stock of goods on hand should be sold, and the proceeds received by the defendant, and that all the outstanding claims should be collected and the proceeds of all applied to the payment of the debts, and in case of any losses, plaintiff was to be accountable for one-half and the defendant the other half; that a sale of the goods was made; that the defend- (371) ant purchased to the amount of $3,500, and also received cash from purchasers to the amount of $898. Plaintiff purchased to the amount of $1,638. That there were in the hands of the defendant, at that time, goods and solvent claims to the amount of $2,768, doubtful accounts $493.45, cash $237.25, 20 shares of stock of the "Fair of the Carolinas," policy of insurance valued at $60; that plaintiff had drawn from the firm $1,266.55, and defendant the sum of $870.72; that debts were due from the firm amounting to over $7,000, and which defendant agreed to pay out of the assets, as far as they would go; that he had failed to do so, and the plaintiff has been surprised at the receipt of letters, alleging that defendant has written that he would only pay seventy-five cents in the dollar of the indebtedness of the firm. Plaintiff avers, as his belief, that the defendant, instead of applying the assets of the firm to the discharge of the indebtedness, has been misapplying them to his own individual purposes, much to the injury of plaintiff, contrary to the trust reposed in him, etc. He alleges that since the dis-

NOTE.—In another case between the same parties and upon the same state of facts, a motion was made to vacate the injunction granted by Judge Cloud. The "motion was allowed," and plaintiff appealed. The opinion delivered by the Court in the reported case is equally applicable to this. REP.

solution he has, with his own funds, paid off and discharged a debt due from the firm amounting to $1,577. He avows his readiness to pay his share of the losses of the firm, as soon as they can be ascertained.

Plaintiff further alleges that the defendant has collected the larger part, if not all the claims due to the firm, which were in his hands, and the funds have not been applied to the extinguishment of the debts.

Plaintiff prays that a receiver may be appointed, and an injunction issued.

Upon application to Judge Cloud, at Chambers, an order of injunction was granted. The injunction was issued by the Clerk of the Superior Court of Mecklenburg County.

Plaintiff filed an affidavit in addition to the above complaint, stating in substance that, since his complaint was filed, he has learned
(372) that defendant had collected from the sale of goods about $1,500, from the debts of the firm $2,350, and $60 by transferring the policy of insurance; that none of the funds have been applied to the discharge of the debts, and that they have been forwarded for collection, and he has been called on for payment; that defendant has repeatedly stated that he is insolvent, and he is informed and believes that defendant intends to remove from the State as soon as he can dispose of the goods in his possession.

During the term of the Superior Court, notice of a motion to dissolve the injunction was given to the plaintiff, and a notice was given to defendant of a motion for the appointment of a receiver. During the term of the Court aforesaid, the motion for appointment of a receiver was made before his Honor, Judge Logan, and the following entry appear of record: "Motion to appoint a receiver. Motion refused."

From the above ruling plaintiff appealed.

H. W. Guion for plaintiff.
Jones & Johnston for defendant.

READE, J. Where one partner, who is insolvent or in failing circumstances, without the consent and against the will of the other
(373) partner, is disposing of the effects of the partnership and appropriating them to his own use, the other partner has the right to an injunction and to have a receiver appointed. That is our case. There was error in refusing the plaintiff's motion for a receiver.

This will be certified, to the end that a receiver may be appointed, with power to collect and receive the effects of the partnership, subject to such directions as may, from time to time, be given by the Court below.

See case between the same parties at this term on motion to vacate injunction.

If necessary, an application may be made to the Judge at Chambers for a receiver.

PER CURIAM. Error.

Cited: Ross v. Henderson, 77 N. C., 173; *Allen v. Grissom,* 90 N. C., 94; *Taylor v. Russell,* 119 N. C., 33.

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JOHN W. MATTHEWS v. W. D. SMITH.

1. Where a person purchased a worthless article as a fertilizer, and gave his note for the purchase money, and afterwards paid the same, with a full knowledge of the facts; *it was held,* that he could not recover the money paid, although paid under threats of a law suit.
2. It is error in a Judge to leave a case to the jury upon a hypothetical state of facts, unwarranted by the evidence.

ACTION, to recover money had and received to use of plaintiff, tried before *Buxton, J.,* Spring Term, 1872, of CUMBERLAND.

Plaintiff testified, that he went to the defendant's store in Fayetteville, to examine an article which defendant had advertised as "Phœnix Guano;" that defendant recommended it highly as a fertilizer, and said it was superior to the Peruvian, in many respects. Upon these representations he bought 2,220 pounds, and gave a note with sureties to secure the price; that he applied the "Phœnix Guano" to a part of his crop; that the land was well cultivated, and that the Guano was absolutely worthless and injured the land; that he told defendant the result of his experiment, and asked him to bring a friendly suit to test his right to recover. He declined, and said he would sue unless plaintiff paid him; that the Phœnix contained all the qualities which he had recommended; that it had been analyzed by a chemist, and that he could show by other persons that it did good. Plaintiff said he was forced to pay, to relieve his sureties, and told defendant that if he failed in a suit which he had brought against other parties upon a similar claim, he, plaintiff, would sue him to get back his money.

Another witness testified as to the worthlessness of the article, and gave it as his opinion that it was of no value whatever.

The grounds of defense were: That the money was paid after a full knowledge of all the facts, and therefore plaintiff could (375) not recover in this action. That although paid under a threat of

a law suit, yet that plaintiff could not recover, as the money was paid under a mistake of legal liability.

His Honor charged the jury, that if a spurious article was sold to the plaintiff, as genuine guano with valuable fertilizing qualities, the plaintiff could not recover the price paid, if he paid the money with a full knowledge of all the facts, even though he paid it to relieve himself and his sureties from a threatened suit; that the plaintiff was bound to know that the law would protect him from a recovery on the note; but that if the plaintiff, in consequence of misrepresentation, taken in connection with threats of suit made by the defendant, was induced to believe that he was mistaken in the estimate he then formed of the worthlessness of the article after a trial of it, and paid the money under this misapprehension, then this being a *mistake of fact,* the plaintiff was entitled to recover. Defendant excepted.

There was a verdict for the plaintiff. Rule for new trial. Rule discharged. Judgment and appeal.

Broadfoot and *McRae* for plaintiff.
Hinsdale and *B. & T. C. Fuller* for defendant.

READE, J. His Honor charged correctly, "that the plaintiff could not recover if he paid the money with full knowledge of the facts." And then he ought to have added, that according to the plaintiff's own testimony he had full knowledge of the facts; but, instead of that, he left it to the jury to determine whether the defendant had not, by misrepresentations and threats of suit, induced the plaintiff to believe that he was mistaken as to the estimate he had formed of the worthlessness of the guano, and in that way paid under a mistake of facts. The evi-

(376) dence does not support the hypothesis; for the plaintiff testified, expressly, that he "was forced to pay the note to relieve his sureties from a suit," and that he told the defendant that, if the defendant failed to recover in a suit that he had brought against others for guano, he would sue him for his money back. And he did not allege that anything the defendant said to him changed his mind as to the quality of the guano.

PER CURIAM. *Venire de novo.*

Cited: Devereux v. Ins. Co., 98 N. C., 8; *Brummitt v. McGuire,* 107 N. C., 356; *Bank v. Taylor,* 122 N. C., 571; *Smithwick v. Whitley,* 152 N. C., 371.

BURROUGHS & SPRINGS v. THE NORTH CAROLINA RAILROAD COMPANY.

1. A sale of shares of stock in a Railroad Company carries with it the dividends declared by the Company, when they are to be paid at a day subsequent to the transfer of the stock.
2. Therefore, where the North Carolina Railroad Company declared a dividend on the stock in said Company, on the 16th day of February, 1870, to be paid on the first days of April and July thereafter, and the owner of certain shares of such stock sold and transferred the same on the 17th day of February; *Held*, that the purchaser of said shares of stock acquired the dividends, as well as the stock.

APPEAL from *Henry, J.*, at a Special Term of MECKLENBURG.

The following case agreed was presented to his Honor:

The plaintiffs on 16 February, 1870, were the owners of thirty-four shares of stock in the North Carolina Railroad Company, upon which a dividend of six per centum was declared on the said 16 February, 1870, three per centum payable on 1 April, 1870, and three per centum on 1 July, 1870. The plaintiffs sold and transferred said (377) stock on 17 February, 1870, to S. H. Wiley. The plaintiffs made due demand for payment of the dividends, before the date fixed for the payment. The payment was refused. The dividend was paid to S. H. Wiley, the assignee. The certificate of stock, issued to plaintiffs, was cancelled, and a new one issued to Wiley on 21 February, 1870.

The following resolution is also made a part of the case agreed:

"The Board of Directors of the North Carolina Railroad Company do declare an annual dividend of six per cent on the capital stock of this Company, for the fiscal year ending 31 May, 1870. Three per cent to be paid on 1 April, and three per cent on 1 July, 1870, and the transfer books be closed from 1 March to 1 April, and from 1 June to 1 July."

The Court was of opinion that the plaintiffs were entitled to recover. Judgment accordingly. From which judgment defendant appealed.

Jones & Johnston for the plaintiffs.

J. H. Wilson for the defendant.

RODMAN, J. On 16 February, 1870, the North Carolina Railroad Company declared a dividend by the following resolution: "The Board of Directors of the North Carolina Railroad Company do declare an annual dividend of six per cent on the capital stock of this company, for the fiscal year ending 31 May, 1870. Three per cent to be paid on 1 April, and three per cent payable on 1 July, 1870, and the transfer-

books be closed from 1 March to 1 April, and from 1 June until 1 July."

On 17 February, the plaintiffs, in writing in the usual form, at the foot of their certificate for thirty-four shares of stock in the com-
(378) pany transferred the same to Samuel H. Wiley, for value, and authorized F. A. Stagg, attorney, to transfer the same on the books of the company. The transfer was accordingly made on 21 February. The certificate of stock to the plaintiffs was cancelled, and a new certificate issued to Wiley. On the same day plaintiffs notified the company that they claimed the dividend declared on 16 February. The Company, nevertheless, paid the same to Wiley, and this action is brought to recover it. One would suppose, that in a case which must be of frequent occurrence, there would be proved some established usage, or that some decided cases could be found fixing the rights of the parties. If there be any established usage, either general or special to this corporation, there has been no evidence of it offered in this case. And the learned counsel inform us that they have been able to find no authority whatever on it. The absence of authority is the more remarkable, as the rule as to a dividend following the stock or not, under the present circumstances would seem to be of a general nature, not confined to sales, but covering the case of a life tenant with remainder, when the life tenant dies after the dividend is declared, and before it is payable, and the case of a will bequeathing stock when the testator dies under the like circumstances.

Before proceeding to the particular consideration of this case, it is necessary to observe:

1. It was clearly within the power of the seller and purchaser of the stock in this case, to have contracted with respect to the dividend declared on the day before. But,

2. If we assume for the moment, that the effect of the resolution, declaring the dividend, was to make it payable to whoever should appear by the books of the company to be the owner of the stock on the days on which it was payable, then, notwithstanding any different contract between the plaintiffs and their vendee, the company was justified
(379) in paying to the vendee, and the redress of the plaintiffs would be by an action against their vendee for money had and received.

It is important to notice that the question is, not as to the contract between plaintiffs and Wiley, but, to whom did the company agree to pay the dividend; for if the company agreed to pay to one who turned out to be Wiley, its liability can not be affected by any collateral agreement between the plaintiffs and Wiley (even if there were express proofs of such) without its consent. Without adverting to the principle, that the contract between plaintiffs and Wiley must be supposed to have

been made in reference to the resolution of the day before, as to which it does not appear that either party had any advantage in point of knowledge; yet, in the absence of a contrary agreement, the sale must necessarily have been of the subject matter with its rights and incidents at the date, or perhaps when the transfer should be completed.

So that the true question is, what was the effect and meaning of the resolutions? Did it mean that the dividend should be payable to those who held the stock on 15 February, or to those who should hold it on 1 April? If the resolution had been clear and explicit in either sense, I conceive there could be no room for a controversy. Being of uncertain meaning, the Courts have to give it a certain one. But whatever shall be determined to be its meaning in law, that must be taken to be as plainly its meaning as if it had been expressly written so.

Now as to the meaning and effect of the resolution: In the absence of a plain reason and of direct authority, a lawyer has but one resource. He must refer to analogous cases, and endeavor to extract from them a principle broad enough to recover the case in hand. And he will be more or less successful, according to the number and closeness of the analogies he is able to adduce.

As to the analogies: It is a familiar maxim, that the incident passes with its principal.

If a bond not negotiable, and bearing interest, whether that interest be made payable with the principal at a certain time, (380) or be made payable annually or at other certain times before the principal, be assigned, the assignee is entitled to receive, as an incident, all interest not paid before the assignment, whether the day for its payment has arrived or not. Of course this doctrine will not apply to bonds with interest coupons detachable.

The analogy is not close in this, because, if a payment of interest had become due and payable on 16 February, and the bond was assigned on 17 February, the assignment of the bond would have carried the interest previously payable; which, if the analogy were strictly followed, would lead us to hold that if the assignment of stock had been after 1 April, it would have carried the dividend payable on that day, if not paid before the assignment, a conclusion not necessary in this case, and as to which we express no opinion. If one assigns a bond or promissory note, secured by mortgage or other collateral, the benefit of the collateral passes as an incident.

I take it to be clear also, that if a registered Government bond be assigned on the books of the treasury, any annual or semi-annual payment of interest, which becomes due and *payable* the next day, would

be paid to the then holder. *Anson v. Towgood,* 1 Jac. & Walker, 637. In such case the dividend would, in substance, have been declared before the assignment, viz: at the making of the bond, but payable afterwards. If a reversioner sell land, the purchaser becomes entitled to the rent which becomes payable the next day. So if tenant for life dies, the remainderman becomes entitled. So with fines and heriots. These analogies, and some others, are found stated in the argument of Sir Samuel Romilly, in *Paris v. Paris,* 10 Ves., 186. These are all the analogies which occur to me, that are indisputable; for if an analogy be
(381) disputable it has no value. They would not be conclusive if any could be brought on the other side. But the general principle is clear, that the incident follows the principal. What reason exists for making this an exception? The burden of the argument is put on the plaintiffs.

What arguments can be drawn from the terms of the resolution?

What was the object in declaring the transfer books of the company closed from 1 March to 1 April?

If the dividend was intended to be payable to any one who was the holder on 16 February, there could be no use in closing the books. In any case, upon a demand for payment, it would only be necessary to see from the books, who was the holder on that day. But if the usage be, to put the dividend on the books of the company to the credit of the holders on 1 March, we can see a reason for closing the books, viz: to give time for the company to make out its accounts with its stockholders on that day. Suppose an assignment of stock between 1 March and 1 April, would the company be bound to notice it, in reference to a dividend payable 1 April? I think not.

The same rule, which applies to the dividend payable 1 April, applies to that payable 1 July. If the first did not pass by the assignment, the second did not.

But the learned counsel were mistaken in supposing the question entirely barren of authority. In such cases we are generally willing to confide in the diligence of counsel, and do not feel ourselves bound to assiduous research. I have found one decided case however, which, if correctly cited, is in point and decisive of this case. I cite it from *Lindley on Partnerships,* 896, as follows: "The specific legatee (of stock) is entitled to all dividends which *become payable* after the death of the testator; *Jacques v. Chambers,* 2 Coll., 435; *Wright v. Warren,* 4 Deg. and S., 367; *even though the resolution authorizing their payment may have been passed in his lifetime; Clive v. Clive,* Kay., 600."
(382) Unfortunately the last case cited is not accessible to us.

Besides the above, the cases in 10 Ves. 185, 290; 13 Ves. 363, and 14 Ves. 70, and also the American cases, *Phelps v. Bank,* 26 Conn., 272; *Minot v. Paine,* 99 Mass., 106, *Goodwin v. Hardy,* 57 Maine, 143, may be referred to. These all relate to the right of a tenant for life to dividends, both declared and payable in his lifetime. So, none of them are in point to the present question. But in the discussion it seems to be generally assumed that the ownership of the stock, when the dividend became payable, fixed the right to it. As in the case of rent, it is only when it becomes payable, that the dividend becomes "fruit fallen," and detached from the principle estate, so as not to pass with it.

Judgment reversed, and judgment for defendant in this Court.

PER CURIAM. Reversed.

Cited: Trust Co. v. Mason, 151 N. C., 269.

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(383)

J. S. MAXWELL, Adm'r. v. T. S. MAXWELL and others.

1. The provision in sec. 247, C. C. P., that if the referees fail to deliver a report within sixty days from the time the action shall be finally submitted, either party may end the reference, applies only (*as the Court are strongly inclined to think*) to cases in which the reference is by consent, and not compulsory under sec. 245, or at least it does not apply to a reference to take an administration account made by order of the Court.
2. By "final submission" is not to be understood the order of reference or ceasing to take testimony, but when the parties have made their arguments or declined to do so, or when they have told the referees that the case was submitted.
3. Where a party fails to name a place or person, in the county where the action is brought, where and upon whom notices and pleadings can be served, the filing of such notices and pleadings in the office of the Clerk of the Superior Court shall be sufficient.
4. It is not the duty of a Judge, in passing on exceptions, to decide all questions of fact without a jury. On the contrary, if the facts depend upon doubtful and conflicting testimony, he may cause issues to be framed and submitted to a jury for information.

PETITION filed by plaintiff, as administrator of John Maxwell, deceased, against the heirs-at-law, to make real estate assets. Heard before *Cloud, J.,* Spring Term, 1872, of DAVIE.

At Spring Term, 1871, this entry is made: "Referred to Charles Price and B. F. Lunn to take an account of the personal estate." At Fall Term, 1871, the referees filed a report to which exceptions were filed. The exceptions being heard, the report was set aside, and an

order made that the referees report under former order to the next term of the Court. The referees agreed upon a report, but before it was signed by both of them, the plaintiff, on 30 March, 1872, filed two notices in the clerk's office, notifying the defendants that he
(384) elected to end the reference, as provided in section 247, C. C. P.

The names of Messrs. Boyden and Bailey, attorneys, were signed to the answer. No place or person was named, where or upon whom notice could be served. It was admitted that Mr. Boyden was on the Supreme Court bench and that Mr. Bailey lived in the town of Salisbury, and that E. D. Scales represented the defendants before the referees, and these facts were known to the plaintiff. On Monday, Spring Term, 1872, the referees filed a report. On that day, the plaintiff called the attention of the Court to the notices filed in the office, and insisted that the reference was ended, and moved that issues be drawn and submitted to a jury. His Honor determined, as a question of law, that as the defendants had been notified in pursuance of section 247, C. C. P., that plaintiff had elected to end the reference, and this having been done more than sixty days after the reference was "submitted" and before the report was delivered, the reference was ended, and the parties should prepare to try the action as though the reference had not been made.

His Honor refused to confirm the report. Defendant appealed to the Supreme Court.

Clement for plaintiff.
Bailey and *Fowle* for defendants.

RODMAN, J. 1. We are strongly inclined to think that the provision in sec. 247, C. C. P., that if the referees failed to deliver a report within sixty days from the time the action shall be finally submitted, either party may end the reference, applies only to cases in which the reference is by consent, and not compulsory, under sec. 245; or at least that it does not apply to a reference to take an administration account made by the order of the Court. This seems to be so from the words, "from the time *the action* shall be finally submitted," and the
(385) further words, "and thereupon *the action* shall proceed," etc.; which are inconsistent with the idea of a reference merely to take an account. And besides, it seems little less than absurd to suppose, that either or both parties can put an end to a reference ordered by the Court in the exercises of its rightful power.

2. But if the provision be applicable to a reference like this, the laches of the referees, which is the condition precedent to the right to

put an end to the reference, does not appear to have existed. By "final submission," we do not understand either the making of the order of reference, or the ceasing to take testimony; but when, in addition to this, the parties have made their arguments, or declined or omitted on notice to do so, or when the parties have told the referees that the case was submitted. It is exactly analogous to that stage in a jury trial, when the jury are told to take the case and make up their verdict. It does not appear when the final submission in this case was made, and it can not therefore be said that the referees were in any default when the notice to end the reference was given. The power is given to the parties, not to enable either of them to withdraw his case from what he has discovered or suspects in an unfavorable tribunal, but to prevent laches and undue delay in the referees. The notice was therefore ineffectual.

3. We are of opinion, that under the circumstances the service of the notice was good, under sec. 80, C. C. P. Service on Mr. Scales might have been good; if he proved to be the general attorney of the defendant in the action, it would have been; otherwise, if he was only an attorney to examine witnesses or argue the case before the referees. But he was not the attorney of the defendant nominated as prescribed in sec. 80; consequently, service need not have been made on him, and the leaving a copy in the clerk's office was good service.

4. We think the Judge erred in holding the reference at an end. If the account was regularly taken, and no sufficient reason appeared for setting aside in gross, it was the duty of the Judge to (386) confirm it, if it was not expected to; or if excepted to, to hear the exceptions. But it does not follow, as the plaintiff seems to suppose, that it was his duty to decide, without a jury, all questions of fact made by the exceptions. On the contrary, if any of these were found to depend on conflicting or doubtful evidence, the Judge might cause issues to be framed on these and submitted to a jury for his information. *Rowland v. Thompson,* 64 N. C., 710. And the proper time for doing this is after the report is returned and excepted to.

By such a practice, questions proper for a jury are submitted to one, while the benefit of the reference of the general account is not lost.

Judgment is reversed and the case remanded to be proceeded in according to law. The appellant will recover costs in this Court.

PER CURIAM. Reversed.

Cited: Green v. Green, 69 N. C., 299; *Maxwell v. Maxwell,* 70 N. C., 267; *Mosley v. Johnson,* 144 N. C., 269.

JOHN HUGHES v. FRANCIS MERRITT and wife.

The Act of 2 March, 1867, entitled an act restoring to married women their common law right of dower, having been repealed by the act of 1868-'69, a *feme covert* cannot set up a claim for dower during the life time of her husband.

ACTION for the recovery of possession of land, tried before *Clarke, J.*, at Spring Term, 1872, of JONES.

The following case agreed was sent up:

(387) "It is agreed that on 31 December, 1861, the defendant Francis Merritt and one Hargett executed a bond for $200, to J. S. Wilkins, and that on 1 November, 1867, judgment was rendered on the bond against the obligors Merritt and Hargett for $269.90. That on 8 November, 1867, execution was issued, which came into the sheriff's hands 30 January, 1868; on the same day this execution was levied on the land and returned to Court, and a *ven. ex.* issued, under which the land was sold and purchased by one McLean, and a sheriff's deed made to him.

An action was begun by McLean to recover the land. After commencement of the suit, plaintiff purchased from McLean for value. It was insisted by the feme defendant, Deborah Merritt, that she was entitled to one-third of the land under the act of 2 March, 1867.

The question was submitted to his Honor, with the understanding that if he should be of opinion with the plaintiff, judgment should be given for plaintiff for the possession, etc., and if for the defendant, the feme covert, judgment to be rendered for plaintiff subject to her claim of dower."

His Honor rendered judgment as follows: Let judgment be rendered for plaintiff subject to the dower of the defendant Deborah Merritt, and for costs.

From this judgment plaintiff appealed.

Haughton for the plaintiff.

No counsel for the defendant.

BOYDEN, J. This is a civil action brought by the plaintiff against Merritt and his wife Deborah, and submitted upon a case agreed to his Honor below, Judge Clarke; and the only question in the cause is the claim on the part of the feme defendant to dower, under the act of 2 March, 1867, during the life of her husband. This suit was

(388) commenced in December, 1871. It is sufficient, for the decision of this case, to state that the act of 2 March, 1867, was repealed

by the act of 1868-'69. But even if the acts are still in force, *Sutton v. Askew,* 66 N. C., 172, decides that the feme defendant would not be entitled to dower.

The case of *Felton v. Elliot,* 66 N. C., 195, is like this, and decides that the feme defendant is not entitled to dower on the land sued for.

There was error, and the judgment of his Honor is reversed and rendered for the plaintiff, for the land sued for, unincumbered.

PER CURIAM. Reversed.

Cited: O'Kelly v. Williams, 84 N. C., 283.

J. J. DAVIS v. J. J. BAKER.

Where land was levied on, and execution issued on a magistrate's judgment, and the said judgment, execution and levy was returned into the County Court and confirmed, and a *ven. ex.* was issued, and the land sold; *Held,* that in an action to recover possession of the land, it was not necessary to show the justice's judgment and execution, but only the judgment of the Court, the execution sale, and deed by the Sheriff.

This was an action commenced 7 July, 1869, to recover real estate, and tried before *Clarke, J.,* at a special session of WAYNE, September, 1871.

The plaintiff introduced the following record from Wayne County Court at May Term, 1868:

Davis & Kirby
v.
John Davis and wife. } Attachment.

It appearing to the satisfaction of the Court that advertisment has been made according to law, and that all the papers (389) have been filed, judgment is therefore, upon motion, rendered in favor of the plaintiffs against the defendants, for the amount of the justice's judgment, to-wit, in the sum of $18, with interest thereon from 13 December, 1867, and all cost incurred in the proceedings below, as well as the cost incurred in this Court. On motion, it is ordered by the Court, that the land levied upon be condemned to satisfy this judgment, and that a writ of *ven. ex.* issue. Accordingly *vend. expo.* issued." He then read in evidence a *ven. ex.* and a sheriff's deed. The plaintiff then introduced evidence to show that the land in question was the property of Isabella Davis, before her marriage with

John Daniel in 1866. The defendant read in evidence a mortgage deed to him by the said John Daniel and wife, dated 21 September, 1869, and proved that said mortgage had not been foreclosed, and that the mortgage debt had not been satisfied, and that he had been in possession of the land since the date of said mortgage deed.

Upon the above evidence, his Honor told the jury that the plaintiff had not introduced the levy and justice's judgment in the attachment, and on that account was not entitled to a verdict in this action, and instructed the jury to find for the defendant.

Verdict for the defendant. The plaintiff excepted to the above charge and prayed for and obtained an appeal to the Supreme Court.

S. M. Isler for the plaintiff.
Faircloth for the defendant.

BOYDEN, J. In this case his Honor was mistaken in holding that it was necessary for the plaintiff to produce the judgment and execution of the Justice of the Peace.

Under the act of 1794, ch. 414, sec. 19, and until the act of 1822, Revised Code, ch. 45, secs. 12 and 13, it was necessary for the
(390) plaintiff, who claimed land under a sale made by a sheriff in a case of a judgment of a Justice of the Peace, and an execution issuing thereon and levied upon land and returned to the County Court, not only to produce on the trial the order of sale of the County Court but likewise to produce and prove the judgment of the Justice and the execution issuing thereon, and also to show a proper levy made on the land sought to be recovered. And even after the act, unless the judgment of the Justice upon its return to the County Court was confirmed and made a judgment of that Court, the plaintiff after the act of 1822 was still bound, in a suit for the recovery of the land, to make the same proof that was required before the passage of that act. But when the plaintiff in the suit before the Justice, upon the return of the papers to the County Court, had his judgment confirmed and made a judgment of that Court, it was no longer necessary to produce the judgment and execution of the Justice of the Peace, but only to show the judgment of the County Court and the execution issuing thereon, the sale by the sheriff and his deed to the purchaser. This disposes of the case in this Court, and makes it unnecessary to notice the questions made as to the mortgage deed.

PER CURIAM. *Venire de novo.*

Cited: Lash v. Thomas, 86 N. C., 316.

(391)

J. D. BRYANT & JAS. READE, Trustees of ANNA BURGWYN and GEO. P. BURGWYN v. ALBERT E. SCOTT.

Where in an action pending in a Court of this State there were several plaintiffs, one of whom was a citizen of North Carolina and the others were nonresidents of the State, the defendant being also a nonresident; *Held*, not to be a proper case for removal to the Circuit Court of the United States, upon petition, under the act of Congress of 2 March, 1867, there being no controversy between a citizen of this State and a citizen of another State.

PETITION in this Court for the removal of a cause, brought up by appeal from the Superior Court of HALIFAX, to the Circuit Court of the United States for the District of North Carolina.

The opinion of the Court contains a sufficient statement of the case.

Smith and *Peebles & Peebles* for the plaintiffs.
Strong for the defendant.

RODMAN, J. This case comes into this Court upon an appeal by the plaintiffs from an order of the Judge below, vacating an order enjoining the defendant from selling certain land conveyed to him by H. K. Burgwyn by way of mortgage. In this Court a motion is made by plaintiffs, upon affidavits, to remove the cause to the Circuit Court of the United States, upon the ground that from prejudice or local influence, they are not able to obtain justice in the State Courts.

The defendant says, in the first place, that the motion should not be allowed, because the action itself is not pending in this Court, but only so much of it as was taken up by the appeal from the interlocutory judgment vacating the injunction. We think we need not consider, whether an order of removal made here under the circumstances would remove the whole case or not. That would more properly be (392) for the Circuit Court, if the order were made; and no doubt some way would be found by which the whole record could be got in that Court.

But is the case one authorized to be removed by the act of Congress? The act (2 March, 1867, 14 Stat. at Large 558), says that in a suit "in which there is a controversy between a citizen of the State in which the suit is brought, and the citizen of another State, etc., such citizen of another State, whether he be plaintiff or defendant," may file a petition, etc.

It appears by the affidavits in this case, that the plaintiffs Bryant and Reade are citizens of Massachusetts, George P. Burgwyn the other plain-

tiff is a citizen of North Carolina, and the defendant Scott a citizen of New York.

Here there is a controversy between Burgwyn, one of the plaintiffs and the defendant; but Burgwyn is not a citizen of another State, and could not file the petition; and Bryant and Reade, who filed the petition, although citizens of another State, have no controversy with any citizen of this State, but with a citizen of New York. We think the case does not come within either the letter or spirit of the act, and the order of removal of suspension is refused.

PER CURIAM. Motion Denied.

(393)

E. P. JURNEY v. WILLIAM F. COWAN, Executor.

Where a testratrix bequeathed a share of her estate to her Executor, "In trust and he shall put the amount of said share at interest on good security, and pay the annual interest to my son for the use of his family, etc.," and the executor assumed the trust and invested the funds as directed by the will, collecting and paying the annual interest until 1862, when, without any necessity for it, and with a view simply to surrender the trust, which was not done, he collected the amount due and invested it in Confederate bonds which were lost; *Held*, that the Executor was chargeable with the trust fund, and the annual interest arising thereon.

BILL IN EQUITY for an account heard before *Mitchell, J.*, at Fall Term, 1871, of IREDELL.

The bill was filed in the name of Edward P. Jurney alone, against the defendant as executor and trustee under the will of Lucy Jurney, to recover the annual instalments of interest owing to him by a bequest for the benefit of himself and family. The testatrix died in 1846. The defendant qualified as executor and assumed the duties of the office for the benefit of the legatees. Upon demurrer the bill was amended, upon payment of costs, by inserting the names of the other legatees. The claim of complainants arises under the following clauses of the will:

Item. "My will is that my executor sell all my property not hereinafter bequeathed, and the proceeds after paying debts, etc., be divided into six equal shares, one share of which I will to my executor in trust that he shall put the amount of said share at interest on good security at his discretion, and after retaining for his trouble a moderate compensation, pay over a part or all of the interest accruing on said share annually to my son Elisha Jurney for the use of his family, in sickness, in schooling his children, and other necessaries, at the sound discretion of my said executor, and at the death of my said son, the

amount of said share, and any interest that may remain unex- (394) pended, as above directed, shall be equally divided among my son Elisha's children share and share alike to be theirs absolutely." Item. This contains a similar bequest, to Edmund P. Jurney, and upon the same trusts. On 20 February, 1849, the defendant held under the will of the testatrix to be paid to plaintiff to the use and benefit of his family and children, the sum of $587.86. This amount was secured by bond and good security until March, 1862. The defendant had paid up the annual interest, and had exceeded it by fifty dollars. In the years 1862-'63-'64, demands were made for the instalment of interest due on the fund, and were refused on the ground that, in the Spring of 1862, the plaintiff Edmund Jurney and defendant had an understanding that the defendant should be discharged of the trust, and some other person substituted as trustee, plaintiff assured defendant that he would procure Mr. Gwyn to act as trustee, and he would receive from him Confederate currency, and advised defendant to collect it in. The defendant consulted with counsel immediately after this understanding, as to the mode of exonerating himself, expressing a wish to do so. By the ensuing August he had collected the full amount of the fund, and had it on hand, and not being able to re-invest at the time, he invested it in Confederate bonds and certificates, by which it was entirely lost. The fund when collected was secured by good and sufficient bond. The defendant had applied to other persons to relieve him of his trust by submitting to become trustee, but neither he nor plaintiff at any time applied to Mr. Gwyn, neither plaintiff nor Gwyn appeared at Court, nor did plaintiff renew the purpose of substituting a trustee.

It is considered by the Court that testatrix, by a bequest of one-sixth of her estate to Edmund Jurney for the use of himself and children, etc., evinced a material concern for their welfare. In the directions as to the collection and payment of the annual interest, she was vigilant and cautious also in requiring security. She was aware (395) that the plaintiff was flimsy in his conduct, indiscreet, and unreliable, and unfitted by capacity to manage even the least part of her estate. The character of plaintiff was as well known to defendant as to the testatrix, that she could not confide in him was a significant intimation to the defendant that he was undeserving of confidence; and if he had enquired his misapprehension would have been corrected. It is adjudged by the Court that the collection of the $587.86, which had been invested on good security for the benefit of Edmund Jurney and family, and investing in Confederate bonds, was a breach of trust, and

judgment is rendered that plaintiff recover of defendant the remainder of interest due, after allowing just credits, etc.

A. MITCHELL, *Judge.*

From this judgment defendant appealed to the Supreme Court.

Armfield, Bailey, Blackmer & McCorkle for the plaintiffs.
W. P. Caldwell for the defendant.

PEARSON, C. J. Upon the facts found by his Honor, and for the reasons given by him, we are of opinion that the defendant is to be charged with the trust fund, and the payment of the interest arising annually thereon. There is no error, the decretal order is affirmed, with the modification, that it be extended to the other five parts of the estate, which was in his hands to be administered.

By a demurrer in the first instance he forced the plaintiffs to pay cost and amend his bill, and make the persons entitled to the other five parts of the estate plaintiffs in the action, so as to have them bound by the decree. That having been done, we see no reason why there should not also be a decree in their favor respectively, for the amounts to which they are entitled.

The decretal order will be so modified, and the reference for an (396) account will extend to all of the plaintiffs. Costs of the appeal will be paid by the defendant.

PER CURIAM. Judgment accordingly.

WILLIAM A. BLOUNT v. WILLIAM W. CARROWAY.

1. Where one acquires the legal title to land, by the means of an undertaking with the party entitled to the equitable estate, that he will hold the estate subject to the equity; a refusal to carry out the undertaking is a breach of confidence, and on that ground the party is converted into a trustee:
2. Therefore, where a power of sale was given by a mortgagor to the mortgagee, in consideration of which the mortgagee agreed to convey a portion of the land embraced in the deed, to a trustee, for the benefit of the mortgagor's wife; *it was held*, that this contract did not come within the provisions of the statute of frauds, and that the mortgagee should be held a trustee, and bound to convey, according to the agreement. In such cases an agreement proved only by parol will not suffice, there must be facts *de hors*.
2. Where a party buys as agent of the mortgagee, as in this case, and with notice of the agreement, he will stand in the place of a mortgagee, and is affected by the same equities.

RODMAN, J., did not sit.

ACTION to recover possession of a tract of land, tried before *Clarke, J.*, at Fall Term, 1871, of LENIOR.

The complaint alleges, that the plaintiff was the owner of a certain tract of land in Lenoir County, describing the boundaries, and that defendant withholds possession, and demands judgment for possession, and damages for withholding the same. (397)

The defendant, William W. Carroway, answers:

I. That prior to 26 June, 1866, he was the owner in fee of the land; that on that day he mortgaged the same in fee to one John C. Washington, to secure certain debts recited in the deed, and that on 14 December, 1867, he executed to said Washington an instrument authorizing him to sell under the mortgage.

II. That there were several executions against him in the hands of the sheriff of Lenoir, among which were several in favor of W. N. and W. F. Rowland, administrators of E. B. Hilliard, issued from Nash Superior Court, and amounting to over $3,000; that Mary B. Carroway, wife of defendant, is the daughter of E. B. Hilliard, deceased, and one of the distributees of the estate of said Hilliard; that her share in the said estate was her sole and separate property, one Lewis Hilliard being her trustee under a marriage contract entered into between her and the defendant.

III. That it was understood that no sale of the land could be made under the mortgage and executions, the same being forbidden by General Order, No. 10, of the 2d Military District, dated in April, 1867.

IV. That it was agreed between the defendant and John C. Washington, that defendant would execute a power of sale, and consent that the land be sold under the mortgage and executions, and that in consideration thereof, and the executions in favor of the Rowlands, administrators, the said Washington would bid, or cause to be bid off, the said lands, and would settle in fee, to the sole and separate use of the said Mary, wife of the defendant, the dwelling house and outhouses and one hundred and fifty acres of the land, and that defendant should not be disturbed in the possession of the land thus to be settled; that defendant carried out his agreement in good faith, and executed the power of sale and gave his consent to the sheriff to sell; that on 7 January, 1868, the land was sold under the mortgage and exe- (398) cutions by the sheriff, who was acting also as agent of the mortgagee; that, at said sale, the plaintiff W. A. Blount, son-in-law of Washington, bid off the land at $6,600, not more than one-third of its value,

which defendant thinks was owing to the fact that it was understood that the purchase was made partly for the benefit of defendant's wife.

V. Defendant alleges and believes that the said land was bid off by Blount, at the instance and for the benefit of Washington, in pursuance of the agreement aforesaid, and with a full knowledge of all the facts; or, if he bid it off his own account, it was with the knowledge and understanding that the agreement should be carried into effect.

VI. That in pursuance of the agreement, as defendant supposed, he remained in quiet possession of the premises and never heard of plaintiff's claim until January, 1869.

VII. That the Rowland executions have not been paid, and that Washington and the plaintiff have utterly failed and refused to carry into effect the agreement aforesaid.

Wherefore defendant insists that plaintiff is a trustee for Mary B. Carroway, for the dwelling and outhouses and land specified, and demands judgment that plaintiff convey the same in fee to the said Hilliard in trust, etc.

Upon motion, Lewis Hilliard and Mary B. Carroway were made defendants.

Plaintiff filed a replication to the several articles of the answer.

The following issues were submitted to a jury:

I. Did John C. Washington agree to purchase and convey, or cause to be purchased and conveyed to Lewis Hilliard, trustee for Mrs. Mary B. Carroway, the land described in the answer of the defendant?

II. Did Wm. A. Blount purchase the land at sheriff's sale as the agent of Washington?

III. Did Wm. A. Blount have notice of the agreement to con-
(399) vey said land to Hilliard, trustee as aforesaid, before he purchased at sheriff's sale?

IV. Having said notice, did he assent thereto?

V. Did Blount have notice of the agreement before he took a deed from Washington, and having said notice did he assent thereto?

The jury found all the issues in favor of the defendant. Whereupon the Court declared Blount a trustee for Mary B. Carroway, and gave judgment that he convey the land specified to Lewis Hilliard, as trustee, for the sole and separate use of Mary B. Carroway.

From this judgment plaintiff appealed to the Supreme Court.

Phillips & Merrimon and *Busbee & Busbee* for plaintiff.
Smith & Strong for defendants.

PEARSON, C. J. The counter claim is not put on the footing of the

specific performance of a contract, but, on the footing of a *constructive trust,* growing out of the connection between Washington and Carroway, as mortgagee and mortgagor, and their dealing in regard to the equity of redemption, and that Blount stands in the shoes of Washington.

The jury find that Blount purchased the land as agent of Washington—issue II, and that Blount had notice of the agreement by Washington to convey the land to Lewis Hilliard, as trustee for Mrs. Carroway—issue III.

So Blount stands in the shoes of Washington, and the case will be considered as if the counter claim was set up against Washington, Blount holding the legal title, subject to the equities between Washington and Mrs. Carroway. If Mrs. Carroway is entitled to the *locus in quo,* the plaintiff can not recover; for he will be treated as if he had executed a deed to Hilliard, in trust for Mrs. Carroway—equity considering that to be done which ought to have been done.

A agrees, by parol, to sell to B an undivided third part of a tract of land, for $425; the money is paid, B enters into posses- (400) sion, and the two occupy jointly for several years, erect a mill, and make other improvements. B acquires no title, for the contract of sale is void under the statute.

In these two supposed cases A and B are strangers, and had no prior connection or privity. In our case, Washington and Carroway were not strangers, but were connected as mortgagee and mortgagor, which created a privity. The question is, does that make a difference, and take the agreement, to have a specified part of the land conveyed for the separate use of the wife of Carroway, out of the operation of the statute, on the distinction between a contract to sell land and a case where a Court of equity will convert the party taking the legal estate into a trustee, on the ground that otherwise the dealing would result in fraud, and an abuse of the confidence reposed.

The agreement between Washington and Carroway can not be treated as *nudum pactum,* for it is supported by a valuable consideration, to-wit: the execution by Carroway of a power of sale, without which Washington could not have sold, so as to convey a clear title; for although he had the legal estate, and might convey it, still the purchaser would take subject to the equity of redemption. So it was for the interest of Washington to acquire a power to pass a clear title, without the exposure and delay incident to obtaining a decree of foreclosure. This is a valuable consideration, and takes the case out of the class of "nude pacts."

Washington held the legal estate to secure the mortgage debt. Carroway had the equity of redemption. An agreement is made that Wash-

ington may sell and pass a clear title, in consideration that he will provide that the purchaser shall convey, for the separate use of Mrs. Carroway, 150 acres. Accordingly, the land is sold, Blount purchases for Washington, and with notice of this dealing between Washington and Carroway. We have the question: is this a parol contract to *sell*

(401) *land,* or is it a case where a Court of equity will convert Blount into a trustee, and require him to convey the 150 acres to the separate use of Mrs. Carroway, as had been agreed on?

Besides the three modes of creating a use or trust by *consent of parties,* to-wit: 1, a deed of bargain and sale; 2, a covenant to stand seized; 3, a declaration of the use or trust, where the legal estate is passed by transmutation of possession, there is a fourth mode of creating a trust *"in invitum,"* in which a Court of equity, to prevent fraud, converts the party acquiring the legal title into a trustee, and requires him to convey the legal estate to the party entitled to the equity, on the ground that he can not with a good conscience hold the legal estate. In such cases, as the Court acts on the ground that its interference is necessary to prevent fraud, the statute is out of the question, as the jurisdiction is assumed in furtherance of the policy of the statute.

A numerous class of cases, under this doctrine, grows out of the relation of guardian and ward; attorney and client, and other confidential relations, where the party acquiring the legal title is converted into a trustee, not on the ground of actual fraud, but because of the facility of practicing it, and he is required to prove that the dealing is entirely fair, or else is converted into a trustee, and will be required to convey the legal title, being held as a security merely for the money actually advanced.

Another class of cases, equally numerous, is where a deed, absolute on its face, is held to be a mere security for the debt, and the party holding the legal title is converted into a trustee, and required to convey on payment of the debt.

In such cases, however, a mere parol agreement for redemption is not enough; *facts de hors* must be proved, inconsistent with the idea of an intention to make an absolute sale.

Another class of cases, although not so numerous, is where one acquires the legal title, by means of an undertaking with the party entitled to the equitable estate, that he will hold the estate subject to the equity. Here a refusal to carry out the undertaking is a breach

(402) of the confidence reposed, and on that ground the party is converted into a trustee. *Cloninger v. Summitt,* 55 N. C., 513, is an instance under this class. In such cases, an agreement proved only by

parol will not suffice; there must be *facts de hors*. In the case of *Cloninger v. Summitt*, "The plaintiff put the title bond in the control of the defendant, *without which special confidence he could not have acquired the title.*"

Our case falls under this principle. Carroway executed a *power of sale* to Washington, without which *special confidence* he could not have made the sale. The title can not be withheld from Mrs. Carroway without a breach of this special confidence.

PER CURIAM. Affirmed.

Cited: Dawkins v. Patterson, 87 N. C., 388; *Sherrod v. Vass*, 128 N. C., 51.

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(403)

CHARLES GOLDSBOROUGH v. J. C. TURNER and J. CALDER TURNER.

1. In an action to set aside a deed for fraud, a Judge may, by sec. 225 of C. C. P., try such issues of fact as are made by the pleading. He may also submit to a jury issues so framed as to present any question of fact on which he doubts, but he is not bound by their verdict, and may proceed to find the facts otherwise than they have found; and he may also find facts not embraced in the issues submitted to them.
2. An authority given to an attorney or agent, to accept in payment of a debt cash in New York or Baltimore funds, does not extend to accepting the bill of an insolvent drawer, no matter upon whom it may be drawn. The credit of a bill is not enhanced by the credit of the drawee until acceptance.
3. The defense, of a purchaser "for value and without notice," can only be made available by one who has acquired the legal estate. Therefore, where land was conveyed in trust, and a person purchased from the trustor his equitable estate, and paid the value thereof, and afterwards acquired the legal estate without paying the value of the same; *it was held*, that neither by the purchase of the equity of redemption for value, nor of the legal estate without value, could he be held a purchaser for value and without notice, within the sense of the rule.

ACTION to set aside a deed, tried before *Cloud, J.*, at Fall Term, 1872, of ROWAN.

The complaint alleged that the defendant, James C. Turner, was the owner of a house and lot in Salisbury; that he was indebted for the purchase money, some $1,500, and that he was also indebted to Goldsborough and Tate in three notes of $1,000 each, with interest due thereon; that in order to secure these debts he executed a deed in trust to the plaintiff, with a proviso that if the debts were not paid on 4 July, 1867, the trustee should sell, etc.; that a thousand dollars was paid in June, 1867; that the remainder was not paid on 4 July, as stipulated in the

deed; that, after postponing from time to time, the plaintiff and James C. Turner agreed that if he would pay $2,300, and the debt due (404) to one Josephi for the purchase money, he, plaintiff, would convey to J. Calder Turner the lot in question; that plaintiff prepared a deed to the said J. Calder Turner, and sent it to his attorneys, Blackmer & McCorkle, to be delivered only on the condition that the sum of $2,300 was paid in cash and the $1,500 secured or arranged, so as to relieve the plaintiff as trustee as aforesaid; that afterwards James C. Turner paid to plaintiff's attorneys $2,000 in cash, and gave them a check on one G. W. Swepson for $300, payable at 90 days, assuring them that the check would be promptly paid, and at the same time the said Turner gave his check to one John I. Shaver, who was his surety on the note given for the purchase money, on the said Swepson for $1,200 at 30 days, in full of the amount due Josephi. That Shaver, confiding in the representation that the check would be paid, agreed that the property should be released from the incumbrance of the said debt. That the holder of the note for $1,500 did not assent to the arrangement, and that there is still due on the same some $1,200. That the said checks were presented to the said Swepson and not accepted. That the said Turner had no funds in his hands and was in fact indebted to Swepson and the fact was well known to both the defendants. That when these checks were accepted the deed was delivered by plaintiff's attorneys to James C. Turner. Plaintiff further alleges that Turner has not paid the checks drawn by him. That he is insolvent, and that he knew that the terms of compromise were that the deed was not to be delivered until the cash for the $2,300, was paid and the note for the purchase money was arranged. That J. Calder Turner had no funds in Swepson's hands when the checks were drawn. Plaintiff asked for judgment that the deed be delivered up to be cancelled and that the land be sold, etc., and that J. Calder Turner be enjoined from selling, etc.

The defendant J. C. Turner admits giving the checks on Swepson, and that they were not paid. He denies all fraud, and that he (405) misrepresented the facts to plaintiff's attorneys. He denies that he had any knowledge, or that the contract was, that the deed was not to be delivered until the cash was paid, but that any negotiable securities were to be taken. He alleges that Swepson was at the time a man of large means and prompt in his payments. That he had no funds in the hands of Swepson at the time the checks were drawn, but avers that he had business transactions with him, and had secured his

legal promise to honor the checks, and that the agents of plaintiffs knew he had no funds in the hands of Swepson.

He avers that the condition and financial reputation of Swepson was well known to the attorneys of plaintiff, and to John I. Shaver, and the drafts were accepted in full payment of his indebtedness.

The defendant J. Calder Turner denies any knowledge of the negotiations between plaintiff and his co-defendant, relative to the delivery of the deed upon certain conditions, or anything of the giving or accepting the checks on Swepson. He avers that he purchased the house and lot in question from James C. Turner for the sum of $2,000, which he paid, and which was applied to the payment of the debt due Goldsborough and Tate. Defendant denies that Josephi did not give his assent to the acceptance of the check on Swepson, but avers that he and Goldsborough and Tate, through their legal counsel and agents, accepted the checks in payment of the debts due from James C. Turner.

He denies knowledge of any fraud, deceit or misrepresentations on the part of James C. Turner or any one else, to obtain the deed from the plaintiff, but on the contrary he says he purchased in good faith, that he paid therefor the sum of $2,000, and that he took the conveyance from the trustee, with the legal assent of the *cestui que trusts.*

After the jury were empaneled, defendant's counsel suggested that Josephi and Goldsborough and Tate were necessary parties, and moved to have them made parties. This motion was refused. Defendants' counsel thereupon prayed an appeal. The Court ordered (406) plaintiff's counsel to proceed and defendants excepted.

The following issues were then submitted to the jury:

1. Did the defendant James C. Turner fraudulently procure the delivery of the paper writing purporting to be a deed, as alleged?

2. Did Blackmer and McCorkle have authority to deliver the paper writing except upon payment of $2,300 in cash?

3. Did defendants, or either of them, pay $2,300, according to the terms of the compromise with the plaintiff?

4. Was J. Calder Turner a purchaser of the house and lot described in the pleadings for value, and without knowledge of the facts upon which plaintiff founds his equity?

The evidence relative to the second issue was a letter addressed to Blackmer & McCorkle, as follows:

Gentlemen:—"We have written to you by Major Turner authorizing you to settle our claim, which is $2,491.33, for which we have agreed

to accept $2,300, Major Turner paying all costs and other charges except your commissions.

* * * * * * *

Please have the matter fixed without delay, and remit us the $2,300 less your commissions. Yours, etc. GOLDSBOROUGH & TATE."

P. S. "Major Turner is to pay cash in Baltimore or New York funds."

There was also evidence that Turner represented to Blackmer & McCorkle, before they took the drafts, that he had authority to draw on Swepson, and that his draft would be promptly accepted and paid. It was also in evidence, that Swepson was reputed to be a man of large means, that he lived in this State, and the draft was drawn at 90 days, payable at the Raleigh National Bank, was presented and refused acceptance and returned protested. It was contended that only a portion of the $2,300 was paid in United States currency, and the re-
(407) mainder in the draft of Swepson. His Honor left it to the jury to say, from all the circumstances, whether Blackmer & McCorkle had authority to accept the draft, and whether it constituted a payment. The defendants contended that, as Swepson was shown to be a man of large means, a draft on him was such funds as was within the terms of the letter.

The jury returned the following verdict in writing:

To the 1st: *Answer*—He did.
To the 2d: *Answer*—They did not.
To the 3d: *Answer*—They did not.
To the 4th: *Answer*—He did not pay full value.

In addition to the foregoing statement, which appears in the record as "Statement for Supreme Court," the Judge rendered the following judgment: "The Court doth declare that the defendant, James C. Turner, on 4 July, 1868, executed to the plaintiff a deed in trust of the premises described in the complaint, to secure the payment of debts due to Goldsborough and Tate, and A. Josephi, and by the terms of said deed in trust, if said debts were not paid and satisfied on or before 4 July, 1867, it became the duty of the plaintiff to sell said premises, and out of the proceeds first pay the expenses of said trust and then said debts; that on 4 June, 1867, James C. Turner paid to the plaintiff $1,000, in part payment of the debts due to Goldsborough and Tate; that in the fall of 1869, the said Goldsborough and Tate agreed with said James C. Turner to accept in full satisfaction of their debt the sum of $2,300,

if paid in a few days, and the plaintiff was instructed and agreed upon the prompt payment of $2,300 to the attorneys of Goldsborough and Tate, Blackmer & McCorkle, and also the debt due Josephi, to make a deed for the premises to the defendant J. Calder Turner. Accordingly a paper writing in the form of a deed, was prepared and forwarded, purporting to convey the premises. That James C. Turner was, during the transaction, and is yet, wholly insolvent. The paper writing was afterwards delivered by the attorneys, Blackmer & McCorkle, to the said James C. Turner. The foregoing facts (408) are declared, as stated in the complaint and not controverted by the answer. The Court doth further declare, as facts found by the jury, that defendants, nor neither of them, paid to said Blackmer & McCorkle the sum of $2,300 at any time, but that only $2,000 was paid.

That Blackmer & McCorkle, at the time of the delivery of the said paper writing, had not received the $2,300, and the same had not been paid by the defendants, or either of them, and that Blackmer & McCorkle had no authority to deliver said paper writing except upon the payment of the sum of $2,300.

That the defendant James C. Turner fraudulently procured the delivery of the paper writing, purporting to be a deed, by false representations.

That J. Calder Turner was not a purchaser for the full value thereof. It is therefore adjudged that the said paper writing was delivered to Blackmer & McCorkle as an escrow; that it was delivered to them upon certain conditions, which have not been complied with, viz.: the payment of $2,300.

It is further ordered and adjudged that the said paper writing be delivered up, by the said J. Calder Turner, for cancellation, and that said Turner execute to the plaintiff a quit-claim deed for the premises, and that the said premises be sold according to the terms of the deed in trust, and that the expenses of the trust be first paid, and the balance be applied to the payment of the debts as specified in the trust, and that the defendants be enjoined from setting up or taking advantage of the said paper writing," etc.

There was a rule for a *venire de novo*. Rule discharged. Defendants appealed.

Bailey and *Blackmer & McCorkle* for plaintiff.
Jones & Johnston and *Clement* for defendants.

RODMAN, J. 1. As the plaintiff has stricken from his complaint his prayer for the sale of the land under the trust, we (409)

think there is no necessity for making the *cestui que trusts* parties to the action. *Calvert on Parties in Eq.,* 213, citing *Wakeman v. Rutland,* 8 Bro. P. C., 145; *Saville v. Tancred,* 3 Swans., 141, and *Hyde v. White,* 5 Sim., 524.

2. By secs. 224, 225, of C. C. P., the Judge may himself decide the issues of fact made in a case like this. He may also submit to a jury issues so framed as to present any questions of fact on which he doubts, arising out of the pleadings. But this is for his information only, or, as it is said, to enlighten his conscience. He is not bound by the verdict, but may nevertheless proceed to find the questions submitted to the jury otherwise than they have done, and to find facts not included in the issues submitted to them. He may of course adopt the findings of the jury, but upon the facts which he finds he is to pronounce his judgment. Whether he adopts or sets aside the findings of the jury, he is required to find the facts upon which he gives his judgment, and to state his conclusions of law and fact separately.

This is the idea upon which his Honor seems to have acted in this case; for in his judgment he declares the facts which he finds, adopting the findings of the jury as his own, and states his conclusions of law on the facts so found.

In this view of the case, any defectiveness or want of completeness in the issues, or in the findings of the jury, becomes immaterial, *provided,* it is supplied by the findings of the Judge, to which those of the jury are fragmentary and ancillary.

Two questions therefore arise, in every case of this sort.

1. Does the evidence sustain the findings of fact by the Judge?

2. Assuming the facts to be as found, do they support his conclusion of law as set forth in his decree?

As to the first, we think that all that the Judge finds as facts are established by the evidence, taken in connection with the admis-
(410) sions in the pleadings. No one of them that is material seems to be really disputed. It is indeed alleged, that Blackmer & McCorkle took the drafts of James C. Turner on Swepson, in payment and satisfaction of his indebtedness to the *cestui que trusts* of the plaintiff. But it is clear upon the evidence, that if they did so, they exceeded their authority, which was special, and was known to be so to James C. Turner. It can never be held that an authority to accept in payment, cash in New York or Baltimore funds will extend to accepting in payment the bill of the insolvent debtor, no matter upon whom it may be drawn; for the credit of a bill is not enhanced by the credit of the drawee until acceptance.

We come then to the second question.

The Judge finds, in substance, that the delivery of the deed, from the plaintiff to J. Calder Turner, was procured by the misrepresentations of James C. Turner to the agents of the plaintiff, and was in excess of their authority. As between the plaintiff and James C. Turner, it can scarcely be denied, that upon this the plaintiff would be entitled to a re-delivery or cancellation of the deed, on returning to him his protested bills, and crediting the debts with the $2,000 paid.

But J. Calder Turner contends that he purchased the land from James C. Turner, and paid him for it $2,000, which was the $2,000 paid by him to Blackmer & McCorkle, the agents of the plaintiff; that he had no notice of the representations of James C. Turner to Blackmer & McCorkle, which are the foundation of the plaintiff's demand; and that he is therefore a purchaser for value and without notice, and entitled to protection as such.

The question arising out of this defence was submitted to the jury by the fourth issue, which embraced all the matters necessary to its determination. But the jury do not respond to the issue: they only find that J. Calder Turner did not give full value for the land.

This is manifestly defective. Neither does the Judge supply the defect by finding on the omitted points. He merely adopts (411) the finding of the jury.

Perhaps in some cases it would be convenient for the Judge to set forth, among the facts which he finds as the foundation of his judgment, not only those which being disputed must necessarily be found, but also those which are admitted by the pleadings, if these last be necessary to support his judgment. But we do not think it necessary for him to do so. The pleadings being a part of the record may always be referred to for the ascertainment of the facts constituting the case, and we think it is proper to refer to them for the purpose of supplying, by the allegations and admissions contained in them, anything which may appear wanting in the finding or declaration of facts by the Judge. We can see no reason compelling a Judge to find upon facts not put in issue. Merely, that his doing so would present the mass of facts in a more intelligible and convenient compass, can not make it imperative.

It becomes necessary therefore to examine the answer of J. Calder Turner, to see whether he alleges facts which amount to the defense contended for, and pleaded in Art. V of his answer. Though not evidence for the defendant, he is bound by it, and the plaintiff may take it as true.

In Article 3, he says he purchased the land in question from James C.

Turner, and paid him $2,000. The probability is, that this sum was paid with the expectation that it would be applied, as in fact it was, to the reduction of the incumbrances on the property, and, it may be, with the further expectation that James would extinguish the residue of the incumbrance; but this is not stated.

It is material that J. Calder Turner does not state when he purchased. If it was before the deed in trust to plaintiff, of course, it would be a clear defense. For this reason, and because all uncertain and defective statements in pleadings are to be taken most strongly against (412) the pleader, we conclude his purchase was afterward, and with at least constructive notice. He purchased then an equity only (for James had nothing more), for which he paid value. But it is clear that a purchaser, in the meaning of the rule we are considering, must be a purchaser of the legal estate. The proposition of the defense must be, that he acquired the legal estate from the plaintiff. Can he be considered as having paid value for that? Can the payment of value to James C. Turner for his equitable interest be connected with and attached to the conveyance to J. Calder Turner of the legal title, so as to bring him within the rule? It does not appear that Blackmer & McCorkle had notice that the $2,000 paid to them by James was paid by him as the agent of Calder, or that it was in any way obtained from him. If, by the transaction between the two Turners, the money became the property of James, then the payment by him was on his own account and in reduction of his debt, of which Calder, as purchaser of the equity of redemption, will have the benefit, but of which he cannot claim the benefit otherwise, or as a value paid by him for the legal estate. If James paid the money and received the deed as the agent of Calder (for the actual handing over of the deed by Blackmer & McCorkle was to James and not to Calder), then on the principle that notice to the agent is notice to the principal, Calder must be taken to have had notice of the whole consideration, including the representations on which the delivery of the deed was obtained.

It follows, that neither by the purchase of the equity of redemption for value, nor of the legal title without value, can J. Calder Turner be held a purchaser for value and without notice, in the sense of the rule.

Decree: that J. Calder Turner deliver up to plaintiff the deed made to him by plaintiff, and convey to plaintiff the land described in the deed, without prejudice to his right to the equity of redemption, (413) after the payment of the residue now unpaid of the debts secured

in the trust deed to plaintiff, and that the bills of James C. Turner on Swepson be delivered up to said James.

PER CURIAM. Judgment accordingly.

Overruled—(as to first headnote): *Lee v. Pearce,* 68 N. C., 89.

Cited: Worthy v. Shields, 90 N. C., 194.

DOE EX DEM of SOL. W. NASH et al. v. WILMINGTON AND WELDON RAILROAD COMPANY.

It is settled, that where a tract of land is described by course and distance, and also by natural boundaries, and there is a discrepancy, the latter description controls. Upon this principle, *it was held,* that when a town lot was sold, and in order to identify it the number or name of the lot was given, and reference was also made to streets, the latter description must give way to the former; for the lot was the object and not the street; and the description, in pursuance of the primary object for which the lot was numbered or named, is less apt to be erroneous than the description by reference to the number or name of the street, as that is incidental, and is a secondary and not the primary object for which the streets were named.

EJECTMENT, tried before *Russell, J.,* at Spring Term, 1872, of NEW HANOVER.

The action was brought in 1858, to recover possession of three lots outside of the old, but within the limits of the present city of Wilmington. The description in the declaration is: Bounded by lands of ————, but lying between north boundary on Water Street and the railroad, on the east by 5th street and on the west by 4th street, said lots being parcel of a certain tract of land conveyed by T. D. Meares, C. M. E., to W. S. Campbell, on 17 day of May, 1845, the said three lots being designated on the plat which forms a part of said deed as Nos. 85, (414) 86 and 87. There were counts on the demise of W. S. Campbell, Solomon and John Nash, and W. S. and James Campbell, heirs-at-law of Marsden Campbell.

The plaintiff showed title in Marsden Campbell, to a tract of land north of and adjoining the old limits of Wilmington, which embraced the land in dispute, and proved that he died in 1842, and the lessors, W. S. and James Campbell, were his heirs-at-law. He proved the destruction of the records of New Hanover during the war, and offered a copy of a deed from T. D. Meares, C. M. E., to W. S. Campbell, with a plat of survey annexed. The only evidence, to show by whom the plat

attached to the deed was made, was the written description accompanying the plat, and which was referred to in the deed as a plat made by Alexander McRae, and the testimony of John McRae, who testified that his brother, Alexander McRae, made a survey of lands for Marsden Campbell, about the time he moved away in 1834, and he thinks he made a plat of the survey, though witness cannot say he ever saw the plat.

Plaintiff's counsel insisted that this testimony, together with the numerous deeds offered by the defendant was some evidence that the plat shown was a copy of the one made by Alexander McRae. Plaintiff showed a deed from W. S. Campbell to Solomon Nash, dated in 1845, and proved that Solomon Nash was dead, and the lessors, Solomon and John Nash, were his heirs-at-law.

The defendant claimed likewise under Marsden Campbell, and showed a deed from him to one London, dated in 1834, and from London to the defendant. The description in the deed was as follows: "All those five lots recently surveyed and plotted by Alexander McRae and filed in the Register's office and known as lots Nos. 88, 89, 90, 91 and 92, together with that portion of Hanover street intersecting between lots 89 and 90, the lots being bounded on the west by 4th street, on the (415) east by 5th street, on the north by Brunswick and on the south by the town of Wilmington, as laid down in said plat, as will more fully appear by reference thereto." The principal question in the case was the location of the land described in this deed. Plaintiff introduced one John H. Brown, who had surveyed the lots in dispute under an order of the Court. He testified, in substance, that the defendant's deed from London was located according to the general description and calls for the streets, it would embrace the three lots in question, but if located according to the numbers of the lots it would not embrace these three lots. There was other testimony as to this point.

Defendant's counsel asked the Court to instruct the jury, that the deed from Marsden Campbell to London conveyed all the lands between 4th and 5th streets on the west and east, and Brunswick on the north, and the town of Wilmington on the south, as those streets and the boundaries of the town existed or were known in 1834, at the time the said deed was executed. His Honor declined this instruction, but told the jury, that the location of the deed from Marsden Campbell to London was exclusively a question for them; that the deed calls for a plat on which the land conveyed is designated by certain numbers, and it is then described by general boundaries. That the defendant says, that in the absence of the plat the particular description must be controlled by the general. The plaintiff insists that the plat attached to the deed from

Meares is the same as that referred to in the deed from Campbell to London. That it appears from deeds read by defendant's counsel, from Marsden Campbell to other persons, that Alexander McRae made surveys of these lands and a plat of them, prior to 1834, and it is for you to decide whether the two plats are the same, and if they are the same, then according to the evidence of the surveyor Brown, the deed from Cambell to London, or the lots as shown by the numbers set forth in that deed, would not include the land in controversy. The plaintiff's counsel, in his argument to the jury, used the plat annexed to the deed from Meares to Campbell, as evidence to locate the deed (416) from Campbell to London, insisting that they were the same, and that both plats were made by McRae and that the jury must so conclude; that the plat referred to in the latter deed was identical with the plat before them, on which the lots Nos. 88, 89, 90, 91 and 92 did not constitute any part of the land in controversy. Defendant's counsel protested against the use of this plat, and this course of argument. 1. Because there was no evidence that the plat exhibited was made by Alexander McRae. 2. Because the description accompanying the plat and made part of the deed was not made until December, 1843, and after the death of Marsden Campbell, and there was no competent evidence to show that this plat was a copy of the plat referred to in the deed to London. His Honor declined to interfere with the counsel in his argument. There was a verdict for the plaintiff. Motion for *venire de novo*. Motion refused, and appeal by defendant.

The diagram shows the location of the lots in controversy, numbered 85, 86, 87, as also the locality of the different streets called for in the deeds. This diagram or plat is a copy of the one referred to, in the case, as the McRae plat.

Strange and *London* for the plaintiff.
Moore & Gatling for the defendant.

PEARSON, C. J. Both parties claim under Marsden Campbell. The plaintiff established the fact by the aid of the plat referred to, and made a part of the deeds under which he derived title; that his title covered the land sued for, to wit: lots Nos. 85, 86 and 87, as designated on the plat.

The deed under which defendant derives title purports to convey lots Nos. 88, 89, 90, 91, 92, as designated on a plat made by Alexander McRae, and also sets out that the land is bounded by Brunswick street, 4th and 5th streets, and the north boundary of the town of (417) Wilmington, as designated on the plat referred to.

There was evidence, which justified his Honor in submitting the question to the jury, "Is the plat referred to in the deed, under which the defendant derives title, the same plat as that referred to in the deed under which the plaintiff derives title?" The jury find the plats to be the same, so that matter is disposed of. Indeed, we are not able to see how the defendants could have located the deed, under which it derives title, otherwise than by the aid of this plat, as no other was offered in evidence, and without some plat the location of Brunswick street and 4th and 5th streets could not be made any more than the location of lots Nos. 88, 89, 90, 91, 92. So the defendant's deed could not be located, either by the one description or by the other, without the plat.

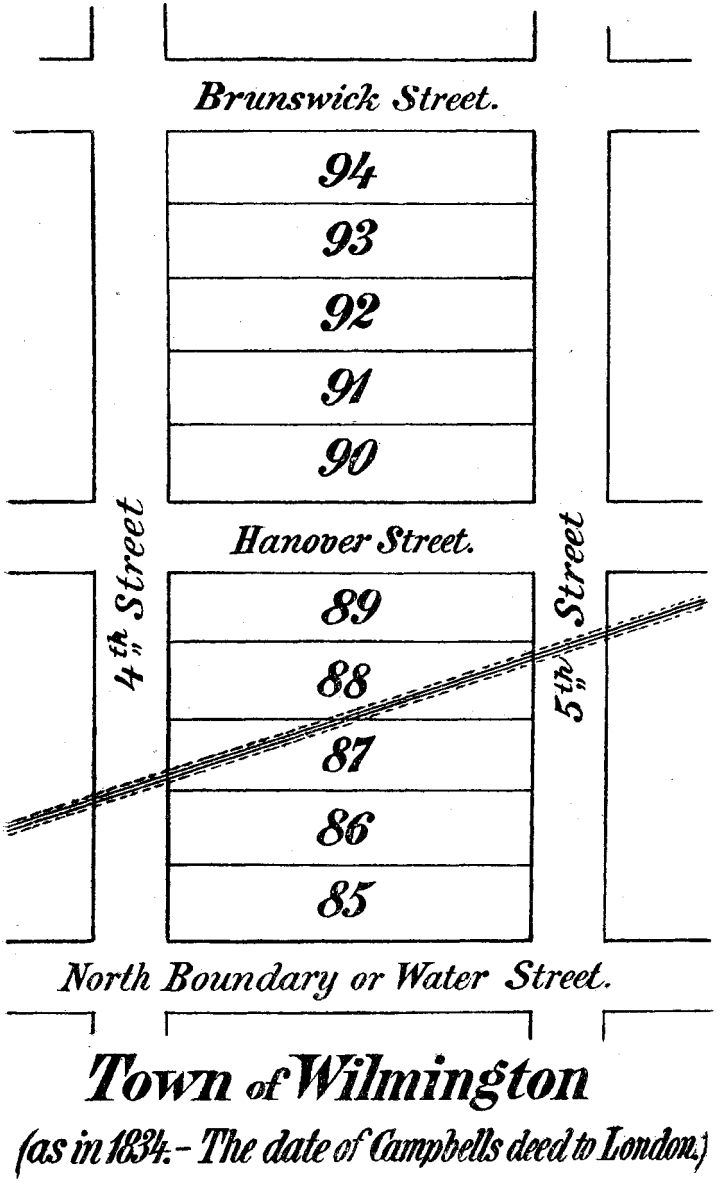
The case turns upon the point, does the deed of Campbell to London cover the land sued for. That depends upon the question, Which is to prevail, the description of the land by the number of the several lots, or the description by the reference to the streets? No direct authority was cited on either side, the solution consequently must be made by principle and general reasoning.

The terms of the deed are as follows:

Campbell, by this deed, sells and conveys to London "all those five several lots of land recently surveyed and platted by Alexander McRae, and filed in the Register's office of the county of New Hanover, and known in said plat as lots Nos. 88, 89, 90, 91 and 92, together with that portion of Hanover street intersecting between lots 89 and 90, the lots being bounded on the west by 4th street, on the east by 5th street, on the north by Brunswick street and on the south by the town of Wilmington, as laid down in said plat, and as will more fully appear by reference thereto."

(418) By reference to the plat, it appears that the lots are bounded on the west by 4th street and on the east by 5th street, but *the lots are not bounded* on the north by Brunswick street, or on the south by the town of Wilmington. For lots 93 and 94 intervene between lot 92 and Brunswick street on the north, and lots 85, 86 and 87 (the lots in dispute) intervene between lot 88 and the town of Wilmington. So there is a discrepancy in these two modes of description. Which controls?

It is settled, that when land is described by course and distance, and also by natural objects, and there is a discrepancy, the latter controls, the former is disregarded, and the description in regard to the course, or to the distance, or both course and distance, must give way, and you go to the natural object called for. This ruling is based upon the principle, that if there be two descriptions, and the two do not correspond, the



one in regard to which a mistake is less apt to be made controls the one in regard to which a mistake is more apt to occur. This principle de-

cides our question, which does not present a new case, but is merely a new application of a well settled principle of law.

For illustration: A deed conveys a lot, and describes it as lot No. 90, as designated in the plat of the town, which lot lies between *third* and fourth streets, as will more fully appear by reference to the plat. It is shown by the plat that No. 90 does not lie between third and fourth streets, but lies between fourth and *fifth* streets. Does the deed convey lot No. 90, or does it convey a lot lying between *third* and fourth streets? There can be no doubt that lot No. 90 is the lot conveyed, and that the description by reference to the streets will be disregarded. Upon what principle does this rest? It is the principle above referred to, as being settled.

The lots in a town are numbered, that is named, in order to identify the lots in case of a transfer, or for any other purpose. *The streets* in a town are numbered or named, in order to identify the streets, for the purpose of enabling persons to know the streets in passing or re-
(419) passing through the town. When therefore, the purpose is to sell a lot, and in order to identify it, the number or name of the lot is set out, and reference is also made to streets, the latter description must give way to the former. For the lot is the object, and not the street, and the description, in pursuance of the primary object for which the lot was numbered or named, is less apt to be erroneous, than the description by reference to the number or name of the street, as that is incidental, and is a secondary, and not the primary object for which the streets were named.

A good rule will work both ways. Information is asked by a man "for the street that leads to the bridge;" he is told "Brunswick street," —"pass up Fourth street until you get to the corner of lot No. 89, then you are at Brunswick street, turn down that street to the east and it will take you to the bridge." The man comes to the corner of lot No. 89, but he there finds Hanover street. Will he turn down that or go on, along Fourth street, until he comes to Brunswick street at the corner of lot No. 94? He will naturally go on to Brunswick street, for he sees there is a mistake, and he will infer there is more apt to have been a mistake in regard to the lot, which was secondary, than in regard to Brunswick street, which was the primary object, as the means of getting to the bridge. So when the object is the lot, you are governed by the name of the lot, and when the object is the street, you are governed by the name of the street.

Again, a deed conveys five lots, to-wit: Nos. 88, 89, 90, 91 and 92, as

designated on a plat, which lots lie between Third and Fourth streets, as will more fully appear by reference to said plat. It turns out, that the lots lie between Fifth and Fourth streets. Does the deed convey the five lots numbered 88, 89, 90, 91 and 92, lying between Fifth and Fourth streets, or does the deed convey the five corresponding lots on the other side of Fourth street and lying between Third and Fourth streets, but having other numbers or names. Beyond question it conveys lots, Nos. 88, 89, 90, 91 and 92, and the reference to the streets will be disregarded, according to the principle that the lots being the (420) object, there is less apt to be a mistake in regard to the names or number of the lots, than in regard to the streets, the reference to which was incidental and in fact unnecessary.

Our case is stronger than this. The deed by Campbell to London conveys, "all those five several lots of lands recently surveyed and platted by Alexander McRae, and filed in the Register's office, known in said plat as lots Nos. 88, 89, 90, 91 and 92, etc. So in regard to the lots which Campbell intended to convey, there is not apt to have been any mistake, that being the primary object in view. The deed then goes on to say, "The lots, being bounded on the west by Fourth street, on the east by Fifth street, on the north by *Brunswick street,* and on the south by the town of Wilmington as laid down in said plat, and as will more fully appear by reference thereto." The reference to Fourth street on the west, and Fifth street on the east, corresponds with the specific description of the five lots, but in regard to Brunswick street on the north, there is a discrepancy, for the lots Nos. 93 and 94 intervene, and the five lots specified are not bounded by Brunswick street on the north. So in regard to the town of Wilmington on the south there is a discrepancy, for the lots Nos. 87, 86 and 85 intervene, and the five lots specified are not bounded by the town of Wilmington on the south. It thus appears by reference to the plat, to which express reference is made, that there is manifestly a mistake in respect to the five lots being bounded either by Brunswick street or by the town of Wilmington. So this part of the description must be disregarded, and is controlled by the other more certain description; on the ground not only that there is more apt to be a mistake in reference to Brunswick street and the town of Wilmington, but that there is in fact a mistake in supposing that the five lots sold and conveyed are bounded by Brunswick street and the town of Wilmington.

In deed the suggestion, that instead of *five* lots, all of which are severally specified and the numbers set out, the deed should (421) be so construed as to convey *ten* lots, five of which are not spe-

cified or set out by their respective numbers, although it appears, on the face of the plat, that all of the ten are consecutively mentioned on the plat, beginning at 85, adjoining the line of the town of Wilmington, and going up to 94, adjoining Brunswick street, and that this effect is to be produced by an incidental and unnecessary reference to Brunswick street and the town of Wilmington, in respect to which the mistake is made obvious by a mere glance at the plat, would seem to involve an absurdity. This absurdity will be avoided and the cause of the mistake explained, by supposing that the draftsman of the deed, in attempting to set out the fact, that the five lots Nos. 88, 89, 90, 91 and 92 are included in the bounds of Fourth and Fifth streets and Brunswick street, and the line of the town of Wilmington, which is the fact, made a mistake in the selection of words appropriate to set out the fact, and used the words *"being bounded by,"* etc., (the usual formula in deeds) and so inadvertently set out that which is not the fact.

PER CURIAM. No Error.

Cited: Mizell v. Simmons, 79 N. C., 193; *Hill v. Dalton,* 140 N. C., 14.

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(422)

B. B. CRAYCROFF & CO. v. J. R. MOREHEAD and wife.

1. Where there is no express contract between husband and wife, the law of the matrimonial domicil controls, as to the rights of property there situate, and as to personal property everywhere. Therefore, where a bond was given by a man to a single woman, both parties being resident in the State of Pennsylvania, and a judgment was obtained in the Courts of this State, and the parties afterwards married in Pennsylvania; *it was held,* that the rights of the parties in reference to said judgment were governed by the laws of Pennsylvania, whereby, "All the estate or property, which may be owned by any single woman, continues to be hers after marriage."

2. Upon motion to dissolve an injunction, where a fund has been taken into the custody of the law, the rule is, that as the Court has hold of it it will not let it go, if the plaintiff show probable cause from which it may be reasonably inferred that he will be able to make out his case on the final hearing. On the contrary, if it appear from the pleadings and affidavits that there is not probable cause, the injunction will be dissolved.

MOTION to dissolve and vacate an injunction, heard before *Clarke, J.,* at Spring Term, 1872, of CRAVEN.

Plaintiff alleged that on 29 May, 1869, he recovered a judgment against the defendant, James R. Morehead, for $3,666.66. That execution was issued on the judgment against the property of defendant, who was a non-resident, and returned not satisfied. That prior to this judgment, but after the contracting of the debt due the plaintiff, the defendant, Jennie Morehead, who was then a single woman, obtained a large judgment, in April, 1869, against the defendant James, and immediately issued execution thereon. Plaintiff alleges that said judgment was obtained by fraud and collusion, upon a pretended indebtedness, and for the purpose of covering up the property of the defendant, James Morehead. That warrants of attachment were issued against the property of said Morehead, and the sheriff levied them upon certain property and choses in action of the defendant. That he has (423) sold the tangible property, and paid over $6,000, and has collected $1,300 of the choses in action, which he intends to pay to the defendant Jennie Morehead upon her judgment aforesaid.

Complaint alleges the mariage of the defendant, since the judgment was obtained, and also the insolvency of the defendant James Morehead. Prays judgment for an injunction and receiver. An injunction was granted by his Honor C. R. Thomas.

Defendants answer, admitting the judgment, warrants of attachment, the marriage of the defendants since the judgment was obtained, and the insolvency of James R. Morehead.

They deny all fraud, and aver that the debt was real and not fictitious. That the consideration was the loan by the defendant Jennie, who was then a single woman, to the other defendant, of the sum of $8,000 in the bonds of the United States. The defendant James gave to her "judgment notes," upon which action was brought in Craven Superior Court and judgment rendered for the amount due. The defendant Jennie Morehead insists, that as the contract was made in the State of Pennsylvania and the parties resided there, it must be governed by the laws of that State, and that by laws of said State "all and every species of property which may be owned by or belong to any single woman shall continue to be the property of such woman after marriage," etc. Various depositions were taken and filed and the testimony was concluded. A motion was made by the defendant to vacate the injunction. This motion was heard before Clarke, J., and he rendered this judgment: "On reading the complaint, answer of the defendants and the affidavits filed, and after hearing the arguments of counsel for plaintiff and defendants, and it appearing to the satisfaction of the Court, upon the whole evidence, that the defendants have been domiciled in the State

of Pennsylvania, and that by the law of that State the property of a single woman continues to be hers after marriage, and it further appearing that there has been no fraud or collusion, it is ordered that (424) the injunction be dissolved," etc. Plaintiff appealed.

Haughton for plaintiff.
Lehman and *Hubbard* and *Green* for defendants.

PEARSON, C. J., The case is before us to review the decision of the Judge below, upon a motion to dissolve an injunction, which was heard upon the complaint, answer and depositions (used as affidavits) and the argument of counsel. We concur with his Honor, both in respect to his conclusions as to the facts and his conclusions upon the questions of law.

Upon a motion to dissolve an injunction when a fund has been taken into the custody of the law, the settled rule is, that as the Court has hold of the fund, it will not let it go, if the plaintiff shows probable cause, from which it may be reasonably inferred that he will be able to make out his case on the final hearing.

As to the question of law, it was conceded on the argument, that the law of the domicile applies to the case, and that according to the law of the domicile of these parties, the estate of the wife is secured to her, and the husband does not acquire it *jure mariti*. So that is disposed of. As to the allegation of fraud, stripped of extraneous matter, the case is this: A lady, who is engaged to be married, is applied to by her intended husband, a man extensively engaged in business, for the loan of $8,000. She has not the cash in hand, but holds a bond secured by mortgage, by the transfer of which the amount can be raised. She yields to his persuasions, and assurances that, with $8,000, he will be able to meet the emergency and put all right. Accordingly, she consents to let him raise the money by a transfer of the bond and mortgage, in lieu of which he executes to her judgment notes for the amount, which is to be secured by the property which he had in Newbern, and this lien is made effectual before the plaintiff acquires a lien. Are these judgment notes (425) to be deemed void and her lien invalid on the ground of fraud?

That she has a *true debt* is fully proved, and we concur with his Honor that the evidence does not convict her of fraud and complicity, with an intent to enable the debtor to defraud his creditors.

The despositions being all in, and the order of publication being then a matter of course, so that the cause might have been set down for final hearing, the defendant, if well advised, would have taken that course; but, under the disadvantage of hearing the matter on a motion

to dissolve, the evidence does not make out probable cause, from which it may reasonably be inferred that the plaintiff will be able to make out his case, on the final hearing.

PER CURIAM. Affirmed.

Cited: Ponton v. McAdoo, 71 N. C., 105; *Morris v. Willard,* 84 N. C., 296; *Ellett v. Newman,* 92 N. C., 523.

D. A. W. CUNNINGHAM, by her next friend, S. B. ALEXANDER, v. SOUTHERN EXPRESS COMPANY.

In an action against a foreign corporation, where the plaintiff resides in this State, or when the corporation has property in the State, or when the cause of action arose therein, service of a copy of the summons upon the general or managing agent is sufficient; but where neither one of the above conditions exists, service must be made upon some one of the principal officers.

MOTION to dismiss a suit, heard before *Henry, J.,* at a special Term, of MECKLENBURG.

A summons in a civil action, to enforce a lien on real estate, was issued in favor of the plaintiff, who was a resident of this State, against the Southern Express Company, a foreign corporation, and one Cunningham, and made returnable to Fall Term, 1869, of Meck- (426) lenburg Superior Court.

The summons was placed in the hands of the sheriff, who made the following return: "Executed by delivering a copy of the within summons to W. P. Hill, agent for the Southern Express Company. Cunningham not to be found." At the return term, plaintiff filed a complaint, setting forth the cause of action, and "J. H. Wilson, Esq., marked his name on the docket as counsel for the defendant, the Southern Express Company." The cause was continued to the special term, January, 1872, when the defendant's counsel moved to dismiss, for want of service on the Southern Express Company. It appeared that the the defendant owned property in this State. The motion was overruled, and defendant appealed.

Jones & Johnston for plaintiff.
J. H. Wilson for defendant.

RODMAN, J. The return of summons is, "Executed by delivering a copy of within summons to Wm. P. Hill, agent for Southern Express

Company." The defendant, it appears from the complaint, is a foreign corporation, the plaintiff is a resident of this State, the cause of action arose here, and it respects property within this State in possession of the corporation. The question of the sufficiency of the service depends on the construction of sec. 82, C. C. P., which reads as follows: "The summons shall be served by delivering a copy thereof as follows:

"1. If a suit be against a corporation, to the president, or other head of the corporation, secretary, cashier, treasurer, a directing or managing agent thereof; but such service [that is, by delivery of a copy of the summons] can be made in respect to a foreign corporation, only when it has property within the State, *or* the cause of action arose therein, *or* where the plaintiff resides in the State, *or* where such service can be made within the State personally, upon the president,
(427) treasurer, or secretary thereof." The words in brackets are not in the act, and are inserted to show the meaning more clearly.

The several cases respecting a foreign corporation, it will be observed, are put disjunctively, and we think that the meaning is, that in either of the first three cases service may be made by delivery of a copy of the summons to one of the offices named in the first clause of the section, among which is the managing agent. In the last case, that is, when the foreign corporation has no property within the State, *and* the cause of action did not arise therein, *and* the plaintiff does not reside therein, then service may be made on the president, treasurer or secretary, if he can be found within the State; but it may not be made on a managing agent found here. A reason for the difference may be discovered. The first three classes of cases embraced all of which would usually occur, and in them every reasonable facility for the service of process is provided. But there was a fourth class of cases, not likely, but still possible, and therefore needing to be provided for, viz.: where a non-resident might be obliged to sue in this State a foreign corporation having no property here, on a cause of action arising elsewhere. The necessity of suing here, might arise out of the fact, that the chief officers were to be found here, and not elsewhere. In such a case, either because the coroporation could not well have a managing agent here, or for other reasons, which may be imagined, it was provided that service should be made on some one of the principle officers.

It is said that it does not appear that Hill was a *managing* agent. Who is such an agent, will depend in each case on the circumstances. A corporation doing the business of expressing goods must have many agents, of more or less limited duties and powers. For some purposes, a porter or wagon driver is an agent of the company, but clearly he is not an agent to receive service of process. For that purpose the agent

must be a general or superintending one. As it is not shown that this was not the character of Hill's agency (which, if it (428) had been otherwise, the defendant could have easily shown) nor that there was any other agent in this State, we must infer that Hill was a general or managing agent. We think the service was sufficient.

PER CURIAM. Affirmed.

Cited: Moore v. Bank, 92 N. C., 597; *Menefee v. Cotton Mills,* 161 N. C., 166, 168.

R. S. PULLEN, Ex'r., and others v. J. F. HUTCHINS and others.

1. The act of 1840, Revised Code, ch. 60, sec. 3, qualifies the maxim "a man must be just before he is generous," in cases where the donor, at the time of the gift, "retains property fully sufficient and available for the satisfaction of his then creditors." But this modification is confined to gifts *inter vivos*, and in respect to legacies or gifts by will there has been no modification of the maxim. On the contrary, the legislation on the subject tends to a strict enforcement of it.
2. The assent of an executor to a legacy, before the debts of his testator are paid, is void as to creditors, and if the executor commits a *devastavit* and is insolvent, the loss must fall upon the legatee rather than the creditor.
3. A legatee cannot avoid responsibility, on the ground that the executor assented and paid the legacy without requiring a refunding bond. The omission to take such bond must be ascribed to collusion, or to gross negligence on the part of the executor, of which the legatee cannot take advantage.
4. Where a guardian took from an executor his note in payment of a legacy due his wards, which was collected and placed to their credit; *it was held,* that a payment in a note, in the first instance, did not release them from their obligation to contribute *pro rata* for the benefit of creditors.

APPEAL from *Watts, J.,* at Special Term *of* WAKE, 1872.

This action was brought by the plaintiffs as creditors of the (429) estate of John Hutchins, deceased, against J. F. Hutchins personally and as executor, and against J. P. H. Russ and wife, and Russ, as guardian of his minor children, legatees, devisees and heirs-at-law of John Hutchins, deceased, and aganst the other defendants, Wilder and others, purchasers of the real estate devised. The complaint demands judgment that the defendant, J. P. H. Russ, account for all money received by him in his own right, and as guardian of the infant defendants, from the defendant Hutchins as executor, on account of legacies, and refund the same, to be applied to payment of plaintiff's debts; and that if the funds arising from the legacies be insufficient to pay the debts, the

real estate, or so much as may be necessary, be sold for that purpose; for the removal of the executor, appointment of receiver, etc.

The facts stated by his Honor are as follows, viz: That John Hutchins, the testator, died in January, 1863, having made and published a last will and testament, which was admitted to Probate at February Term, 1863. That John F. Hutchins was appointed executor; that a large amount of property, amply sufficient to pay all debts, legacies and charges of administration, came into his hands, and which has been exhausted in payment of debts, legacies and otherwise, leaving unpaid the plaintiff's debts, to wit: Judgment due plaintiff Pullen, executor of Penelope Smith for $306.84, obtained in the Superior Court of Wake against the defendant Hutchins, executor, and a judgment due plaintiff Womble for $309.70, with interest, etc. That the defendant Hutchins is entirely insolvent. That the defendant Russ, in November, 1863, received from the said executor in payment of a legacy bequeathed to him, the sum of $3,500 in Confederate money. That said John Hutchins died seized of several pieces and tracts of land; a tract in Wake County, containing five hundred acres, adjoining lands of Fisher and
(430) others; a tract on Walnut creek, containing about one thousand acres; a lot in the city of Raleigh on Newbern street. That the lot in the city of Raleigh was devised to the wife of J. P. H. Russ, and was sold *bona fide* by him and his wife more than two years after the probate of the will, and the qualification of the executor. That the land adjoining Fisher and others, was devised to the defendant Hutchins, and more than two years after the probate of the will and qualification of the executor, to-wit: at October Term, 1868, this land was sold under various executions against Hutchins, and bought at sheriff's sale by the defendant Russ, at a full and fair price. And the defendant, John F. Hutchins, being in open Court, by A. M. Lewis, Esq., his attorney, distinctly declined to enter bond for the further administration of the estate of his testator, and surrendered his executorship.

In addition to these facts, it is stated in the answer of Russ, and admitted, that a legacy of $3,000 was given to his children, and that as guardian, and fearing that the legacy would be lost, he took the note of the executor Hutchins, who had become personally liable, that afterwards suit was brought on this note and the money collected under execution.

The other defendants answer, that they are purchasers of the real estate devised, for value and in good faith, and that they bought more than three years after the death of the testator, and when the estate was supposed to be perfectly solvent and good.

The following are such clauses of the will as are deemed material:

"Item. I give and devise to my daughter Adeline Russ, the lot and houses in the city of Raleigh whereon I now reside, to her and the heirs of her body.

Item. I give and bequeath to my daughter Adeline Russ and the heirs of her body only, the following named slaves Ruffin, Harriet, Fannie, Bob, Henrietta and child and Maria.

Item. I give to the children of my daughter, $3,000 in money, be allowed by my executor to said children equally, to such of (431) the boys as may live to be twenty-one years of age, and to such of the girls as may live to be eighteen years of age, said money to be invested by my executor in good notes or bonds bearing interest, and as the interest accrues annually, to be likewise invested in notes or bonds for the use and benefit of said children.

Item. I give to my daughter, $500, to be paid to her by my executor out of any money on hand at the time of my decease.

Item. I give to my son-in-law, John P. H. Russ, the money that I have heretofore advanced to him and now hold his notes for, making about $2,000, said notes to be delivered to him by my executor.

Item. I give and devise to my son, John F. Hutchins, all my lands, consisting of different tracts, to him and his heirs forever.

Item. I give and bequeath to my son, John F. Hutchins, all my negroes except those named in the foregoing part of the will."

His Honor gave this judgment.

"It is ordered that————————be appointed receiver in this action, and that the said J. P. H. Russ pay to the receiver the value of the said sum of $3,500 in Confederate money, paid him by the executor J. F. Hutchins, to be ascertained by the scale established by law, with interest. That the amount so received be applied to the *pro rata* payment of plaintiff's debts.

"That the said receiver sell enough of the real estate to pay the outstanding debts of the estate, to be selected by him, as in his opinion will be least prejudicial to the rights of the defendants, in the manner prescribed by law, in case of application by administrators to sell realty to pay debts, and report his proceedings to the next Term of the Court."

From this judgment, there was an appeal to the Supreme Court. (432)

Moore & Gatling, and *R. G. Lewis* for the plaintiffs.

Batchelor and *A. M. Lewis* for the defendants.

PEARSON, C. J. It is a maxim of the common law, "A man must be just, before he is generous." In affirmance of this principle, the statute,

13 Eliz. declares all gifts void, as against creditors. There is no qualification or exception, and a donee could not retain the property as long as a single debt of his donor, existing at a time of the gift, was left unpaid. *O'Daniel v. Crawford,* 15 N. C., 197.

The act of 1840, Rev. Code, ch. 50, sec. 3, makes a qualification in cases where the donor, at the time of the gift "retained property, fully sufficient and available for the satisfaction of all of his then creditors." This modification of the maxim is confined to gifts *inter vivos.*

In respect to legacies, or gifts by will, there has been no modification of the maxim; on the contrary, the legislation upon the subject tends to enforce a strict adherence to it.

The assent of an executor to a legacy, before he has paid all of the debts of his testator, is void as to the creditors; for it is a fraud, an act done in violation of the maxim "A man must be just before he is generous." So long as the executor is solvent, no debt can be left unpaid, for he is liable to the creditors *debonis propriis,* by reason of the devastavit. If the executor be insolvent, the loss must fall upon the legatee rather than upon a creditor; on the ground that the assent to the legacy was void, as a fraud upon the creditor, and the legatee can not, with a good conscience, retain the legacy and leave the debts unpaid; for he is a volunteer and only claims a bounty for which he has paid nothing, whereas a creditor demands a right. The legatee can not take benefit by the default of the executor, who is an agent acting in the place of the testator, and the maxim bears upon the case with
(433) full force; *Barnwell v. Threadgill,* 40 N. C., 86; *S. c.,* 56 N. C., 62.

In respect to legatees, there is no such modification of the maxim as is made by the act of 1840, in respect to donees, where the donor retains property enough to pay all of his debts. So the fact, that at the time the executor assented to the legacy he was solvent, and had in his hands assets fully enough to discharge all of the debts of the testator, can not be allowed the effect of making valid the assent of the executor, as against cerditors, and of relieving the legatee from his liability to refund for the payment of debts.

The legislation upon the subject, so far from having a tendency to modify the common law maxim, evinces an earnest desire to secure its enforcement. Rev. Code, ch. 46, sec. 24, requires legatees and distributees to give bond, with two or more able securities, "conditioned that if any debt truly owing by the deceased shall be afterwards sued for and recovered, or otherwise duly made to appear, he will refund his ratable part of such debt out of the part or share allotted to him." If

this statute had been complied with, the creditors could, as a matter of course, by action on the bond, have compelled the legatees to refund.

In our case the legatees can not evade this liability to pay "a debt truly owed by the deceased," on the ground that the executor had assented and paid the legacies without requiring a refunding bond; for the omission to take a refunding bond must be ascribed to collusion, or else to gross negligence on the part of the executor, of which the legatees can not take advantage. By doing so, they convict themselves of being *particepes criminis* in a fraudulent evasion of the law, and are checked by the maxim, "No one shall take advantage of his own wrong." Every one will admit, at once, the proposition, "A legatee who has procured the assent of the executor and a payment of the legacy, without giving a refunding bond, can claim no better right to be exempted from the liability to refund, imposed by the common law maxim, than (434) a legatee who has, in order to obtain his legacy, strictly complied with the requirements of the law."

So much of the decree in the Court below as directs the appointment of a receiver, and the payment to him by J. P. H. Russ of the value of the sum of $3,500 in Confederate notes, received by him of the executor in satisfaction of his legacy, the value to be fixed by the scale of depreciation, is affirmed, subject to a deduction by reason of the further order in respect to the legacy of $3,000 to the infant children of said Russ, received by him as guardian, in January, 1869.

The judgment in the Court below makes no mention of this legacy to the children of Russ. In this there is error. It was said at the bar, that this omission was because of the fact, that this legacy of $3,000 was not in the first instance received by Russ, as guardian of his children, from Hutchins as executor, *in money,* but that Russ took his note for the amount of the legacy, which was afterwards made on execution by the sale of the property of Hutchins. We have seen, that had Russ received the legacy from Hutchins in money, the wards would have been liable to refund in payment of debts—how could the fact that he took the note of Hutchins, which was afterwards collected and passed to the credit of the wards, affect their liability to refund? We are not able to see how that could make any difference, unless it be to suggest the idea, that after Hutchins had used the money, Russ agreed to condone devastavit and take the note of Hutchins, provided no refunding bond was required. However this may be, the fact that the money was ultimately received and passed to their credit, in account with the guardian, put the wards precisely in the same predicament as if their guardian had received the legacy of $3,000 for them in money in the

first instance, and had executed a refunding bond as required by law.

The judgment in the Court below will be modified, by adding (435) judgment against J. P. H. Russ, that he pay out of the funds of his wards a ratable part of the legacy received by him, towards the satisfaction of the debts of the plaintiffs. The adjustment of the ratable balance to be paid by the legacy of $3,500, received in Confederate notes and the legacy of $3,000 received in 1869, to be stated by the clerk, and unless the amounts be paid within one month after the parties receive a copy of this judgment, execution will issue. That part of the judgment having reference to the real estate is reversed, and the case will stand for further directions in the event that the debts of the plaintiffs be not satisfied. We are not called upon to express an opinion as to the liability of the land, in the hands of a *bona fide* purchaser from the devisees, after the expiration of two years from the probate of the will, or as to the liability of the devisees personally for the money into which the land has been converted.

A judgment will be entered according to this opinion.

PER CURIAM. Judgment accordingly.

Cited: Worthy v. Brady, 91 N. C., 267; *Clement v. Cozart,* 112 N. C., 418.

STATE v. JOHN BROWN.

Where a Judge in charging a jury expressed his strong indignation that persons, in hearing of the alleged violence, did not rush to the rescue of the person upon whom it was committed, and also expressed his eagerness and desire to punish them for their cowardice; *it was held,* that such expressions were a clear intimation of an opinion upon the facts, and a violation of the statute.

INDICTMENT for rape, tried before *William J. Clarke, J.,* at Spring Term, 1872, of ROBESON.

The prisoner, John Brown, was charged with rape, upon the (436) person of one Winny McDaniel; and one A. C. Moody was likewise indicted as aiding and abetting. Brown was tried alone, the other party having escaped. The principal witness on the part of the State was Winny McDaniel, who swore that John Brown and Moody came to her house in May. Brown was a colored man and called himself Lowery, and said he was a brother of Henry Berry Lowery. He told the witness to get him something to eat. She said she had nothing, did not want to get it; he said, kill a chicken, which was done. While

the chicken was cooking, he said he was going out and would call her and she must come. He put his pistol by his plate while he was eating; after he had finished eating he gathered a pail of water and put out the fire. He said Henry Berry said it must be put out. He then went into the other end of the house and called her daughter Mary. Witness went, he made her go. He wanted to know why she had been shunning him. He said, if witness did not give up to him he would make her feel what was in his pistol, and would have Henry Berry and his gang upon her. Witness further stated, that the prisoner had connection with her, and against her will. Upon cross examination, she stated that this occurred about four miles from Lumberton, on the road to Moss Neck; that when the parties came she was in bed, and there was no light in the house and that it was a dark night. They cursed and swore around the house, for some time before they came in. Moody gave his name, and said to the other person with him, "Come in, Mr. Lowry." The house was a double pen log house, with a passage between the rooms. Prisoner called Mary, and she went to save Mary. He was standing up when she went in. He said if she did not submit to him he would have Henry Berry's gang upon her. She was very much frightened, and there was some scuffle. He had a pistol, and she feared those whom she supposed were around the house; witness said Brown was black and Moody was white, and she knew it was brown. The parties were drinking and remained until daylight. Witness stated that Turney Davis and his two brothers (437) were around the house at the time the violence was committed, but that neither she nor the accused knew it. She kept the fact a secret, for some time from fear.

Mary McDaniel was examined as a witness, and her testimony in every particular corroborated her mother's.

Turney Davis was examined. He said that the prosecutor, Winny McDaniel, was his aunt. That when he heard that the Lowery gang was there, he and his two brothers armed themselves and went to the place described by first witness; they were in the yard and near the house, heard the parties talking and heard Brown say he had plenty of friends at his back. Knew the parties, saw prisoner with his arms around his aunt Winny; she was begging him to let her alone. The railroad depot was about about half a mile distant. Witness and his brother did not interfere, or make any effort to assist his aunt, or to arrest the parties. They remained in the yard, and near the house until break of day.

Prisoner examined several witnesses. The tendency of this evidence was to show that the principal witness had made contradictory statements in regard to the transaction, and to impeach her character. The

prisoner's counsel asked the Court to charge that, if they believed Davis, the prisoner was not guilty. His Honor refused, and prisoner excepted.

The Solicitor, in his conclusion, pointed to the prisoner and said, "Gentlemen of the jury, I do not ask a verdict in behalf of a poor old woman, but demand, in the name of justice, that this infamous villian be hung, and I will be glad to see him hung." Prisoner excepted. The Judge delivered a written charge to the jury, which is sent up as a part of the record in the case, and is as follows:

"Gentlemen of the Jury: The investigation of guilt and punishment of crime are a painful, but a highly important duty. God has so ordered it, and we worms of the dust must recognize what He has ordered. If He and my country say to me, hang a man, I will (438) do it, however painful it may be. But, gentlemen, your duty is not as painful as mine. You sentence no man. You have only to determine an issue of fact. You have under your oaths, before God and your country to say, upon the evidence, whether the prisoner at the bar is guilty of the crime of which he is accused. Before God and His Holy angels, I charge you, that you will not try him as a colored man —a negro; but as a man accused of crime, without knowing his color or condition. A jury has no right to have 'bowels of compassion.' In the courthouse we do not invoke a God of mercy, but a God of justice and of vengeance. If John Brown is guilty, and you say he is, I will condemn him to be hanged as guilty; and I will add, if my duty so declared, if my duty to our mother, North Carolina, required, I would hang him, as many, now in the sound of my voice, have seen me in time past, by orders from the powers above me representing North Carolina, have a man shot. This is painful, but it is necessary. It must be done fairly and manfuly, or the law must perish. If this man is guilty and he is allowed to escape, then the chastity of every woman in Robeson County is put at the mercy of every villian that may attempt it. Especially is this the case, if the men of her family should be as cowardly as the wretches, who knowing their kinswoman in the hands of ruffians, and having arms in their hands, to the disgrace of manhood failed to rush to her rescue. May the God of the fatherless, the protector of the widow and the orphan, consume them with the lightnings of His wrath. I would sentence them, more cheerfully than any criminal ever convicted before me.

"Then you have to determine a mere matter of fact, as that two times two are four, irrespective of consequences; just as you would look at the clock to ascertain the hour, whether its chimes would summon an

eager bridegroom, to clasp in his arms the long sought object of tenderest affection; or cause the dungeon doors to unbar for a trembling criminal, to go forth to meet his doom. Crime must be punished, (439) or law will cease to be respected; and, oh my countrymen, I beg you to remember, that if crime is not punished by law, that men will cease to look to the law for protection, and will take justice and vengeance into their own hands. If my wife, my son, or my daughter is injured and the law does not protect them, I will avenge them myself, and you will readily see what such a course will bring about in the land. By the ordinance of God, Himself, the high-prist was made the avenger of blood in Israel. Then let us decide this matter firmly, and with determination, not swayed or influenced by our feelings, but calmly, justly, fairly, without passion or prejudice. It has been contended in an argument of some length, that rape can not be committed without the consent of the woman; that it is impossible to be accomplieshed violently, without such injury to the person as would leave marks to be exhibited. You can form as correct an estimate of this matter as I. You can determine what chance a feeble woman would have, in the grasp of a strong, vigorous man, excited by passion. As an evidence that there was consent in this case, it is said there was no outcry for assistance and rescue. How is this? Sacred history informs us that the Princess Tamar was ravished by Amnon in David's royal palace; and profane history records the fact that the lustful Tarquin accomplished his fell purpose on the chaste Lucretia in her own house, where she was undoubtedly surrounded by her family; and in each case the crime was not known until the victim revealed it. But the argument has but little bearing on the case before us, for Mrs. McDaniel tells us, that she neither resisted nor cried out; that she was threatened with death if she resisted, and was ordered not to speak 'above her breath;' that she submitted from terror of the man, armed with a pistol, and from fear of those whom she had been informed were around the house, the terrible Lowery gang, who she believed were within call, and who would destroy her and her family. Whether she had spoken the truth is for you to determine. Why should she speak falsely? What inducement (440) can she have? What object or end has she to obtain? It can not be malice, for she tells you she never saw the prisoner before that memorable night, when she alleges he came to her house.

"It is the theory of the defense that the defendant can not be found guilty, because Mrs. McDaniel went to him willingly, in place of her daughter, on the principle *"nulla injuria volenti fit."* Is this so? Was her conduct that of a wanton, so carried away by the pruriency of lustful

desires, that she sought its gratification in the presence of her family, and with their knowledge, and with a negro too? Or was this an act of sublime heroism and noble sacrifice? Does it bring to your minds a picture of beastly sensuality, or that engraving which we often see, of a mother on the deck of a sinking ship, who, while the waves closed over her, holds her babe at arm's length above her head, that its little life may be prolonged a few moments beyond her own? Do you see the leering harlot, or a mother willing to sacrifice herself to the loathsome embrace of a fiend, maddened with lust and liquor, to save her pure and innocent daughter? And does not this act of parental affection remind you of the anguished cry of Israel's King lamenting his beloved but rebellious son, "O my son Absalom; my son; my son Absalom! would God I had died for thee, O, Absalom, my son!" Did she act willingly? If she did, then there was no rape, and the prisoner is not guilty. But if she acted under duress, if she submitted from his compulsion, he is guilty. The Italian bandits, who compelled a female captive to yield to their lusts, by threatening to kill her husband if she did not submit, as truly ravished her, as if they had used the extremest force. Rape is "the carnal knowledge of a woman, forcibly against her will." 4 Black., Com. 210.

"Having stated these principles of law, and briefly discussed some portions of the testimony, it only remains for me to inform you, that it is exclusively the province and office of the jury to attach such (441) weight and importance, and give such credence to the evidence as they, in the exercise of a sound discretion, may see fit. The Court would desire to instruct you, to place you in a position to see the matter clear and understandingly for yourselves, but not to dictate to you how you shall find. It is your duty to weigh and consider every fact and circumstance, as well those that make for the prisoner, as those which tell against him. You will consider the character of the witnesses, their intelligence, the manner in which they gave in their testimony, their opportunities for knowing whereof they testified, the influences, biases, prejudices, passions, which may induce them to testify falsely. You will endeavor to reconcile discrepancies and conflicting statements, if possible, remembering that *substantial agreement* outweighs *circumstantial variations,* or you may receive or reject the whole, or any part of the witnesses' statements. You must weigh witness with witness, compare fact with fact, consider circumstance with reference to circumstance; in a word, you will bring to bear all the tests of truth which your observation, experience or reflection may suggest. You will distinctly bear in mind that the conclusion of guilt must ex-

clude every reasonable supposition of innocence. If you entertain a reasonable doubt of the guilt of the prisoner, you will return a verdict of not guilty; but if you are satified that he undoubtedly committed the act, as charged in the indictment, then you will return a verdict of guilty.

"Sincerely hoping that you may arrive at a sound and truthful conclusion; one which no lapse of time, no subsequent reflection will cause you to wish it had been otherwise, I leave the cause in your hands, remarking to each, 'Let all the ends thou aim'st at be thy Country's, thy God's and Truth's.' "

I certify that the foregoing statement of evidence, and the Judge's charge, in the case of the *State v. John Brown,* are correct.

WM. J. CLARKE, J. S. C.

The jury returned a verdict of guilty. Motion for a *venire* (442) *de novo.* Motion overruled. Judgment of death was pronounced and the prisoner appealed.

Attorney-General for the State.
W. McL. McKay for the prisoner.

READE, J. The expression, by his Honor, of his strong indignation, that persons within hearing of the alleged violence did not rush to the rescue of the woman upon whom the violence was alleged to have been committed, and of his eagerness for an opportunity to punish them for their cowardliness, was a clear intimation of his opinion that the violence was committed, and that the prisoner was guilty. Such intimation of his opinion upon the facts is forbidden by statute; and, as has often been decided, entitles the prisoner to a new trial.

PER CURIAM. *Venire de novo.*

(443)

THE SCHOOL COMMITTEE OF PROVIDENCE TOWNSHIP v. TOBIAS KESLER and others.

1. According to the Constitution and the legislation in reference to Common Schools, the school committees of townships are the successors of the school committees of the districts under the former system, and are entitled to all the property, and subject to all the liabilities of their predecessors.
2. A clause in a deed "as long as the system of Common Schools shall be continued at that place, or as long as it shall not be applied to any other purpose except to schools, of any kind," is not expressed in apt and proper terms to create a condition, or qualification of the estate conveyed, or even a covenant to run with the land.

3. A base or qualified fee has never been in use or in force in this State, or recognized by its laws; and a condition or qualification in a deed, conveying an estate to a school committee "as long as the system of common schools shall be continued, etc.," is contrary to public policy, repugnant, and inconsistent with the nature of the grant, and therefore void.

4. If a grantee, although an illiterate man, executes a deed without demanding that it be read, or elects to waive a demand for the reading the deed will take effect.

APPEAL from *Cloud, J.*, at Spring Term, 1872, of ROWAN.

The action was brought to recover damages to a school house.

Plaintiff exhibited a deed from the defendant Kesler to the school committee of District 38, in Rowan County, dated 27 November, 1848. This evidence was objected to, but received by the Court. This deed was made to Samuel Peeler and others, whose names are set out in the deed, School Committee of the 38th district of common schools and their "successors in office," etc; and the *habendum* clause is, "To have and to hold, etc., as long as the system of common schools shall be con-
(444) tinued at that place, or as long as it shall not be applied to any other purpose except *for schools of any kind.*"

Plaintiff proved that the deed embraced the *locus in quo*, and that it was within the limits of Providence township. The alleged trespass by the defendants was also proved.

Defendants introduced Tobias Kesler, the maker of the deed. He stated that he was an illiterate man, and at the time he signed the deed he could not read one-fourth of it, and he did not see any interlineation, "or schools of any kind." That he requested Peeler, who brought the deed, to read it. Peeler said, he could not read it, but had heard it read, and it carried out the contract with the School Committee. Witness then signed. He was allowed to state what the contract was, independent of the deed, though objection was made by the plaintiff. It was, that the land to be conveyed was to be used for school purposes, as long as the present system of common schools should continue. Plaintiff proved that the schoolhouse had been used by the old School Committee for 25 or 30 years, and continuously up to the adoption of the new system. That in the year 1870, a free school had been taught in the house for two months. Defendant's counsel requested, in writing, special instructions. These special requests are eleven in number, but as the important exceptions are repeated, and discussed in the opinion of the Court, it is unnecessary to set out the others.

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

Henderson and *Kerr* for the plaintiff.
Blackmer & McCorkle and *Bailey* for the defendants.

PEARSON, C. J. Many points were made in the Court below, but we will notice only the three that were urged on the agreement here.

1. The deed, under which the plaintiff makes title, conveys the *locus in quo,* to the School Committee of the *thirty-eighth district of common schools and their successors in office,* of the county of Rowan. The deed was executed in 1848, and the plaintiff is *not the suc-* (445) *cessor* of the school committee existing at that date.

We think it entirely clear, that the plaintiff is the *successor* of the School Committee of the thirty-eighth district of common schools of the county of Rowan, existing at the date of the deed, and as such successor is entitled to all of the property, and is subject to all of the liabilities of its predecessor, according to the Constitution and legislation in regard to common schools; in the same way that the Commissioners of a county are the successors of the justices of the county, under the old system, in regard to the executive duties, rights and liabilities of such justices. *Carson v. Commissioners,* 64 N. C., 566. Indeed, our case is stronger; for the functions of the justices of the peace, as a corporation, were divided; its *judicial* functions being transferred to the Superior Courts and the Courts of Justices of the Peace, while only its executive functions are transferred to the commissioners of the county: still it is held that the Commissioners of the county, although not the representatives of the Justices of the Peace are the successors of the Justices of the Peace, entitled to their property and liable for their contracts; whereas the functions of the school committees of districts, under the old system are all transferred to the school committees of the townships, and are incidental departures from the exact limits of the district. This can make no difference, provided the township includes the school house and is substantially the same territory or section of the county, as in our case.

2. The deed contains this qualification: "As long as the system of common schools shall be continued at that place, or as long as it shall not be applied to any other purpose except for schools of any kind." This clause, it is insisted, has the legal effect to make the estate of the School Committee for district No. 38, existing in 1848, a "base or qualified fee" to said committee and its successors, so long as the *then existing system of public or common schools* shall be in (446) force; but the estate terminated, by its own limitation, when the system of common schools was changed and a new system was adopted. An estate to A and his heirs, tenants of the manor of Dale, is at an end as soon as they cease to be tenants of the manor of Dale.

There has been but one instance of a "base or qualified fee" in this State. That is the case of the Cherokee tribe of Indians, in the western part of the State. The tribe was permitted to hold the land, so long as it continued to occupy the territory. As soon as the Indians were removed by the Government of the United States west of the Mississippi, the title of the State was freed of the incumbrance. The occupancy of the Indians was looked upon rather as an analogous incumbrance, than an actual "base or qualified *estate.*" It would be something new under the sun, if the addition of a few unnecessary words in a deed of Tobias Kesler to a school committee, for a quarter of an acre of land, of the value of one dollar, can have the legal estate to revive this obsolete estate, which has never been "in force or in use" in this State, or recognized by its laws. Suppose it to have been the intention of Kesler, in limiting the estate to the school committee or its successors, to add a qualification, that the estate of the school committee should be at an end whenever the house, which should be erected on the parcel of land, was used for any other purpose than a school house for *boys,* or a school house for *girls,* it being his conviction that males and females should not go to the same school, or whenever the house was used for any other purpose than a school house for *white children,* or for *free colored children,* it being his conviction that white and colored children should not go to the same school, and that proper and apt terms had been set out in the deed to make this qualification. It would seem that the Courts could not give effect to this intention, for several reasons. Among others, it is against public policy; for "great detriment would (447) arise and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon land a peculiar character which should follow the land into all hands, however remote." *Keppel v. Bailey,* 2 Mylne & Keene, 577, cited in *Blount v. Harvey,* 51 N. C., 186.

II. It is an attempt to substitute the notions and caprice of individuals, in the place of the wisdom and discretion of the General Assembly, and to take from the legislative department of the Government the power to regulate and control the system of common schools.

III. The school committee, under its power to acquire suitable sites for school houses by purchase or donation, were not authorized to accept a site and erect schoolhouses thereon at the public expense, if the title to the land was clogged by any such condtion or qualification. The condition or qualification being repugnant, and inconsistent with the object of the grant, is void, and must be rejected, in the same way that a condition annexed to an estate in fee simple, that the grantee shall not

alien, or to an estate tail, that the donee shall not levy a fine or suffer a common recovery, is rejected and treated as surplusage, as repugnant to the nature of the estate.

IV. In this instance, the condition or qualification has not, as yet, been violated, for the school law provides, "The school committees shall consult the convenience of white residents, in setting the boundaries of districts for white schools, and of colored residents, in setting the boundaries of colored schools. The school of the two races shall be separate, etc." So the condition or qualification has not been violated, and the estate of the committee still continues. It will be time enough to determine the rights of the grantee, when the contingency happens.

But a decisive reply, to the position assumed by the counsel, is that the deed does not contain apt and proper terms to create a condition, or a qualification, or even a covenant to run with the land. See *Norfleet v. Cromwell,* 64 N. C., 1. So the position has nothing to rest on. The clause is, "as long as the system of common schools shall (448) be continued, etc." It is not restricted to the system of common schools existing at the date of the deed; that is very properly left to be regulated by law; and the amount of the qualification is, that the parcel of land shall be used for no other purpose except for schools of any kind," and when the system of common schools shall be abrogated and the School Committee shall cease to exist as a corporation, the estate shall terminate, which is neither more nor less than the law implies. So this clause is mere surplusage, inserted by a draftsman, not skilled in regard to the legal effect of deeds to corporations.

3. The grantee was an illiterate man, unable to read, and demanded that the deed should be read to him. This was refused, and the deed is of no legal effect.

This is a rule of the common law, adopted to prevent fraud and circumvention. If a grantee, although an illiterate man, executes a deed without demanding that it should be read, the deed takes effect; here there was a demand, but there was no *refusal;* for Peeler excused himself, by frankly admitting that he was unable to read the deed. This fact, which is conceded to be true, puts fraud and circumvention out of the question. Kesler than had his election, either to decline to execute the deed, until some person was procured to read it to him, or else to waive his demand to have it read and "go it blind," in the strong language of his Honor in the Court below. He elected to waive a demand to have the deed read to him, and so the case stands, as if he had executed the deed without requiring it to be read, and the rule has no application. It only applies to cases where the grantee or the person

who, as his agent, applies to have the deed executed, is called on to read it, and refuses or declines to do so, under some *false pretense,* and in this way procures the execution of the deed by fraud and circumvention.

The point, that the action can not be maintained, unless the (449) plaintiff was in the actual or constructive possession of the *locus in quo,* at the time of the alleged trespass, is excluded by the verdict, for the jury find that the plaintiff was "lawfully possessed."

PER CURIAM. No Error.

Cited: S. v. Roseman, 70 N. C., 238; *Devereux v. McMahon,* 108 N. C., 147; *Hall v. Turner,* 110 N. C., 304; *Dixon v. Trust Co.,* 115 N. C., 279; *Wilson v. Leary,* 120 N. C., 92; *Ricks v. Pope,* 129 N. C., 55; *Wool v. Fleetwood,* 136 N. C., 465; *Griffin v. Lumber Co.,* 140 N. C., 520.

CLERK'S OFFICE v. HUFFSTELLER et al.

1. An undertaking on appeal, given under secs. 303 and 414 of C. C. P., though not so expressed, is, by implication, taken to be made with the appellee.
2. Such undertaking secures the costs of the appellee, but not those of the appellant. Therefore, when there was judgment in the Supreme Court in favor of the appellant, his sureties are not liable on their undertaking for his costs, when such costs cannot be made out of the appellee, or their principal.
3. Prosecution bonds, and undertakings on appeal, being sent up as part of the record, summary judgment may be taken upon them, as before the adoption of C. C. P.

RULE in this Court upon the sureties of an appellant, to show cause why they shall not pay his costs, judgment having been rendered here in his favor.

The opinion of the Court contains a sufficient statement.

Bailey and *Schenck* for the defendant.
W. N. H. Smith, contra.

PEARSON, C. J. In *Hagans v. Huffsteller,* 65 N. C., 443, there (450) was judgment in favor of Huffsteller, who was the appellant.

The rule is against the sureties of Huffsteller, to show cause why they shall not pay the costs of Huffsteller in this Court, on the ground that these costs can not be made either out of Hagans, or Huffsteller.

The clerk insists that the sureties of the appellant, under these circumstances, shall pay the costs. His reasoning is, that if the appellant had paid money into office in place of the undertaking, the costs would have been retained out of the money: *ergo,* the costs should be made good by the sureties. This is a *non sequitur;* for the money would have been that of the appellant, but when he gives the undertaking as required by C. C. P., there is no money in the office, and if it is made, it must come out of the sureties, which they insist is "more than they bargained for."

Either the undertaking is void, or else it must be by implication, a promise made to the appellee.

In taking an appeal, under the old mode of procedure, a bond, with sureties, *payable to the adverse party,* with condition, etc., was required. The Code of Civil Procedure substitutes *"an undertaking"* in the place of a bond, and omits to direct, in express terms, *to whom or with whom the undertaking is to be made.* No one has ever suggested to me the reason for making this change, nor have I been able to conceive of one, although I am to assume there was some sufficient reason. Justice Rodman, who was of the Code Commission, informs us that the idea is borrowed from the procedure in courts of admiralty, where "the libel" being against a thing, the undertaking is "with all whom it may concern." However this may be, a prosecution bond payable to nobody, and an undertaking for an appeal made with nobody, is a novelty at the common law.

This raises the question, in courts proceeding according to the course of common law, are the prosecution bonds and the undertaking for appeals void for want of an obligee in the bond, and of a (451) party with whom the undertaking is made in cases of appeal? This rule is so clearly based on common sense, that it has become a common saying, "It takes *two* to make a bargain." There is no statute which essays to abrogate this rule of the common law, and it may well be doubted whether it does not exceed the power of legislation to enact, that property may be conveyed without a grantee, or that a contract or "undertaking" shall be valid when the contract is made with no one.

So these "undertakings" are all of no legal effect, unless the Court can, by implication, supply a person with whom the undertaking is made, and we have come to the conclusion that there is an implication, that the undertaking is made to the opposite party; therefore, we take it, that the undertaking on an appeal is made with the appellee. C. C. P., sec. 414, 303; "A written undertaking must be executed on the part of the appellant by at least two sureties, to the effect, that the appellant

will pay all costs and damages, which may be awarded against him on the appeal, etc." "Such undertaking or deposit may be waived by a written consent on the part of the respondent." In passing, it may be remarked, this last clause which allows the undertaking to be waived by *"the respondent"* or, as we term it, "appellee," seems to confirm our conclusion, that the undertaking is supposed to be made with "the respondent," or appellee.

Take it then, that the undertaking is not void, but is made with the appellee, and that the sureties are bound to pay all costs and damages, *which may be awarded against the appellant.* As judgment was rendered in his favor, no costs or damages have been awarded against the appellant, and the sureties are not bound to pay anything, by the terms of the undertaking.

The bond, given at the issuing of the summons, secures to the defendant his costs; no provision is made requiring security for the
(452) plaintiff's costs. The undertaking given on an appeal secures to the appellee his costs; no provision is made requiring security for the cost of the appellant.

In our case we can find no ground, however much disposed to do so, on which we can aid the clerk by fixing on the sureties for the appeal the costs of the appellant. The appellee may waive an appeal bond. This shows that the appellant is not required to secure his own cost.

The question was mooted at the bar, whether, as the Code makes no provision for taking summary judgments on motion, the party is not put to his civil action, to get judgment on prosecution bonds and undertaking for appeals. So much of the Revised Code as is not inconsistent with, or superseded by the Code of Civil Procedure, is still in force; it follows, that prosecution bonds and *"undertakings"* for appeals, which are a substitute for appeal bonds, are sent up to this Court as part of the record, and a summary judgment may be taken as was done before C. C. P.

PER CURIAM. Rule discharged.

Cited: Ins. Co. v. Davis, 74 N. C., 80; *Sims v. Goettle,* 82 N. C., 272; *S. v. Wallin,* 89 N. C., 580; *Dorsey v. R. R.,* 91 N. C., 202; *Morris v. Morris,* 92 N. C., 143; *Chamblee v. Baker,* 95 N. C., 100; *Perkins v. Berry,* 103 N. C., 143.

FOUSHEE and THOMPSON v. PATTERSHALL.

(453)

1. A Judge of the Superior Court, in passing upon a mixed question of law and fact, should, as required by C. C. P., secs. 241, 242, state the facts found and the conclusions of law separately.

2. The jurisdiction given to the Supreme Court by the Constitution is appellate, upon any matter of law, or legal inference. No *issue* of fact shall be tried before it. The phrase "issues of fact," is a technical one, and must be understood in its legal, technical sense, as including only such issues as are joined in the pleadings, and does not forbid the Court from deciding questions of fact which arise incidentally upon motions; at least, not in cases where the decision, though final for the purposes of the motion, does not conclude the rights of the parties, as, on motion, to grant or vacate injunctions.

RODMAN, J., *arguendo.*

The questions of fact which incidentally arise, upon exceptions to an account, differ a little in their nature from those upon a motion to grant or vacate an injunction, as the decision upon them is necessarily final for the purposes of the action. But we think this Court has never decided that it was prohibited from reviewing the finding of a Judge of the Superior Court in such a case. We should be reluctant so to decide, as it is difficult to conceive that the law of North Carolina ever intended to confer, on a single Judge, the vast and dangerous power of deciding all questions of fact so arising, without responsibility, and without liability to review or correction, even in cases of plain and evident mistake.

APPEAL from Tourgee, J., at Spring Term, 1872, of CHATHAM.

The action was brought by plaintiffs, administrators of John A. Johnson, against the defendant as administrator of B. Pattershall, to recover the sum of $225 and interest from 16 February, 1857, covenanted to be paid by the intestate of the defendant. Defendant pleaded, among other things, retainer and no assets. By order of the Court, there was a reference to the clerk "to take and state an account of the defendant as administrator, etc." A report was made, and exceptions filed. At Spring Term, 1872, his Honor rendered judg- (454) ment as follows: "This cause being brought on before his Honor A. W. Tourgee, etc., upon the report of the commissioner and exceptions, which exceptions are in the following words: That he is not charged with the amount of the note of $700, subject to a credit, etc., and the proceeds of which should have been assets, etc.; that he is not charged with a note of $433, principal, signed, etc. That said exceptions be in all things sustained." There was no further finding of facts, and the judgment rendered is given as above. The defendant excepted to the said ruling and decision of the Court, and appealed to the Supreme Court.

Manning for the plaintiffs.
J. H. Headen for defendant.

RODMAN, J. The plaintiff sought to charge the defendant with two notes, which he alleged belonged to the estate of his intestate, and which defendant had failed to collect and lost through negligence. It was referred to a referee to report upon the facts relating to the notes; he reported that they did not belong to the estate of the intestate, and that the defendant had not been negligent in respect thereto. The plaintiff excepted to the report, and his Honor sustained the exceptions, thereby holding that the defendant is chargeable. But his Honor finds no facts, and therefore does not separate his conclusions of law from the facts found, as he is required to do by C. C. P., secs. 241, 242.

The jurisdiction which is given to this Court by the Constitution is appellate, upon any matter of law or legal inference. It says, that no issues of facts shall be tried before it. Art. IV, sec. 10. In *Heilig v. Stokes,* 63 N. C., 612, this Court held that the phrase "issues of fact," was a technical one, and must be understood in its legal, technical
(455) sense, as including only such issues as were joined on the pleadings, and did not forbid the Court to decide questions of fact which arose incidentally upon motions; at least, not in cases where the decision, though final for the purposes of the motion, did not conclude the rights of the parties, as on motions to grant or vacate injunctions. The questions of fact, which incidentally arise upon exceptions to an account, differ a little in their nature from those upon a motion to grant or vacate an injunction, as the decision upon them is necessarily final for the purposes of the action. But we think that this Court has never decided that it was prohibited from reviewing the finding of a Judge of a Superior Court in such a case. We should be very reluctant so to decide, as it is difficult to conceive that the law of North Carolina ever intended to confer on a single Judge the vast and dangerous power of deciding all questions of fact so arising, without responsibility, and without liability to review or correction, even in cases of plain and evident mistake. No question as to the power of the Court in this respect occurs in this case, and these observations are only made here, to show that the point is at least an open one.

This Court, however, has several times said that it would not try any such question of fact, except it had been found in one or another way by the Judge below; and upon appeal. *Clegg v. Soapstone Co.,* 66 N. C., 391. The reason is obvious; the jurisdiction of this Court is appellate, and can be exercised only after a finding below.

This Court has a plain and undoubted power to review the decision

of a Judge of a Superior Court, on any matter of law or legal inference. But this power can not be exercised unless the facts found and the conclusions of law thereon are separately stated. It is impossible to review a mixed conclusion of fact and law; because, whether the law is right or wrong, depends entirely on the facts to which it is applied.

Nor, as was said in *Clegg v. Soapstone Co.*, is it allowable to assume that the Judge found such facts as would support his conclusions of law; for in that case the Judge would always be right. (456)

The judgment below is reversed; and the case remanded, in order that his Honor may state separately the facts relating to the subject of the exceptions, and his conclusions of law thereon, and that the case may be further proceeded in according to law.

The defendant will recover costs in this Court.

PER CURIAM. Reversed.

Cited: Keener v. Finger, 70 N. C., 43; *Sheppard v. Bland,* 87 N. C., 165; *Pasour v. Lineberger,* 90 N. C., 163; *Mining Co. v. Smelting Co.,* 99 N. C., 464; *Harvey v. R. R.,* 153 N. C., 574.

STATE v. WILLIAM WILSON.

An averment in an indictment for highway robbery, "That W. W., late of the County of Yancey, at and in the county aforesaid, in the common highway of the State, did then and there feloniously assault one F. L., and did then and there put him in fear of his life, and ten pounds of coffee, etc., did then and there feloniously and violently steal, take and carry away, etc.," is made with sufficient certainty. There is sufficient certainty to support a plea of *autrefois acquit, or convict,* and sufficient certainty to apprize a prisoner of the place where the offense was committed.

INDICTMENT for highway robbery, tried before *Henry, J.,* at Spring Term, 1872, of YANCEY.

The bill of indictment was in the following form, viz.:

"The jurors for the State, upon their oaths present, that Riley Ramsey, Joseph Ramsey and William Wilson, late of Yancey County, on 28 May, 1866, with force and arms, at and in the county aforesaid, in the common and public highway of the State, then and there, in and upon one Finley Laws, in the Peace of God and the State, felo- (457) niously did make an assault, and him the said Finley Laws in bodily fear and danger of his life, in the highway aforesaid, then and there feloniously, ten pounds of coffee, ten pounds of sugar of the value,

etc., of the goods of one M. P. Penland, from the presence and against the will of the said Laws, in the highway aforesaid, then and there feloniously did steal, take and carry away, against the peace, etc."

Upon the evidence in the case, the defendant was convicted, in manner and form as charged, etc. Verdict guilty. Motion in arrest of judgment, because the indictment did not specify more particularly the locality of the highway. Motion overruled; judgment and appeal to the Supreme Court.

Attorney-General and *Battle & Son* for the State.
No counsel for the defendant.

PEARSON, C. J. The ground, upon which the motion in arrest of judgment is put, is too attenuated to support the motion, and falls within the meaning of the word "refinement," as used in Rev. Code, ch. 35, sec. 14.

That William Wilson, with force and arms, at and in the county of Yancey, *in the common and public highway of the State,* then and there did feloniously assault the said Finley Laws, and did then and there put him in fear of his life, and ten pounds of coffee, did then and there feloniously and violently steal, take and carry away; is certainly indefinite in regard to the particular place at which the robbery is alleged, and could have been made more certain, by alleging that the robbery was committed in a common and public highway of the State, leading from the town of Burnsville to the Tennessee line in the direction of the city of Johnson; or, if such had been the fact, by alleging that the robbery was committed in a common public highway of the State, in the county of Yancey, leading from the town of Burnsville, in
(458) the direction of the town of Asheville in the county of Buncombe.

The question is, Do the rules of law, applicable to criminal proceedings, require the State to notify the prisoner of the particular place at which it is alleged he committed the crime; or is it sufficient to notify him that he is charged with having committed robbery, upon a highway in the county of Yancey?

We think the averment in the indictment is made with sufficient certainty, and, at all events, that it is covered by the statute above referred to. There is sufficient certainty of description, to support a plea *autrefois acquit or convict,* and there is sufficient certainty to appraise the prisoner of the place at which it is alleged that he committed the offense; so that he could not have been misled.

It is charged, that A. B., one bushel of corn, the property of C. D.,

in the county of Yancey, then and there being found, did feloniously steal, take and carry away. This is sufficiently certain to support the plea of *autrefois acquit or convict,* and to inform the prisoner that he is charged with stealing the corn of C. D., at some place in the county of Yancey. We see no reason for requiring greater certainty, in setting out the particular highway, or the particular part of the highway, of the State in the county of Yancey, in charging the offence of robbery on the highway of the State in said county.

PER CURIAM. No Error.

Cited : S. v. Van Doran, 109 N. C., 867.

(459)

G. W. HOWEY and Wife, to use of R. R. REA v. J. M. MILLER.

1. It is the right of every creditor to have his debt paid to himself, and a law authorizing payment to be made to another person without the consent of the creditor, is in derogation of this common right, and ought to be strictly construed;
2. Therefore, as section 265, C. C. P., authorizing "any person indebted to the judgment *debtor* to pay to the sheriff the amount of his debt," etc., is worded in the singular number; *it was held,* that said action, especially when considered in connection with sections 264 and 266, did not apply to cases where there are *several debtors* in the same judgment.

APPEAL from *Henry, J.,* at a Special Term, of MECKLENBURG, January, 1872.

The plaintiff declared on the following bond:

"$787.79. Charlotte, 22 January, 1861.

One day after date I promise to pay Mary Jane Stitt seven hundred and eighty seven dollars and seventy-nine cents.

J. M. MILLER [Seal.]

The following credits were endorsed:

$100, 25 February, 1863; $103, October, 1867; $100, 27 April, 1869; $35, 3 July. Signed, J. N. Hunter."

It was admitted that the obligee in the bond had intermarried with the plaintiff Howey, and the complaint alleged that Rea was the owner of the bond, having purchased for value.

Defendant, in his answer, insisted that Howey and his wife, before

the transfer to Rea, had sold the bond to one Hunter for value, and that while Hunter was the owner there were various judgments against him in Mecklenburg Superior Court; that executions were issued upon these judgments against Hunter, and that they were paid to the sheriff by the defendant. Several judgments are set out in defendant's answer, and were all against Hunter and other parties. Upon the trial, he proposed

to prove that executions were issued upon the judgments, were (460) in the hands of the sheriff, and were paid as stated in the answer.

Plaintiff objected to the evidence. The objection was overruled. Defendant exhibited the executions, which were in the sheriff's hands in October, 1869, and produced receipts from the sheriff, which were in the following form, etc.: "Received 16 October, 1869, of J. M. Miller, $248, in full of an execution against S. F. Houston, J. N. Hunter and L. W. Osborne, the said Miller being a debtor of J. N. Hunter." The sheriff testified that he gave the receipts exhibited.

Defendant testified, that in 1867 Hunter had the bond in his possession, claiming it as his own; that he then, and frequently afterwards, and up to July, 1869, demanded payment. Defendant offered to pay in notes and accounts, which Hunter refused; and he applied to counsel to know if the notes and accounts could not be made available to meet the bond in question. He placed several notes, etc., in the hands of his counsel, and the payments were made to the sheriff by his counsel, and he did not know when. He stated that he had made no settlement with his counsel and did not know whether they had collected the notes and accounts or not; that Hunter applied to him for payment after he had been told that the bond was paid. Defendant received notice from plaintiff, that he was owner of the bond before suit was brought; thinks after he had been informed that the bond was paid off. Notice of payment was given to Hunter 26 October, 1869.

Plaintiff's counsel insisted that the proofs offered did not bring the case within the provisions of sec. 265, C. C. P.

The Court charged, that if the payments alleged were made to the sheriff, while Hunter was the owner of the bond in suit, and these payments and those endorsed were equal to the principal and interest of the bond, they should find for the defendant. That payments made by counsel were the same as payments made by the defendant.

The jury returned a verdict for the defendant. Motion for (461) *venire de novo*. Motion overruled. Judgment and appeal by plaintiff.

Guion for plaintiffs.

Jones & Johnson for defendants.

PEARSON, C. J. The case turns upon the construction of sec. 265, C. C. P. If this section stood alone, we should be inclined to restrict its operation to cases where there was a single judgment debtor, and to hold that it did not apply to cases where there are several debtors in the same judgment.

It is the right of every creditor to have the debt paid to him; and a law, authorizing the debt to be paid to another person without the consent of the creditor, is in derogation of this common right, and is to be construed strictly. Of this character is the law in reference to attachment, and garnishment in cases of non-resident and absconding debtors. The section under consideration extends the principle and introduces a provision for a *voluntary garnishment;* where the judgment debtor is neither a non-resident or an absconding debtor, and without any allegation of fraud.

For these considerations, as the section is worded in the singular number "any person indebted *to the judgment debtor,* etc.," the Court would hardly, if the section stood alone, feel at liberty to extend its operation by adding the words "or to any one of several debtors in the same judgment;" for, such extension might in many cases result in much inconvenience and injustice to some of the several debtors in the same judgment. For instance, a judgment on a guardian bond and levy on the principal; a debtor of one of the sureties pays to the sheriff the amount of the execution, and thus discharges the levy and deranges the order of liability. Any one can see the consequences that this officious and voluntary payment to the sheriff, instead of to the creditor, may lead to.

But the construction of this section is put beyond all doubt, by taking it in connection with sections 264 and 266. (462)

"When an execution against property of the judgment debtor or *any one of several debtors in the same judgment,*" etc.; sec. 264, paragraph 1. This has reference to cases where the execution has been returned "unsatisfied." "After the issuing of an execution against property, on affidavit, etc., that any judgment debtor has property which he unjustly refuses to apply, the Court or Judge may by order require the judgment debtor, etc;" paragraph 2. This has reference to cases where the execution is in the hands of the sheriff.

"After the issuing of execution against property any person indebted to the judgment debtor may pay to the sheriff, etc.," sec. 265. This, like paragraph 2 of sec. 264, has reference to cases where the execution is in the hands of the sheriff. These contemplate cases where there is a single judgment debtor, and the words "or any one of several debtors

in the same judgment," in paragraph 1, sec. 264, are omitted. It must be taken that the words were omitted on purpose, and the Court is not authorized to supply them, or to give to sec. 265 the same operation as if the words had been used. Again, "After the issuing or return, if an execution against property of the judgment debtor, or of *any one of several debtors in the same judgment," etc.;* sec. 266. Here the words are set out, and the section is made applicable to cases where there are more than one judgment debtor. This makes the question of construction too plain to admit of further discussion.

PER CURIAM. *Venire de novo.*

Cited: Weiller v. Lawrence, 81 N. C., 71.

(463)

W. K. WILCOXON v. B. C. CALLOWAY and P. M. CALVERT.

1. In an executory contract for the sale of land, the payment of the purchase money constitutes the vendee the owner in equity, and he has a right to a conveyance from every person having the legal title with notice of his claim;
2. Therefore, where a person contracted to buy two tracts of land, represented in the description to contain one hundred acres, when, in fact, there were only sixty-six acres, and paid three-fourths of the purchase money, and the vendor afterwards sold the same land to a third person, who had notice of the previous contract, and became insolvent; *it was held,* that a deficiency of one-third of the number of acres was a material matter, and that the purchaser was entitled against the vendor, and those claiming under him, with notice, to a conveyance and an abatement of the price.
3. It is not a general rule that the abatement shall be in the proportion of the deficient quantity to the quantity purchased. Improvements, natural advantages, etc., are to be considered. In such cases the only mode of estimating the abatement is by a reference, to ascertain how much more was given by reason of the supposed additional quantity.

APPEAL from *Mitchell, J.,* at Spring Term, 1872, of WILKES.

The plaintiff complained, that the defendant Calvert contracted to sell him, for the sum of $200, two tracts of land, each containing fifty acres. That at the time of the trade he paid defendant one hundred and fifty dollars, and the bargain was that the land should be run out, and if there were one hundred acres plaintiff was to pay $50 more; if there was a deficiency it was to be deducted from the price paid; if an excess he was to pay for the excess at the rate of $2 per acre. That the land was surveyed according to the contract and there were only 66 acres. That thereupon defendant applied to Calloway who owned

worthless lands adjacent to the land sold, and bought of him enough to make up the 100 acres, had it run out with the land (464) sold, but plaintiff refused to receive it, and demanded title of Calvert for the sixty-six acres and that he should refund what he had paid over the price of the 66 acres, at $2 per acre. That Calloway, with a full knowledge of these facts, purchased the 66 acres, and had taken a deed for the same.

Complaint asked that Calloway be declared a trustee of the legal title for plaintiff, and be compelled to convey the same to him, and that plaintiff have judgment against Calvert for the excess of the price which he had paid.

Calloway alone answered, and judgment was taken against Calvert for want of answer, he having left the State and been brought in by advertisement.

Plaintiff offered in evidence a written contract between Calvert and himself, and then offered to prove, that before the written contract was signed by Calvert, it was agreed between them that the lands were to be run out, and if 100 acres plaintiff was to pay $200; if there was a deficiency it was to be deducted from the price at the rate of $2 per acre; if an excess to be added at the same rate. Defendant's counsel objected to this testimony, but it was admitted by the Court. Defendants excepted. Plaintiff offered to prove that the contract, as proved by the witness, was made both before and after the signature of the written agreement. This was objected to, but admitted by the Court. The material portion of the written contract is set forth in the opinion of the Court. Verdict for the plaintiff.

The Court rendered judgment according to the prayer of the complaint. Defendants appealed.

Folk for the plaintiff.
Armfield for the defendants.

RODMAN, J. On 13 January, 1868, the defendant Calvert agreed to convey to plaintiff a good title in fee to "all that certain piece or parcel of land known as the Turkey Pen tracts, two separate (465) parcels or tracts, fifty acres each, entered, one by Neal and William Calvert, Sr., and the other by William Calvert and son Neal, these tracts lying and joining B. C. Calloway at this date," on 1 April, 1868, provided that by that date the plaintiff should have paid Calvert $200, or its equivalent. It appears that at the execution of this contract the plaintiff paid the defendant Calvert $150 on the contract. The land was afterwards run out and found to contain but 66 acres.

Afterwards Calvert sold the land to Calloway for value, but (as is not denied, and it is therefore assumed to be true) with notice of the previous contract with plaintiff.

As Calloway bought with notice, he stands in the shoes of Calvert so far as respects his liability to convey the land. We think the judgment of the Court below to that effect was right. *Ward v. Ledbetter,* 21 N. C., 496.

The next question then is, is the plaintiff entitled to compensation for the deficiency in the quantity, and by what rule is that compensation to be ascertained?

The land is described in the contract as two tracts of fifty acres each, but run out only sixty-six acres in all. Both parties seem to have had equal opportunity of knowing the quantity of the land, and were equally ignorant of it. There are no allegations of fraud or wilful deception. It is a case of mutual mistake. But upon a contract for a hundred acres, even though there is no suggestion that the vendee, for any reason, desired exactly that quantity, or that quantity was of any value except as a *quantity,* yet a deficiency of one-third must be held material, and would probably entitle the vendee to rescind the contract if he chose to do so, or at all events, to an abatement of the price. In *Gentry v. Hamilton,* 38 N. C., 376, there was a deficiency of 355 acres out of a tract described as containing "1,670 acres, more or less." In (466) *Leigh v. Crump,* 36 N. C., 299, the land was described as containing 1,000 acres, more or less, and it contained in fact only 600. In both those cases the purchaser was held entitled to an abatement. See also *Jacobs v. Locke,* 37 N. C., 286, and Fry Spec. Perfor., 191, 348, S. 801, Hilliard Vend. 331, 273, 277, 328. In this case, the vendor having received payment of three-fourths of the purchase money, and being insolvent, the purchaser is clearly entitled against him and against a purchaser from him, with notice to have a conveyance with an abatement of the price.

By what rule shall the compensation or abatement be ascertained?

It is not the general rule that the abatement shall be in the proportion of the deficient quantity to the quantity represented. Such a rule would in many cases be plainly unjust. As if the part which the vendor could convey compromised valuable building, or mines, or a water-power, while the part which he could not convey was unimproved or sterile. But this supposes some definite piece of land to which the vendor is unable to make title as was the case in *Jacobs v. Lock, ubi sup.* Take the case of a contract to convey a definite tract represented as containing 100 acres which runs out 66 acres only, if there were build-

ings or other things of value upon the tract, it would not be fair to calculate the value of the deficient acres by an average, obtained by dividing the price agreed to be paid, by the number of acres agreed to be conveyed, because the purchaser has got the land upon which were the things which give it a peculiar value, and would not have got them over again had the quantity held out as represented. In such a case the only mode of estimating the abatement would be by a reference to inquire how much more was given for the land by reason of the supposed additional quantity. *Hill v. Buckley,* 17 Ves. 394. In this case, however, it does not appear that any part of the land has been improved, or that there is anything to give any one part of it extraordinary value over any other part, and we do not see why it will not be fair and reasonable to estimate the value of the deficiency at the average (467) price per acre. That was the course which seems to have been adopted in the Court below, and no especial exception has been taken to it there.

In this opinion no allusion has been made to the evidence of a parol variation of the contract, because, if admissible, it would not have varied the conclusion we have come to.

PER CURIAM. Affirmed.

Cited: Hill v. Brower, 76 N. C., 126; *Blue v. Blue,* 79 N. C., 76; *Anderson v. Rainey,* 100 N. C., 335; *Woodbury v. King,* 152 N. C., 680, 681.

STATE v. WILLIAM HANEY.

1. Where a homicide was committed in November, 1865, and it appeared that the prisoner and deceased belonged to the same army, and that the quarrel which preceded the homicide did not grow out of "any war duties or war passions," but out of a private transaction between the parties; *it was held,* that in such a case the amnesty act did not apply.
2. Where a bill of indictment for murder did not allege the time of the death nor that it occurred within a year and a day from the time when the wound was inflicted, but used these words, "of which said mortal wound the said J. H. did languish, and then and there did die"; *Held,* that the charge in the indictment was sufficient; especially under the act of the General Assembly, Rev. Code, ch. 35, secs. 15 and 20.

INDICTMENT for murder, tried before *Henry, J.,* at Spring Term, 1872, of YANCEY.

The prisoner was charged with the murder of James Haney. The evidence was that the homicide was committed in November, 1865.

The quarrel grew out of a misunderstanding concerning a dis-
(468) charge which the deceased had purchased from the prisoner, and which the deceased desired the prisoner to take back, and to give up a pistol, etc. The prisoner refused to recant the trade, and an altercation took place in which the deceased was shot and killed by the prisoner. It was agreed by the Solicitor and the prisoner's counsel, that the deceased and prisoner, in the early part of the war, both belonged to the Confederate army, and that afterwards they both joined the Federal army, from which they had both been discharged, and returned to their homes some time prior to the homicide.

Prisoner moved for his discharge under the amnesty act, which was refused by the Court. Under a charge from the Court the jury found a verdict of guilty. Judgment of death was pronounced, from which prisoner appealed to this Court.

Attorney General and *Battle,* for the State.
Ovide Dupree for prisoner.

READE, J. There is no reason to suppose that the homicide grew out of any "war duties or war passions," so as to bring it within the benefit of the amnesty act. Long after the war was over, but prior to 1 January, 1866, the parties quarrelled about a trade which they had made while they were soldiers, and the prisoner killed the deceased. They were not enemies during the war, but were together in the same army on the same side, so that the transaction about which they subsequently quarreled was not an act of hostility but of friendly dealing. We are of the opinion that the amnesty act does not apply. *S. v. Blalock,* 61 N. C., 242; *S. v. Shelton,* 65 N. C., 294.

There was a motion in arrest of judgment in this Court, upon the ground that the indictment did not charge the *time* and the *death* of the deceased, nor that it was within a year and day from the time when the wound was inflicted. The objection would be fatal if it
(469) were sustained by the fact, for "if the death did not take place within a year and a day of the time of receiving the wound, the law draws the conclusion that it was not the cause of death." In *S. v. Orrell,* 12 N. C., 139, the language in the indictment was, "of which said mortal wound the said Penelope Orrell died." It did not state when or where she died, nor did it state that she then and there instantly died, as is usual to state. In that case the indictment was held to be bad, and judgment was arrested.

The case before us differs from that in this: "Of which said mortal wound the said James Haney, then and there did languish and then and there did die." It is to be regretted that there should ever be negligent departures from established forms, and, in capital cases especially, experiments are very reprehensible; but still we think the indictment sufficient. "Then and there died" distinguishes it from the case of *S. v. Orrell, supra.* The usual form is, "then and there instantly died." And it is insisted that the omission of "instantly" leaves the time of the death indefinite, and that it is made still more indefinite by the preceding words, "did languish." And that "then and there did languish" and "then and there did die," are inconsistent. From the omission of the word instantly, and from the insertion of "did languish," we infer that the deceased did not die immediately; but still, from the words, "then and there died," we infer that he died at that place and on that day. This construction is in consonance with our statute, which provides that in criminal proceedings "judgment shall not be stayed by reason of any informality or refinement, if in the bill or proceedings sufficient matter appears to enable the Court to proceed to judgment." And again "No judgment upon any indictment, etc., shall be stayed, etc., nor for omitting to state the time at which the offense was committeed in any case where time is not of the essence of the offense, etc." Rev. Code, ch. 35, secs. 15 and 20.

PER CURIAM. No Error.

(470)

STATE v. GREEN BROWN.

Under the act of 1868-'69, ch. 209, sec. 4, the wife is a competent witness against her husband "as to the fact of abandonment, or neglect to provide adequate support." She is not, however, a competent witness to prove the fact of marriage.

INDICTMENT tried before *Clarke, J.*, at Spring Term, 1872, of GREENE.

The first count in the indictment charged the defendant with wilfully neglecting to provide an adequate support for his wife and children. The second count charged a wilful abandonment of his wife, etc.

The only witness introduced by the State was Cherry Brown, who was asked if she was not the wife of the defendant. The question was objected to by the defendant, but admitted by the Court. There was a verdict of guilty. Judgment and appeal.

Attorney General for the State.
Smith & Strong for the defendant.

PEARSON, C. J. It is a general rule of evidence at the common law, that husband and wife are not competent witnesses for or against each other. This rule is based upon the ground of public policy in reference to the delicate relation, calling for the utmost confidence, between man and wife. An exception is made in the instance of an assault and battery by the husband on the wife. This exception (471) is allowed on the ground of the necessity of the case.

A further exception is now claimed by the force and effect of the statute. Acts 1868-'69, ch. 209, sec. 4. It is not for the Courts to call in question the wisdom of a statute which attempts to compel men to provide for their wives and children, by means of a fine that impoverishes, and imprisonment that puts it out of the power of the man to be of any service: it is our duty to ascertain the intention of the law makers, and to give effect to it in such a way as to interfere as little as possible with the rules and principles of the common law, on the assumption that it was the intention to depart from them only so far as it might be necessary to carry into effect the policy of the statute as indicated by its words and general meaning.

The statute under consideration makes another exception to the general rule of evidence, and the wife is made a competent witness, *"as to the fact of abandonment, or neglect to provide adequate support."*

This departure from the general rule of evidence may have been suggested upon the idea of necessity, as such matters come peculiarly within the knowledge of the wife, but in regard to the *fact of marriage* there can be no such necessity. Marriage is a relation which the law supposes will be entered into under circumstances of great solemnity, and usually with openness and much notoriety, and in all cases there must be a license duly obtained, and the ceremony must be performed by a Justice of the Peace, or a Minister of the Gospel. So the idea of a necessity for making the wife a competent witness to prove the fact of the marriage is out of the question. The evils of allowing such an exception to the general rule of evidence can hardly be enumerated. Make any woman a competent witness to prove that she is my wife, and that the marriage ceremony between us had been duly performed! But it is not necessary to enter further into this subject. The exception to the general rule of evidence is expressly confined to the fact (472) of abandonment or neglect to provide adequate support. This excludes any other exception. We should not have discussed it at all except for the purpose of letting it be known, that no departure from the rules of evidence, which have been accepted by the Courts, as sanctioned by the wisdom of ages, can be allowed unless it be so expressly

enacted. If a gap is made at one place the Courts will not come to the conclusion that the intention was to take away the whole fence.

PER CURIAM. *Venire de novo.*

ISRAEL CABLE v. PETER R. HARDIN.

1. Where a note was given in 1862, for the loan of Confederate money, and afterwards, in 1864, the obligor tendered the amount due in Confederate currency, a portion of which was received, and a new note given for the remainder: *it was held*, that the old debt must be regarded as paid, and the transaction a new loan and the scale applied as of that date.
2. When the pleadings state the same material facts, and no issue can be joined, it is proper for the Court to withdraw the case from the jury, and determine it as a question of law.

APPEAL from *Tourgee, J.*, at Spring Term, 1872, of ALAMANCE.

The action was brought for the recovery of money due on a bond dated 25 August, 1864. Upon the trial the plaintiff offered to show the consideration of the bond. His Honor refused to allow the evidence, holding that when the pleadings make no issue of fact it was a question of law for the Court to decide. A juror was therefore (473) withdrawn, and the Court adjudged that the plaintiff have judgment for the amount of the bond sued on according to the scale of Confederate money at the date of the bond, less the set-off admitted by plaintiff. From this ruling and judgment plaintiff appealed. The facts set forth in the pleadings are stated in the opinion of the Court.

Parker for plaintiff.
Dillard & Gilmer for defendant.

RODMAN, J. We think the Judge was right in taking this case from the jury and holding it a question of law for his decision. The parties by their pleadings stated the same material facts, and there was and could be no issue of fact joined between them.

2. From the pleadings the case is this: "In November, 1862, the defendant borrowed of plaintiff $1,100 in Confederate money, and gave him a bond for that sum with a surety, the plaintiff agreeing to receive payment in Confederate Money. When this bond was payable is not stated, but it is not material. On 25 August, 1864, defendant tendered payment to plaintiff in Confederate money, when plaintiff desired

defendant to keep it, and agreed to accept payment of the excess over $1,000, to take the note of the defendant for that sum without surety, and to surrender the original note, all of which was done, and the note for $1,000, then given, is the one now sued on. The first bond was surrendered to the defendant.

The defendant also sets up in his answer certain small set-offs, which we are told by counsel were admitted.

The only question which we are called on to decide is, whether the plaintiff is entitled to recover according to the scale applicable to November, 1862, or to August, 1864.

By the act of 1866, and subsequent acts *in pari materia,* as they have been construed by this Court, certain general rules have been (474) established, which as far as they touch the present case, are as follows:

1. Where the note complained on was given on a loan of Confederate money, the scale is applied at the date of the note.

2. When it was given on a purchase of property, the recovery will be for the value of the property at the time. *Robeson v. Brown,* 63 N. C., 554.

Now, was the consideration of the note of 1864, a loan of Confederate money, or a purchase of property? If the former, the scale for that date must be applied by the statutes; if the latter, the plaintiff will recover the value of the property purchased of him by the defendant, which was $1,000 reduced according to the scale for 1862.

We think it was substantially a loan of Confederate money. If the plaintiff had transferred the note of a stranger in consideration of defendant's note, it would have been a sale. But the note transferred, or rather surrendered, was that of the defendant, and it was necessarily destroyed by the act of transfer. By a sale something passes from the vendor to the vendee; and we cannot conceive of a sale in which the thing transferred is destroyed by the very act of transfer.

Here nothing passed; a right of action was extinguished. The transaction resembles what the civil lawyers call a novation, which is defined by Pothier (1 *Pothier Oblig.* 566) as the substitution of a new debt for an old. The old debt is extinguished by the new one contracted in its stead. And he says (p. 563), "the effect of a novation is, that the former debt is extinguished in the same manner as it would be by a real payment." And all the hypothecations and securities to the old debt are extinguished with it, unless expressly reserved, which it seems may be done. The novation of the civil law corresponds in its effect on the old debt most closely with what the common law calls an accord

and satisfaction. It is settled by numerous authorities that if a debtor pays a part of the debt and gives a new note for the resi- (475) due, which is accepted in satisfaction, the old debt is extinguished as it would be by a payment. *S. v. Cordon,* 30 N. C., 179; Story Prom. Notes, 404, 408; *Cornwell v. Gould,* 4 Pick., 144; *Hare v. Alexander,* 2 Metc., 157; *Gabriel v. Draper,* 80 E. C. L.

The transaction in this case must be regarded as if the defendant had paid the old debt, and then borrowed $1,000 out of the sum paid.

PER CURIAM. Affirmed.

Cited: *Bank v. Davidson,* 70 N. C., 122; *Arnold v. Estis,* 92 N. C., 167.

Dist.: *Cobb v. Gray,* 78 N. C., 95; *Wilson v. Patton,* 87 N. C., 322.

STATE OF NORTH CAROLINA on relation of JOSEPH S. JONES, as Trustee, v. JACOB F. BROWN.

1. In an action on a guardian bond, the right of the relator to sue under the former system of practice and pleading can be raised by demurrer or on the plea of the general issue.
2. Under the old system, a trustee appointed by a Court of Equity is a proper relator in an action on a guardian bond to recover the trust fund.
3. A bond may be given as a security for equitable rights, and the nonperformance of the decree of a Court of Equity in relation thereto may be assigned as a breach of the bond.

AN ACTION of debt on the guardian bond of Ridley Brown as guardian of Mary F. Brown, to which the defendant Jacob F. Brown was surety. It was brought in the name of the State on the relation of Jones, who was substituted as trustee under a decree of the Court of Equity of Warren County, at Fall Term, 1863. On the trial at Fall Term, 1871, before *Watts, J.,* there was judgment for plaintiff, and defendant appealed.

The facts are sufficiently stated in the opinion of the Court.

(476)

Moore & Gatling for the plaintiff.

Batchelor & Plummer for the defendant.

RODMAN, J. This is an action begun on 10 March, 1868, in the name of the State "on the relation of Jones, trustee, to the use of L. B. Eaton,

appearing by S. W. Eaton his guardian," against Ridley Brown and Jacob F. Brown. The writ was returned to Spring Term, 1868, of the Superior Court for Warren, executed on Jacob Brown, but not on Ridley Brown. At the same term a *nol. pros.* was entered as to Ridley Brown, and judgment by default taken against Jacob Brown, with an order of inquiry as to damages, to be executed at next term. The case was transferred to the docket of the new Superior Court in August, 1868; and at Fall Term, 1868, of that Court, the case is continued to Spring Term, 1869, when the bankruptcy of Ridley Brown is suggested; a *nol. pros.* is entered as to him for the second time; and Jacob F. Brown pleads "general issue (execution of bond admitted), payment, release, accord and satisfaction," and it is referred to the clerk to state an account of the guardianship of Ridley Brown. Afterwards that reference was set aside and one Davis was made referee, who, at Fall Term, 1871, reported an account to which exceptions were filed by defendant, Jacob F. Brown, which were overruled, and judgment given against him for the sum found due by the report, from which he appealed to this Court.

It is contended for the defendant that the action cannot be maintained on the relation of Jones, trustee, etc. It is necessary to notice, very briefly only, the position of the counsel for the plaintiff, that the question was concluded by the refusal of the Judge to nonsuit the plaintiff. A plaintiff cannot be compelled to be nonsuited if he is actually in Court prosecuting his action. Moreover, such a refusal concludes nothing; every ground on which a defendant could ask for an opin-
(477) ion of the Court adverse to the right of the plaintiff, would continue open to him at the trial by asking instructions from the Court, and excepting if improperly refused. It is also a misconception on the part of the plaintiff that the question is one of jurisdiction arising out of some personal disability of the plaintiff. The State is the plaintiff of record, and can be under no disability. In not one of the cases was the objection to the relator taken by plea in abatement, and it would be difficult or impossible to draw such a plea. It would necessarily be in substance a plea that the condition had not been broken, and so be a plea in bar.

To understand the true nature of the objection, and ascertain whether it is now open to the defendants, it will be necessary to look at the course of pleading in actions on official or other bonds with conditions.

Rev. Code, ch. 54, sec. 5, enacts that all bonds taken from guardians shall be made payable to the State, and *any person injured* may, at his own costs, prosecute suit thereon, and recover all damages he may have

sustained by reason of the breach of the conditions thereof, and if judgment shall be rendered against the relator, he shall pay the costs. The relator who may prosecute the suit in the name of the State is *any person injured by the breach of the condition.* He must be named as relator in the writ of *capias,* because it is necessary for that to show by whom the suit is prosecuted, in order that it may be seen that some one, and who, is responsible for costs, and also because the writ usually and properly, after demanding the debt, contains the formula, "which the defendant detains to the damage of said Jones ten thousand dollars."

The declaration follows the writ, and after setting out the bond, with its conditions, assigns a breach by which the relator was injured, to a certain amount, etc.

If the defendant meant to take issue in law, that the relator was not a person that could, in law, be injured by the breach assigned, he might have demurred. That was not done here. He might also plead denying the breach. In this case the defendant pleads (478) "General issue, execution of bond admitted," etc. Certainly this was a very informal way of pleading performance, and it is only by making great allowance for the loose and inaccurate mode of pleading that was general before the present Code, that it can be considered to have that effect. As no objection was taken to it we construe it in that way. The authorities hereinafter cited show that the defence was held available under the plea of the general issue. By this plea an issue of fact is made for a jury. Upon this the relator would, of course, be entitled to recover only such damages as he had sustained by the breach. So that a question of law is involved, the same which would have been presented directly by the demurrer at a previous stage of the case, viz: whether the person alleged to be injured by the breach was in law injured? Does he come within the condition of the bond? Upon this the Judge will instruct the jury at the trial. It is in this way, and at this stage of the proceedings, that the question arises in this case. The exact shape of the question, and the precise time in which it would occur, might be varied by the form of the report of the referee, and of the exceptions thereto, etc. But still the Court must decide this question before or at the time of final judgment. We have said enough to show that the defendants had a right to raise this question at the trial. The Judge held this question in favor of the relator, and by the appeal we are called on to decide it.

We may be excused for expressing our regret at being compelled to decide questions of practice arising out of the fact that, under our former system, legal and equitable rights were administered in different

Courts, and out of the rule of the law Courts that they would take no notice of equities. Our decision must be founded on a state of the law which has passed away, and though from its importance to the
(479) present parties, it requires and has received our patient consideration, yet it is of no importance to any one else.

In deciding such a question we feel bound to decide in exact accordance with the rule established by previous decisions, if such a rule can be found applicable; but if no such can be found, then of course we are obliged to decide upon what seems to us the reason which governs the case. We have examined all the authorities to which we were referred by the learned counsel.

Evans v. Lightfoot, 24 N. C., 306, was an action on a constable's bond; the relators were two of the members of the firm of Evans, Home & Co.; the breach assigned was that the constable had failed to pay to the relators a sum collected by him of London, who was a member of the firm when the claims were put into his hands, but who had ceased to be so before the breach. The Court says that the persons *with whom he contracted* (that is, all the original partners) were in contemplation of law the persons injured, and the plaintiffs were not entitled to recover.

Governor v. Deaver, 25 N. C., 56, was also on a constable's bond, and the claim given the constable to collect was assigned by the relator to a third party afterwards. The Court held that the action was properly brought on the relation of the person who had put the claim in the hands of the constable, because the contract was made with him.

Burch v. Clark, 32 N. C., 172, was an action, on an administration bond. The relators were husband and wife, the wife was one of the distributees of the intestate, but they had assigned their interest to one Smith, before action brought. The Court held that the legal title being in the relators, and not assignable at law, they were properly made relators, instead of Smith.

Waugh v. Clark, 32 N. C., 235, was an action on a Clerk's bond. The Court held that the relator must be the person entitled to the legal interest.

The case on Constable's and Clerk's bonds we think have no
(480) application. It would not be difficult to assign reasons, but rather than be prolix we forbear to do so. We conceive that the case of *Burch v. Clark* lays down the rule to be followed. The relator must be a person having a *legal* interest in the performance of the duties which the guardian assumes. So the question is reduced to this: Did Jones have a legal interest?

In 1858, Ridley Brown became the guardian of Lucy Brown and made the bond declared on. In 1860, the ward, in contemplation of marriage, conveyed all her personal property, consisting of slaves, bonds, etc., to her said guardian, to hold in trust, and in 1861, she and her husband joined in a deed conveying all her interest under the deed of 1860, to Jones, in trust. So that under this deed Jones had nothing but an equitable interest in any part of the property. Consequently under the cases cited he could not recover upon a breach of duty by the guardian to him, arising out of his equitable estate; that is, he could not sue as relator by virtue of such estate.

We are now obliged to consider another question. Under the former system of pleading, in an action on a penal bond, no breaches were actually assigned; but it was considered that the plaintiff assigned all the breaches which his case entitled him to do. Happily so loose a practice has disappeared under the Code, but we must respect it, in cases that began under it.

The relator and Samuel Eaton filed a bill at October Term, 1862, in the Court of Equity for Warren County, against Ridley Brown, as guardian and trustee as aforesaid, and against the ward and her son La Fayette Eaton. At October Term, 1863, it appearing that Brown desired to be relieved of his trusteeship, the Court substituted Jones for him, and ordered that Brown convey to Jones "all the property, estates, rights and credits" mentioned in the deed of 1860, and deliver to him "all the slaves, securities, and other property and estate," held and admitted to be held by him under that deed; and it was referred to the master to state an account, etc. (481)

At October Term, 1866, it was ordered that Brown pay to Jones as trustee $2,000.

We must therefore assume that the relator has in this suit assigned as a breach of the bond sued on, a refusal or failure by the guardian to perform each of these decrees. The question then arises whether by force of the decrees the relator is a person injured under the Act, and whether he comes within the condition of the guardian bond, which is set out in the case and contains these words: "Now if the said Ridley Brown shall faithfully, etc., and deliver up, pay to and possess the said wards of all such estate or estates as they ought to be possessed of or to such other persons as shall be lawfully empowered or authorized to receive the same," etc.

We think it can scarcely be doubted that a person to whom a Court of Equity has decreed that a guardian shall pay the fund, is a person injured by a refusal to do so, within the sense of the act, and a person

authorized to receive within the condition of the guardian bond. A bond may be given as a security for equitable rights. The only reason why a court of law will not allow an equitable assignee to be a relator, on a failure to perform a duty which is regarded as such only in a Court of Equity to be assigned as a breach, is because courts of law cannot determine equitable rights and duties; but when these have been determined by the proper court, that difficulty no longer exists, and the non-performance of the decree may be assigned as a breach.

We think also that under the breach assigned arising out of the failure to perform the decree of 1863, the question of damages is an open one, and that the relator is not confined to the sum ordered to be paid in 1866, which does not profess to be in full. These decrees are not conclusive against the surety in one sense; they do not conclude as to him that in 1863, the guardian had any fund, etc., of the ward (482) or that he owed the representative of the ward $2,000 in 1866.

As to these matters they are only evidence. But they must necessarily conclude him from denying that the relator represented the ward, and was entitled to the estate in the hands of the guardian whatever it might be.

This brings us to the questions raised by the exceptions to the report, and as they are important and perhaps difficult, and were only slightly or not at all discussed by counsel, we defer our judgment in order that these may be argued again.

PER CURIAM. *Venire de novo.*

Cited: Boykin v. Barnes, 76 N. C., 319; *Harris v. Harrison,* 78 N. C., 216; *McKinnon v. McKinnon,* 81 N. C., 203.

JACOB WEST *v.* TORQUIL SHAW.

1. Where the main question in dispute was whether the third corner of the defendant's land stopped at L or "proceeded on to 3"; *held*, that it was competent for the plaintiff, with a view of fixing the third corner, to offer in evidence a deed to defendant of later date than the one under which he claimed in the suit, one of the calls therein being from a point indicated on the diagram as K, "thence south 60 degrees east, 6.65 chains to a stake and pointers," his (the defendant's) "own corner"; it being established in connection therewith, that the course of this call was towards L, and the distance falling short only 25 links; *and held further*, that the evidence was admissible on two grounds:

   (1) As tending to show a recognition by the defendant of the dividing line between him and the plaintiff, to wit, from D to L, and as

such, should be considered by the jury, upon the question of the location of the defendant's third corner at L.

(2) As evidence tending to confirm other evidence offered by plaintiff of the declarations of the defendant, to the effect that his bargainor had marked the third corner at L.

2. It is competent for one party to a suit, involving a question of boundary, to show that another party to such suit pointed out a certain tree as his corner, if the spot described by such witness, is by another witness, identified as the disputed corner.

3. In questions of boundary, it is competent to prove by surveyors, as experts, that the marks on trees in a certain line are *apparently* of a certain age.

4. Where the phraseology of a deed, under which one of the parties to such action claims the land, leaves it uncertain whether a pond is embraced by it, or the line ran *near to it*, but so as not to cover it, an instruction prayed: "that the land of the defendant should be so located as to include within its boundaries the (said) pond," was properly refused.

5. Where in such an action, the defendant's deed under which he claims the *locus in quo* called for 153½ acres, an instruction prayed "that as 153½ acres of the land" (the whole tract embracing originally the land covered by defendant's deed, conveyed by one Henry Elliott to Smith & Elliott "was reserved by Henry Elliott in his deed to Smith & Elliott as before that time sold and conveyed to the defendant, that defendant's land should be so located as to secure to him that quantity of land"; *held*, to be properly refused, it appearing that the defendant had received all the benefits of such fact that he was entitled to, by its being left to the jury as a *circumstance* to be considered by (484) them on the general question of boundary involved in the cause.

6. Where a call in the defendant's deed was "thence south 26 and one-half degrees east 45 chains to a stake and *pointers*," which was admitted to begin at 2 on the diagram, and by running course and distance to extend to 3, but was insisted by the plaintiff stopped at L and there was evidence to show the existence of pointers at L, marked when the deed was made: *held*, "that at the time of making the deed (defendant's) 19 July, 1855, the second line" (beginning at 2) "extended from figure 2 to the figure 3, that being the point where the distance gave out," was properly responded to by an instruction, as follows:

The corner at 2 being an admitted corner of the Torquil Shaw (defendant) 153½ acres, that after reaching 2 they should follow the *course* called for, admitted to be along the marked line leading from 2, and they should also run the *distance* called for in the deed, 45 chains to 3, where the distance gives out, unless before reaching 3 the distance was controlled by a corner established at the making of the deed, and indicated by some natural object as trees marked as pointers; that if from the evidence submitted to the jury, they were satisfied that such corner existed at L, as contended for by the plaintiff, then they should stop at L, as the *third* corner of the deed.

7. There being evidence to show that a certain point opposite to L, marked as M on the diagram, was the *fourth* corner called for by the defendant's deed, and which point would be reached by running the *third* call from L, according to course and distance; *held further*, that an instruction that if the jury found M was the *fourth* corner, they had

a right to reverse the line so as to find the corner at the intersection with the second line.

8. A tree marked and called for as a pointer, with a line of marked trees leading to another corner, must control distance.

The statement made by the presiding Judge is given in full. The annexed diagram indicates the points in controversy. The plaintiff's beginning corner is indicated by an arrow. The defendant's corner by a hand. (See diagram.)

ACTION for trespass on land, tried before *Buxton, J.*, at Fall (485) Term, 1871, of HARNETT. Action commenced 27 September, 1870.

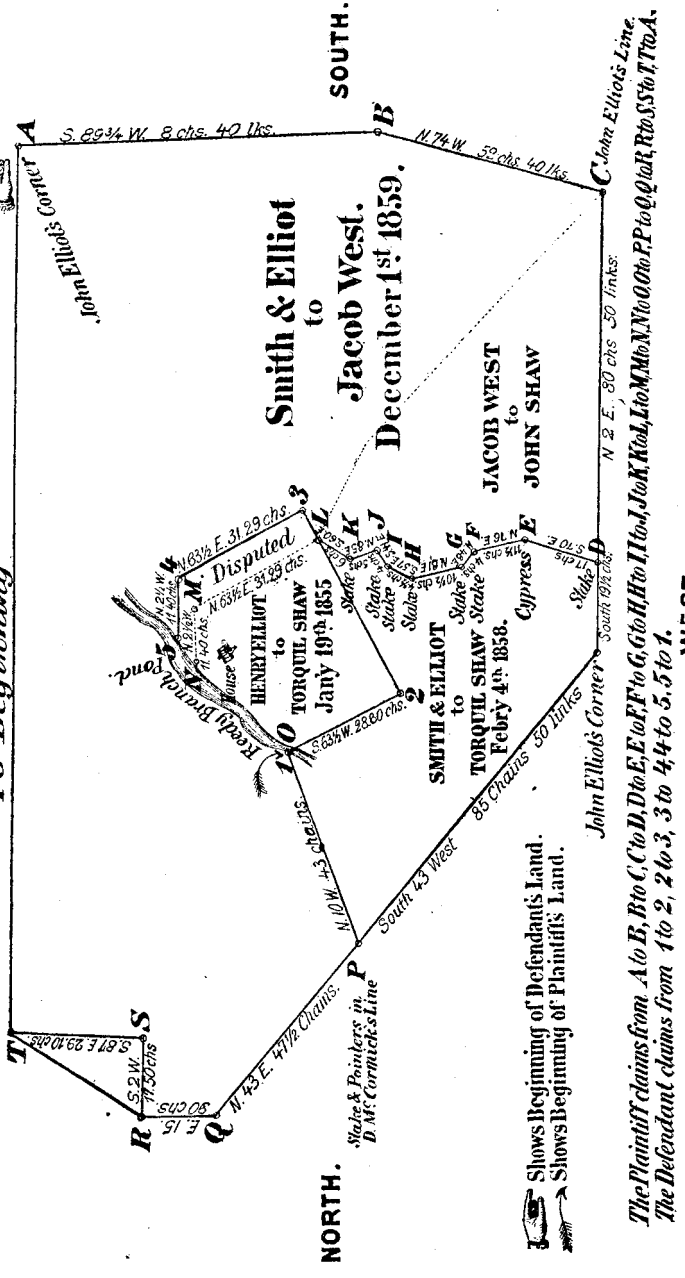
The locus in quo is designated on the annexed plat by L, M, N, 5, 4, 3, marked "Disputed." The plaintiff read in evidence a deed from Smith & Elliott (Jno. D. Smith & Geo. Elliott) to himself dated 1 December, 1859, for 1,856 acres, more or less. There was no dispute as to the location of this deed, it commenced at A, and is designated by A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, covering the land in dispute. The call in the deed from the corner represented at K, is "then south 60 degrees, east 6 chains and 65 links to a stake and pointers, T. Shaw's corner; then with his line north 63½ degrees, east 31 chains, 29 links to a small gum and gum pointers on the south side of Reedy branch; then north 2½ degrees west, 11 chains, 40 links to a pine with gum and maple pointers in the Reedy branch to T. Shaw's beginning corner, then north 10 degrees west, 43 chains, etc." giving the various calls to the beginning at A. Under the deed the plaintiff entered in 1859, and continued in possession of the land embraced therein; including the disputed part, when two years ago the defendant, under a claim of right, entered upon the disputed part, back-boxed the trees, and cut timber, for which acts this suit was brought.

There was evidence of the amount of damages.

The defendant read in evidence a deed from Henry Elliott to Smith & Elliott, the parties under whom the plaintiff claims, dated 3 March, 1855; which deed, after giving the boundaries, has this recital "containing 2,925 acres, including 155½ acres, I have sold to Torquil Shaw, and is not here intended to be conveyed."

The location of the deed was agreed upon; its boundaries ran all around the land both of the plaintiff and defendant, and included the land of both.

The defendant next read in evidence a deed from Henry Elliott (486) to himself, dated 19 January, 1855, for 155½ acres, more or less,


EAST.
To Beginning
NORTH.
WEST.
SOUTH.
John Elliot's Corner
S. 89¾ W. 8 chs. 40 lks.
N. 74 W. 59 chs. 40 lks.
John Elliot's Line.
Smith & Elliot
to
Jacob West.
December 1st 1859.
JACOB WEST
to
JOHN SHAW
Disputed
HENRY ELLIOT
to
TORQUIL SHAW
Jany 19th 1855
SMITH & ELLIOT
to
TORQUIL SHAW
Febry 4th 1858.
Really Branch Gone.
House
Cypress
Stake & Pointers in D. McCormicks Line
N. 10 W. 43 chains.
South 43 West
85 Chains 50 Links
John Elliots Corner
N. 2 E., 80 chs 50 links.
N. 43 E. 47½ Chains.
S. 61 E. 29.10 chs.
N. 2 W. 77.50 chs.
E. 15 80 chs.
Shows Beginning of Defendant's Land.
Shows Beginning of Plaintiff's Land.
The Plaintiff claims from A to B, B to C, C to D, D to E, E to F, F to G, G to H, H to I, I to K, K to L, L to M, M to N, N to O, O to P, P to Q, Q to R, R to S, S to T, T to A.
The Defendant claims from 1 to 2, 2 to 3, 3 to 4, 4 to 5, 5 to 1.

described as follows: Beginning at a stake and pointers on the south side of the Reedy branch above Torquil Shaw's house, and runs south 63½ degrees, west 28 chains 80 links to a stake and pointers in a small branch; thence south 26½ degrees, east 45 chains to a stake and pointers; thence north 63½ degrees, east 31 chains, 29 links to a small gum and gum pointers on the south side of the Reedy branch; thence north 2½ degrees, west 11 chains, 40 links to a pine with maple and gum pointers on the Reedy branch; thence up the various courses of the Reedy branch, so as not to interfere with a small pond of water on said branch, reserved for the benefit of Smith & Elliott's steam mill, to the beginning, containing 155½ acres, more or less."

It was agreed that the beginning corner of this deed was at 1, as represented in the plat; also that running from 1, the course and distance called for at the second corner was at 2. It was also agreed that the course of the line from 2, as called for, was to be followed, to wit: south 26½ degrees east. The point in dispute was where the line running from the corner at 2, in the direction south 26½ degrees east, was to stop, whether at L, as claimed by the plaintiff, or at 3, as claimed by the defendant. If it went to 3, and the remaining lines were run according to course and distance called for, the figures 1, 2, 3, 4, 5 would represent the defendant's land and include the disputed part, so that he would be no trespasser, as he held the oldest deed from Henry Elliott, under whom both claimed. But if it stopped short at L; and the remaining lines were run as called for in the deed, then the figures 1, 2, L, M, N, would represent the defendant's line, and the disputed part would be left out of his line, so that he would be a trespasser. For the defendant, it was in evidence, that there was a marked line of trees, apparently as old as the defendant's deed, from the beginning corner at 1 to 2; also from 2 as far as L; at L was a stake and oak pointers; L was distant from 2 38 chains; there was no (487) marked line between L and 3; there was nothing to indicate a corner at 3; the distance from 5 to 3 was 45 chains, being the distance called for in the deed to defendant. By extending line 2, 3, beyond 3, 1 chain and 25 links, a point is reached where, upon a recent survey made for the defendant two years ago, by one McLean, a stake and pine pointers were marked as a corner; from this point there is an old marked line for about 15 chains in the direction of 4, of apparently the same age as the marked line 1, 2 and 2, L; at the end of the 15 chains the old marked line gives out, but the same surveyor, at the instance of the defendant, and in continuation, as defendant stated, of the old line survey made by Henry Elliott, went on to 4, and there placed a

stake with pine pointers as a corner, in place of a gum, which defendant stated to a witness used to be there.

These statements were made by defendant, in presence of plaintiff, while the survey ordered for this trial was going on. The survey made by McLean was made two years ago. There was nothing at 5 to indicate a corner except a stake, which McLean set up in a field cultivated by plaintiff. It was reached by following course and distance called for as 4th line in defendant's deed, but is on the north side of Reedy branch, instead of on the south side as called for. By running the lines from 3 to 4, and from 4 to 5, the small pond referred to in the deed from Henry Elliott to defendant, and indicated on the plat midway between 5 and N, would be included in defendant's boundary but it would not be interfered with by defendant's deed if his lines were run from L to M, and M to N. The defendant's deed calls for 155½ acres, more or less. By running the outside line as claimed by him, and thus including the disputed part, he would get by surveyor's estimate 153 acres. By running the inside lines L M and M N, and thus leaving out the disputed part, he would get but 123 acres—the disputed part containing 30 acres.

It was also in evidence for the defendant, that the distance from 2 to L is 38 chains, whereas the second line of his deed calls (488) for 45 chains, and it was agreed by all the surveyors examined, that if the line L M was reversed as to course and distance, it would stop at L, but that in reversing from L, if the whole distance called for was run, the line from L would extend 7 chains beyond 2, the admitted second corner of defendant's deed. The defendant also proved that his deed was in the handwriting of Henry Elliott, now dead; that Elliott kept surveying instruments, and sometimes did his own surveying, but usually got Surveyor McCormick to do difficult surveying for him.

In reply to defendant's evidence, it was in evidence for the plaintiff that in 1858 the defendant pointed out to the witness, Surveyor McCormick, the stake and oak pointers at L, and told him that Henry Elliott had marked the lines, and had made the corner at L, as a corner of his land; also that defendant pointed out a gum pointed at M, which he said Elliott had marked as a corner; the gum at that time being as large as a man's leg, which gum had since rotted down, but the stump still remaining; also that defendant pointed out a pine marked as a corner with gum and maple pointers in the Reedy branch at N, which are still there, and told witness that Elliott had marked them as a corner. In the conversation alluded to the defendant did not specify the day when Henry Elliott marked these lines and corners, whether

before or after the conveyance, but merely stated the fact. The plaintiff also proved by all the surveyors that there was a marked line from L to M, running the course and distance called for as the 3d line of defendant's deed, apparently as old as the line from 1 to 2 and from 2 to L, that at M, on the south side of Reedy branch, there was a gum stump and gum pointers; that there was an old marked line from M to N running the course and distance called for as the 4th line of defendant's deed; that at N is a pine marked as a corner, with gum and ma-
(489) ple pointers on the Reedy branch. It was also in evidence, that upon the recent survey no sign of a gum could be found at 4, which was high and dry land; it was in proof, however, that gums are short lived trees, that there was clearing and ditching and burnt woods in that locality. It was also proved that the defendant, in the lifetime of Henry Elliott, had complained of his not getting his complement of land, and after Elliott's death, which occurred several years ago, had complained to his executor about it; that they had engaged a surveyor to ascertain the deficiency with a view of its being settled for, and that the defendant had dropped the deficiency from his tax list. The corners L, M and at F, were apparently as old as the agreed corners. The plaintiff offered to introduce a deed from Smith and Elliott (the same parties under whom he claimed), to the defendant, dated 4 February, 1858, for a tract of land adjoining the land of the plaintiff and the defendant's 155½ acre tract, being part of the land conveyed to them in the Henry Elliott deed; it was offered with the avowed purpose of fixing the 3d corner of defendant's 155½ acre tract at the point L.

The defendant's counsel objected to the evidence for such purpose, and asked his Honor to exclude it.

His Honor remarked that he would admit the evidence, but would reserve his opinion as to its legal effect. The deed was read in evidence. There was no dispute as to its location. It is designated on the plat. Its beginning corner is the same as the beginning corner of the 155½ acre tract of the defendant, at 1 or O, which is the same, then to P, then to John Elliott's corner, then to D, then to E, then to F, then G, then to H, then to I, then to J, then to K, then south 60 degrees east 6 chains 65 links to a stake and pointers, his own corner; the course and distance leading towards L, the distance would fall short 25 links as measured, then with his own line to his corner at 2, and then to the beginning.

His Honor afterwards being of the opinion that the taking of this deed by the defendant was evidence of a recognition by him of
(490) the dividing line between him and the plaintiff to wit: the line

running from D, by the various courses up to L, and as such, ought to go to the jury, upon the question of the location of the corner at L, as a circumstance to be considered by them, and also being of opinion that the plaintiff was entitled to submit evidence of this act of the defendant (taking such deed) as confirmation of the evidence of Surveyor McCormick in regard to the statement of the defendant about this very corner at L. Upon these considerations his Honor refused to exclude the evidence, and defendant excepted.

The plaintiff proved by a witness, Angus Shaw, that on one occasion after the defendant had obtained his deed from Henry Elliott for the 155½ acres, that witness was present with defendant on the land, upon which occasion the defendant complained that Elliott had not given him his complement of land.

The plaintiff then offered to prove by this same witness that upon the same occasion the defendant pointed to a bunch of gums 60 or 70 yards distant from where they were standing, and remarked to witness that Elliott had made "a corner in those gums and hadn't given him his complement of land."

To the reception of this evidence the defendant objected. His Honor remarked that the objection was well taken, unless the particular corner pointed out was identified. The witness then testified that the bunch of gums referred to stood at the mouth of a small branch where it empties into Reedy branch. Surveyor McCormick was then called to the witness stand and testified that the locality of the gum corner at M; where the defendant had showed him the gum the size of his leg, marked as a corner by Elliott, and where the gum stump is still to be found corresponds with the description of the spot spoken of by the witness Angus Shaw. Upon this proof as to the identiy of the corner being made his Honor admitted the proposed proof; and the witness Angus Shaw testified accordingly.

The defendant excepted. The defendant's counsel asked for the following special instructions to the jury:

1st. That the land of the defendant should be so located as to enclose within its boundaries the small pond mentioned in the (491) deed from Henry Elliott to Torquil Shaw, January 19, 1855, and reserved for the benefit of Smith & Elliott's steam mill."

This instruction was declined. Defendant excepted.

2d. That as 155½ acres of the land were reserved by Henry Elliott in his deed to Smith & Elliott, as before that time sold and conveyed to Torquil Shaw, that defendant's land should be so located as to secure to him that quantity of land.

The instruction was declined; defendant excepted.

His Honor thinks it proper to add that the circumstances of the reservation of the 155½ acres was pressed before the jury by defendant's counsel, and his Honor was of opinion that this was the only use that could be legitimately made of it.

3d. That at the time of making the deed, 19 July, 1855, the second line extended from figure 2 to the figure 3, that being the point where the distance gave out.

His Honor declined giving this instruction to the jury, and charged them as follows:

The corner at 2 being an admitted corner of the Torquil Shaw 155½ acres, that after reaching 2 they would go the course called for, admitted to be along the marked line leading from 2, and they would also go the distance called for in the deed 45 chains to 3, where the distance gave out, unless, before getting to 3 the distance was controlled by a corner established at the making of the deed, and indicated by some natural object, as trees marked as pointers. That if from the evidence submitted to them they were satisfied that such corner existed at L, as contended for by the plaintiff, then they should stop at L, as the 3d corner of the deed.

That if they were not satisfied that L was such corner, but were satisfied from the evidence that M was the 4th corner called for as a small gum and gum pointers on the south side of the Reedy branch, with a marked line leading to it according to the course and distance
(492) called for, then to ascertain the 3d corner they might reverse the line from M and the point of intersection with the line running from 2, which, according to all the surveyors, would be at L, would be the 3d corner, and the fact likewise testified to that running back from L to 2, the distance called for 45 chains would extend 7 chains beyond 2 would make no difference, they would stop at 2, which is an agreed corner.

That if they were not satisfied either in regard to L or M being such corners, then there was nothing to control the distance called for on the second line, but they would go the whole distance, 45 chains, and stop at 3 as the 3d corner.

Defendant excepted, both because his Honor declined to give the instructions asked for and because of the instructions actually given.

Under these instructions there was a verdict for the plaintiff, and from the judgment rendered thereon the defendant appealed.

Neil McKay, for the plaintiff.
B. & T. C. Fuller and *W. McL. McKay,* for defendant.

PEARSON, C. J. The evidence: 1. For the reasons stated by his Honor we think the deed from Elliott and Smith to defendant, dated 4 February, 1858, was admissible evidence.

2. The testimony of Shaw was properly admitted. It would have been more forcible had the witness himself identified the tree. The fact that it was done by another witness only weakens it in degree, but does not exclude it as incompetent.

3. The same remark is applicable to the evidence as to the apparent age of the line trees from 2 to L, and from L to M, and from 1 to 2. True, direct evidence that these trees were marked at the making of the deed would have been much stronger, so if the trees had been blocked and found to correspond this natural evidence would have been stronger, but surveyors can form an opinion from the external appearance, whether trees have been recently marked, or whether it is (493) an "old marked line," so they can form an opinion whether the lines are of the same age. This furnishes natural evidence, weaker, in degree, but competent and fit to be considered by the jury.

The instructions asked for:

1st. The instruction asked in regard to the small pond was properly refused. The wording of the deed leaves it uncertain whether the line was near to the pond, but so as not to take it in, or whether the fourth line did take in the pond, and the purpose was to except it out of the land granted. Suppose the latter to be the proper construction. That would not settle the dispute between L and 3, which is "the point in the case"; for running to M, if course and distance is then to be controlled by the pond as a natural object, it will be met by a diagonal line from W to 5, thence with the branch, so that natural object will be taken in without disturbing any but the fourth line, and without touching the land in dispute.

2d. The instruction that the land must be located so as to include 155½ acres, was properly refused. The defendant had all the benefit of it that he was entitled to, as a circumstance that might be considered by the jury in determining questions of boundary.

3d. The instruction asked for is covered by the charge.

His Honor told the jury that the distance called for must be observed and the line run to 3, unless the distance was controlled by a corner established at the making out of the deed and indicated by some natural object, "as trees marked as pointers." A tree marked as a corner con-

trols distance; this is settled, and the same reason applies to trees marked as pointers, to a corner at a stake, particularly where there is a marked line going off from the spot indicated according to course and distance of the third line, leading to another corner and pointers. So the only point in the case is, was there evidence for the jury as to the (494) trees marked for pointers, and as to the marked line trees? The declaration of the defendant and the other evidence certainly warranted his Honor in leaving the matter to the jury.

His Honor instructed the jury that if M was established as the fourth corner the line might be reversed so as to find the corner at the intersection with the second line. The only objection to this is that it would seem to be superflous, for it is not reversing merely the course, but here we have a line of marked trees, and supposing M to be established, it would make but little difference whether you follow the line from M to L, or went to M and followed the marked line back to L, and it could only be natural from the fact that at M a small gum was marked as a corner and gum pointers on the south side of the Reedy branch," whereas at L the call was for a *stake* with pointers. The main point was that at L there was a tree marked as a pointer, and that in running the next call, according to course and distance, you had a line of marked trees leading to M, another corner. Our decision is that a tree marked and called for as a pointer, with a line of marked trees leading to another corner will control distance. Our case is stronger than *Safret v. Hartman,* 52 N. C., 199, for here the fact of there being trees marked for pointers is set out in the deed.

The principle of controlling distance by natural objects is based on the fact that it is easier for a mistake to be made in regard to distance than in regard to a tree marked as a corner, or a tree marked as a pointer and called for in the deed, and marked line trees, so in case these several modes of description do not correspond, the less certain is to give place to the more certain.

PER CURIAM. No Error.

N. B. This case was prepared at January Term, but for want of a diagram was not reported.

Cited: Norwood v. Crawford, 114 N. C., 522.

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