[*Citations Include 166 N. C.*]

NORTH CAROLINA REPORTS

VOL. 68

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

JANUARY TERM, 1873

TAZEWELL L. HARGROVE, REPORTER.

ANNOTATED BY
WALTER CLARK
(2nd Anno. Ed.)

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" Eq.	"	62	"

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AT JANUARY TERM, 1873.

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HON. EDWIN G. READE,

HON. THOMAS SETTLE,*

HON. WILLIAM B. RODMAN,

HON. NATHANIEL BOYDEN.

*Commissioned by the Governor, on the 5th day of December, 1872, in place of the Hon. R. P. DICK, appointed by the President Judge of the U. S. District Court for the Western District of North Carolina.

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CASES REPORTED

CASES CITED

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

JANUARY TERM, 1873

JOHN G. BLOUNT, Commissioner of the Bank of Washington, v. R. C. WINDLEY.

1. The maker of a note due a bank has the right to tender in payment of such note, as equivalent to gold and silver coin, the bills issued by the bank.
2. A bank can not, by assignment of its effects, choses in action, etc., deprive a maker of a note due the bank of his right to pay the same with the bills of the bank; nor can the bank, by any authority derived from the Legislature, deprive the maker of such right of payment of a note due the bank, in bills of the bank.

APPEAL from *Watts, J.*, at Spring Term, 1872, of BEAUFORT, upon the following case agreed.

At Fall Term, 1866, of the Court of Equity for Beaufort, upon the petition of the stockholders of the Bank of Washington, there was a decree of that Court, vesting all the real and personal property and choses in action of the Bank of Washington in the plaintiff, as commissioner, pursuant to the act of the General Assembly, ratified March 12, 1866, for the benefit of such of the creditors of said bank as proved their debts within twelve months. The notices and advertisements required by the Act were complied with.

At Fall Term, 1867, of BEAUFORT, plaintiff obtained judgment against one A. T. Reddett, and the defendant, who was his surety, (2) on a note for $1,735.50, payable to the cashier of the bank for money borrowed, with interest from 1 November, 1867, and for costs, and execution was duly issued thereon, returnable to Fall Term, 1868. Subsequent to the issuing of this execution, the defendant, Windley, ob-

tained bills of the Bank of Washington sufficient to cover the debt, and tendered them to plaintiff in payment thereof, which were refused. He then deposited said bills with the clerk of the Superior Court of Beaufort County, who received them, not in payment of the judgment, but subject to the order of the Court in the case.

At Fall Term, 1868, there was a motion in the cause to set aside the judgment, which motion remained pending until Spring Term, 1872, and then on the hearing was refused.

At Spring Term, 1872, there was a motion on behalf of the defendant to have the bank bills of the Bank of Washington, theretofore deposited with the clerk of the Court, received in payment of the judgment against the defendant, and the same declared satisfied, which motion was allowed by his Honor, who directed the clerk of the Court to receive said bills of the Bank of Washington as a payment of the judgment against the defendant, and to enter satisfaction of the judgment of record.

From this order, the plaintiff appealed.

Haywood for appellant.
Phillips & Merrimon, contra.

PEARSON, C. J. *Bank v. Hart,* 67 N. C., 264, the right of the defendant to have "the bills of the bank" applied in payment of a judgment in favor of the bank; is conceded; and the only question was, as to the allowance of interest upon the bills from the time at which
(3) the defendant had demanded to have the bills received in satisfaction of the judgment; it is decided that interest should be allowed. *Bank v. Tiddy,* 67 N. C., 169, the principal question was, as to the right of the defendant to have "the bills of the bank" applied in satisfaction of the judgment. It is decided, "on payment of the bills into Court, satisfaction of the judgment be entered of record." No notice is taken of the effect of making Baldwin a party plaintiff as receiver, and the case is made to turn on the point, that as against a bank, chartered in another State, suing citizens of this State in the courts of this State, the defendant is entitled to have the bills of such bank applied in satisfaction of the judgment. So between the bank and its debtors, the question may be considered to be settled. In our case, the action is in the name of Blount, who is the assignee of the bank, and the point made is, that the defendant has not the right to have the bills of the bank applied in payment as against the assignee. In *Mann v. Blount,* 65 N. C., 99, an opinion is intimated by the Court that the defendant is entitled to the same right as against the assignee, that he would have had against the bank, had the note not been assigned. But it was not necessary to decide the point, as the matter went off upon an objection to the mode of

procedure, and although the subject was then discussed, we were willing to hear further argument, treating it as an open question.

The assignment of the note by the bank to Blount is not made by endorsement, as provided by the Statute of Ann, "in like manner as inland bills of exchange, according to the custom of merchants of England": Revised Code, chap. 13, sec. 1; but, as we will assume for the sake of the argument, by a general deed of assignment, conveying all of the effects, choses in action, etc., of the bank to Blount, in trust for the creditors of the bank, *pro rata,* who elect to take under the deed. So, the learning in respect to the legal effect of the endorsement of a bill (4) of exchange, or promissory note, according to the custom of merchants in England, before maturity, or after maturity, has no application to our case; and we will not enter into a consideration of the point, whether the endorsee of a note, before maturity, made to a bank, has a right to compel payment in gold or silver coin, and is relieved from the right of the maker to pay the note in the bills of the bank, which right he certainly had, as against the bank; or whether the endorsee, after maturity, of a note made to a bank, has a right to compel payment in gold and silver coin, or is subject to the right of the maker to use the bills of the bank in discharge of the note, as a right which had attached at the date of the endorsement; for, in either case, if the maker has not the same right as against the endorsee, that he would have had against the bank, it results from the effect given to the endorsement, "by the custom of merchants in England," with which we are not now concerned.

Nor, will we enter into a consideration of the point, in respect to the law of set off whether the defendant must hold the "mutual demand," at the time of the assignment, or at the commencement of the action, or at the time of plea pleaded, or at the trial; for, ours is not a question of set off, but a question as to the right of a bill holder to use the bills of the bank, as a legal tender, equivalent to gold and silver coin, *in satisfaction of a debt due to the bank.*

The neglect of advertence to those diversities is the cause, as it seems to us, of the obscurity and confusion in which the question is involved in many of the cases. See *Bank v. Knox,* 19 Gratton, 739; 3 Wend., 13; 8 Watts & Serg., 311; 1 Ohio, 381. It certainly is the main fallacy of the very labored argument of the plaintiff's counsel in this case.

Nor will we enter into a consideration of the point, how the question would have been had the payee of the note been an in- (5) dividual or a corporation *other than a bank, chartered for the purpose of supplying a currency in the shape of bills of the bank, to circulate as the representative of money.* For here, the payee is such a bank.

The question will be considered in four points of view:

1. Did the maker of the note have a right to tender *the bills of the banks* in payment, as equivalent to gold and silver coin, or had the bank a right to compel payment in gold or silver coin, and to refuse to accept its own bills in payment of debts due to it?

This is too plain for discussion. The object of incorporrating the bank was to furnish *a currency,* and as a condition for the grant of this franchise, or exclusive privilege, the law "tacitly" annexed the condition (using the words of Lord Coke), that the bank would receive its own bills in payment of debts due to it.

So, when the note was made, there was this condition implied by law, *as a part of the contract,* just as forcible as if set out in the face of the note, "the bills of the bank will be accepted in satisfaction of this note, as equivalent to gold and silver coin;" and carrying out the idea, as if every ten dollar bill had been stamped, "equal to $10, in gold, in payment of debts due to the bank." Assuming this to be so, it is said, "tender of money must be pleaded, and the money be brought into Court, which, of course, must be done before judgment."

Here we have another instance of the confusion of ideas by the introduction of irrelevant learning. The defendant does not propose to avail himself of a right common to every defendant, when there is a controversy as to the amount due, to tender money and bring it into Court. He takes the broad ground of a right as a part of the contract, to pay this debt in the bills of the bank, and that the bank has its mouth shut by estoppel, and by the maxim, "no one shall take advantage of
(6) his own wrong." So it can make no difference whether the bills of the bank, which are, as against the bank, to be treated as equivalent to gold and silver coin, are tendered before or after judgment. Surely a debtor can discharge his debt, by a tender of gold and silver coin, at any time before the sheriff sells under execution. As against the bank, the bills of the bank are to be treated as equivalent to gold and silver coin. At the common law, when execution had not issued within a year and a day, the plaintiff was required to issue a *sci fa.,* to give the defendant a day in court, show cause if an execution issued within the year and a day, the defendant, in order to get a day in court, sued out a writ of *audita querela,* and in either case, as good cause why execution should not issue or should be superseded, and satisfaction be entered of record, it was enough to show, that he had tendered the amount of the judgment in gold and silver coin, or its equivalent. In *Bank v. Tiddy,* the application of the bills of the bank was allowed at the time when the judgment was entered. In *Bank v. Hart,* the application was allowed after the judgment had been rendered. In neither case, was it suggested, that the act of 1869 violated the constitutional provision, as to "legal tender," for the plain reason that *the bills of the*

bank are made a legal tender by the act of the parties, as a part of their contract, and as a necessary incident to an undertaking, to supply a circulation to pass as money. The legislation on the subject was treated as declaratory, and in affirmance of the right of the defendant to have the bills of the bank applied in satisfaction, and to provide a mode of procedure.

2. Did the bank, by its own act, have the power to deprive the maker of the note of this right, and by a general assignment of its effects, choses in action, etc., to the plaintiff, in trust for such of its creditors as should elect to claim under the deed, to put it in the power of the trustee, or assignee, or commissioner, to compel the maker of the (7) note to pay in gold and silver coin, instead of the bills of the bank? A statement of the proposition would seem to be sufficient for its solution, if the idea of the endorsement of negotiable paper according to the law merchant, and the doctrine of set off, which, as we have seen, has nothing to do with the question, be kept out of view. It takes two to make a bargain, and it takes two to rescind it. The bargain was, that the bank would receive its bills in payment of the debt. The defendant is ready to comply with his contract, and has never agreed to forego this right. Why shall he not use it against the assignee, in the same way that he could have used it against the bank, had there been no assignment? That is the question.

We assume that the bank has executed a general deed of assignment in trust for creditors, which is the most favorable view for the plaintiff, and such we will suppose to be the legal effect of the decree of the Court of Equity, set out in the case, in connection with the act 12 March, 1866, under which the bank went into liquidation. Suppose, then, that the bank had executed a general deed of assignment, in trust for creditors, to be paid *pro rata,* what is the effect of the assignment? To vest in the plaintiff all of the rights of the bank for the benefit of such creditors as may elect to claim under the deed; but how can that affect or impair the rights of bill holders, who did not concur in the arrangement, or the rights of debtors of the bank, to pay debts due to the bank, in its bills as equivalent to gold and silver coin? In other words, on what principle of law or equity can the assignee or the creditors be put on higher ground than the bank occupied in respect to the right of the debtors of the bank to tender its bills, in satisfaction of debts due to the bank? *

The endorser of a negotiable instrument before maturity, stands on higher ground than the payer, by the law merchant, but that has no application to a deed of assignment in trust for creditors. A (8) purchaser for valuable consideration without notice, who takes a deed from a trustee, passing the legal title, is not subject to the trust, and stands on higher ground than the trustee, by the rule in equity,

"when equities are equal the legal title prevails"; but that doctrine has no application to a deed of trust for the benefit of creditors, for two reasons: 1st. The legal title in choses in action does not pass, so the rights and equities stand as before; 2d, Neither the trustee nor the creditors are purchasers for valuable consideration within the meaning of the rule. The trustee pays nothing. The creditors pay nothing, nor do they surrender any right; they merely concur in an arrangement, by which they hope to secure some portion of their debts. The idea of a "purchaser," who pays nothing in money, or in money's worth, is absurd. The fact is, that all that has heretofore been claimed, or conceded to assignees in trust for creditors, is, that the deeds of assignment should not be deemed and held to be voluntary and fraudulent under the statute, 13 Elizabeth, as against creditors. After much hesitation, in opposition to the ruling of the courts in England, it was held that the *bona fides* of the creditors, secured by the deed of trust, relieved it from the imputation of being voluntary and fraudulent, as against creditors and in that sense the deed was to be treated as made for valuable consideration and not void as a fraudulent arrangement; but the notion that the trustee, or the creditors could occupy the ground of being purchasers for valuable consideration, without notice, entitled to stand on higher ground than the maker of the deed of trust is novel, and we should say is absurd, were we not forbidden by the respect due to the decisions of some of our sister States, cited on the argument. *Ingram v. Kirkpatrick,* 41 N. C., 463; *Wallenger v. Coutts,* 3 Minn., 707.

(9) By confounding the distinction between deeds, which will not be treated as voluntary, and for that reason, fraudulent, and void as against creditors, under 13th Elizabeth, and deeds to purchasers for valuable consideration, in fact paid, without notice of a trust, a plausible argument is made in support of the position, that the assignee or trustee, and the creditors claiming under the deed, are entitled to a higher position, than the bank could have occupied. Our opinion is, that the assignee and creditors stand "in the shoes of the bank." The position, that by the effect of the deed of assignment, the debt ceased to be a debt due to the bank to be satisfied by "the bills of the bank," and became a debt due to the creditors of the bank, exempt from that right, is a conclusion illogical and unsatisfactory.

3. Could the bank by the aid and concurrence of the General Assembly, deprive the maker of this right, by a transfer of the note, going into liquidation, and surrendering its charter? "No State can impair the obligation of a contract." When this contract was made, a part of it was, that the maker had the right to pay the note in the bills of the bank; he has never forfeited that right. How, then, can the General Assembly and the bank, by any kind of combination and confederacy, alter the contract, and force the maker to pay in gold and silver coin,

when he is ready, able and willing to pay in the bills of the bank. You say, he did not pay, when the note fell due; but he is willing to pay the interest, and has it ever before been heard of, that because a debtor does not pay at the day, that gives the General Assembly power to alter the contract and strike out one important part of it, even although the bank has been unfortunate and is compelled to go into liquidation, and is earnestly desirous to divide its funds, as far as they will go, among its billholders and its depositors, all being honest creditors. Can the misfortunes, or the shortcomings of the bank, put it in the power of the General Assembly to alter the contract of the defendant, and take from him a "vested right?" If requested to consent to divide the loss with another class of creditors, he says, when I incurred the debt, (10) it was a part of the contract, that I was to be at liberty to pay it, in the bills of the bank; you deposited your money solely on the faith you had in the bank, knowing that all of its debtors had a right to pay debts in its bills at all events, I feel at liberty to stand upon my rights, under the contract, and the bank cannot by its own action or with the aid and concurrence of the General Assembly, alter the contract.

4. Has the General Assembly concurred with the bank, in this attempt to deprive the defendant of his right to pay the debt in the bills of the bank? So far from doing so, the act of 1 March, 1866, and the ordinance of the Convention 22 June, 1866, both being before the bank made its transfer, expressly reserved the right of the debtors of banks to pay in the bills of the bank; and the act 12 March, 1866, under which the Bank of Washington went into liquidation, must be construed, in reference to the act passed only two days before, as is declared and affirmed by the ordinance 23 June, 1866, with notice of which the bank made the transfer; and as is also declared and affirmed by the acts 12 March and 17 December, 1869, and 4 March, 1871, all of which declaratory acts show, that it was not the intention of the General Assembly to continue and coöperate with the bank, to aid it, in an attempt to deprive the defendant of his right to pay off his note in the bills of the bank; on the contrary, these latter acts are so strong, that the argument for the plaintiff is bound to get rid of them, by asserting that they are unconstitutional, as impairing rights acquired under the transfer of the bank.

No one can read the legislation upon the subject, without being convinced that the General Assembly, so far from intending to deprive the holders of bills of banks, of the right to use them in payment of debts due to the bank, there is a constant and earnest endeavor to preserve that right, and to provide ways for its exercise, as well (11) after as before judgment.

BOYDEN, J., dissents.

PER CURIAM. Affirmed.

WILSON B. FEREBEE v. THE N. C. MUTUAL HOME INSURANCE COMPANY.

1. Parol evidence is admissible to explain a receipt, given by an agent of an Insurance Company, for the premium on a policy of insurance against loss or damage from fire.
2. An Insurance Company is not bound by any private arrangement entered into by their agent, acting without the knowledge or authority of the company, in respect to the payment of the premium on a policy of insurance. Especially is this so, when the company, instead of affirming the action of the agent, gives notice to the assured, to "pay his note when due, and save his policy."
3. Although an Insurance Company may waive the right to declare a policy void, for the reason, that a note given for cash premium is not paid at maturity: still, such waiver does not preclude the company from insisting upon a condition contained in the policy, declaring it void, in case of loss or damage by fire, if the note so given, or any part thereof, shall remain unpaid and past due, at the time of such loss or damage.

APPEAL from *Pool, J.*, at Fall Term, 1871, of CAMDEN.

In his complaint, the plaintiff alleges, that in January, 1870, the defendants through their accredited agent, Dr. R. K. Speed, insured his dwelling-house and furniture against loss or damage by fire, to the amount of $1,999, and also his barn and the corn therein, to the further amount of $267, all of which was covered by one policy of insurance that he duly fulfilled all the conditions contained in the policy, and that his said dwelling with most of the furniture was destroyed by fire, on 18 August, 1870, for which damage he demanded judgment, etc.

(12) In their answer, the defendants admit the issuing of the policy upon the application of the plaintiff, but deny that the conditions therein set out, were ever performed by the plaintiff, or that any consideration was ever paid by him for the risk undertaken by the company. The loss and damage as alleged by plaintiff were established on the trial below.

In support of their answer, the defendants offered in evidence a note executed by the plaintiff, and payable on 1 April, 1870, to the Secretary of the N. C. Mutual Home Insurance Company, for $30.83, "for value received," etc.; and proposed to prove by Dr. Speed, the agent of the company, that at the time of the plaintiff's application for insurance, the note was executed by him as a premium note, and the plaintiff distinctly informed, if the same was not paid at maturity, the policy issuing on the application would be void. The introduction of the note, and the testimony of the agent—for the reason that the contract of insurance was embodied in the application, note and receipt, which were in writing—were objected to by the plaintiff, but received by his Honor; the plaintiff excepted.

In reply, the plaintiff offered in evidence a receipt, signed by the agent, Dr. Speed, purporting to have received the sum of $30.42, "on account of premium on insurance against fire, for which an application is this day made," etc.; and testifying himself, that at the time of the application, the agent, Speed, was indebted to him, and that upon his approaching him about insuring his property, that he, the plaintiff, stated he would do so, if he could use in payment of his premium the amount that he, Speed, owed him. That the agent said, "that would be all right," and gave him the note to sign, which he did, taking the receipt above alluded to. The plaintiff testified further that he did not read the note, nor did he understand, that he was giving a premium note, and thought that he was getting a cash receipt, and that the note was given for the accommodation of the agent himself. (13) That he was not informed at the time, if the note was not paid at maturity, the policy would be void. Upon his cross-examination, the plaintiff admitted that he had received a notice from the company in the usual form, dated before the maturity of the note and headed, "Pay your premium note and save your policy," or words to that effect, and subsequently had received two similar notices dated respectively in April and June. That he did not pay the note after receiving the notices; but sheltering himself under the receipt of the agent, considered, that so far as he was concerned the note was paid. The evidence as to the indebtedness of the agent, Speed, to the plaintiff, as well as to the understanding between the agent and plaintiff at the time of the application for insurance, is contradictory, yet immaterial in the decision of the case, for the reason, that his Honor held, that even, upon his own showing, the plaintiff could not recover.

Among the instructions asked by the plaintiff, the most of which were immaterial to the issue, he asked his Honor to instruct the jury, "that if the note given by him was regarded by defendants as a premium note, the defendants should within a reasonable time after its maturity, have canceled it in whole or in part, and notifying plaintiff that his policy was void, offered to surrender the note. That from April to June was not a reasonable time." This instruction his Honor refused, and charged the jury, that upon the facts as proved, the plaintiff could not recover.

Verdict for defendants. Rule for a new trial; rule discharged. Judgment in favor of defendants for costs; and appeal by plaintiff.

Batchelor & Son for appellant.
Battle & Son and *W. N. H. Smith, contra.*

SETTLE, J. We are of opinion, that the defendant had a right to introduce parol evidence to explain the receipt produced by (14) the plaintiff. But the charge of his Honor relieves us from all

questions, as to the admissibility of testimony, for it says in effect, that the plaintiff is not entitled to recover upon the case which he has proven. So the action stands before us, as it would have done, had there been a demurrer to the evidence.

The plaintiff alleges in his complaint, that the defendant insured his property against fire; on 10 January, 1870; that his property was destroyed by fire, on 18 August, in same year, and that he (the plaintiff) duly fulfilled all the conditions of said insurance on his part. Is this true?

(15) It is not pretended that the plaintiff paid his premium in cash, but he admits that he gave to the company what is known as a premium note, which fell due on 1 April, 1870.

He alleges, and we are to take it as true, that there was a private understanding between Speed, the agent of the company, and himself, that Speed should pay this note to the company, in consideration of prior indebtedness from Speed to himself. But there is nothing to show, that Speed had authority from the company to make this arrangement, as to his private indebtedness, nor is there anything to show, that the company knew of this conduct on the part of their agent; and certainly it has done nothing to affirm his promise to the plaintiff, or to accept his liability for that of the plaintiff.

The company incurred risk, and rested under liability to the plaintiff, from 10 January to 1 April, when his note fell due. And the liability of the company continued after that date, provided the plaintiff had paid the premium, at any time before the fire; but there is an express stipulation in the policy, which bars the right of the plaintiff to recover, inasmuch as the premium was unpaid and past due at the time of the loss. "No insurance, whether original or continued, shall be considered as binding, until the actual payment of the cash premium. But when a note is given for cash premium, it shall be considered a payment, *provided the notes are paid when due.* And it is hereby expressly stipulated and agreed, by and between the parties, that in case of loss or damage by fire, to the property herein insured, and the note given for the cash premium, or any premium or any part thereof, *shall remain unpaid and past due at the time of such loss or damage, this policy shall be void and of no effect.*"

Here is an unmistakable condition, agreed upon by the parties to this policy and the plaintiff tells us that he received three notices

(16) from the company, one before the maturity of his note, and two afterwards, calling upon him to "pay his premium and save his policy." So he was not left in ignorance of the fact, that Speed had failed to comply with his private arrangement; on the contrary, the plaintiff had repeated notice, that his note was still unpaid and past due.

The plaintiff risked everything upon his private arrangement with Speed, and paid no attention to the warnings of the company. This was his misfortune, and he is now left to his action against Speed for damages; but has no claim upon a company with which he contracted upon certain conditions, which conditions have never been fulfilled on his part, although he was repeatedly requested to do so.

But it was insisted upon the argument, that the defendants had waived their right to treat this policy as void, since they did not cancel, nor return the plaintiff's note, after it fell due. Granting for the argument that there was a waiver of the stipulation that the note should be paid on the first day of April, it can not be maintained that there was a waiver of the further stipulation, "that in case of loss or damage by fire to the property herein insured, and the note given for the cash premium, or any premium or any part thereof, shall remain unpaid and past due at the time of such loss or damage, this policy shall be void and of no effect."

PER CURIAM. No Error.

Cited: *McCraw v. Ins. Co.*, 78 N. C., 155; *Isler v. Murphy*, 83 N. C., 219; *Sexton v. Ins. Co.*, 157 N. C., 144; *Sexton v. Ins. Co.*, 160 N. C., 599.

(17)

BOYLSTON INSURANCE COMPANY, of Boston, and others, v. JOHN D. DAVIS.

Where A. enters into an agreement with B. to save from a wrecked vessel as much of the cargo as could be saved, and B. agrees to allow him, A, for his service, such a per cent of the property saved, as compensation; and in pursuance of such agreement, A. recovers from the wreck a portion of the cargo and lands it on the beach in a place of safety: *Held*, that A. and B. are tenants in common of the property so saved, and that the undivided share of A. is liable to be seized by the sheriff under a warrant of attachment.

ACTION, for the recovery of certain iron saved from the wreck of the ship "Pontiac," tried before *Clarke, J.*, at the Fall Term, 1872, of CARTERET.

The plaintiffs, Marine Insurance Companies, claimed title to the property sought to be recovered, by virtue of the following agreement, entered into by their duly accredited agents, B. L. Perry and E. H. Faucon, that is to say:

"It is agreed between B. L. Perry and E. H. Faucon, parties of the first part, and John Lewis, of the second part, that the said Lewis is to use all his means and skill necessary, and that he is possessed of, or can

procure, to get from the wreck of the late ship "Pontiac," now under water, off and near the Core Banks, or Beach, all the property of whatever description, or so much of it as he can possibly at any time succeed in obtaining, and land it in the store or freighthouse at Morehead City.

"It being understood and agreed that the said Lewis is to receive three-quarters, or seventy-five per cent of the whole, and the said Perry and Faucon the remaining one-quarter, or twenty-five per cent, and is to go into the possession of said Perry, one of the parties of the first part, and resident in Beaufort, N. C.; and the division of the property recovered is to be made in the presence of ....., with the consent of the said Perry; and in case of his sickneess or otherwise unable to
(18) act, then the said Perry shall appoint some one to act in his place, and to give his receipt for the property so received, and with a description and memorandum of it.

"And the said Lewis, of the second part, engages to use his best diligence in working at the above-named property, whenever the condition of the weather and sea permit him to do so. And it is also agreed, that if said Lewis, of the second part, choose to receive his three-quarters here, as it may be brought in and divided, or to let it go forward undivided to a market, which will be the port of Boston, Mass., with the other quarter, he shall be allowed to do so—he, the said Lewis, of the second part paying his proportion of duties and all the other expenses that may accrue in forwarding the property north, and the finally disposing of it. Said Lewis to draw at sight for whatever he may be entitled to, on being notified of the closing of any account of sales.

"Beaufort, N. C., March 6, 1871."

(Signed by Perry & Faucon, agents, and Lewis.)

In pursuance of the agreement, Lewis raised a quantity of iron from the wreck and placed it on the beach. Before the iron was removed from the beach, and a short time after it was taken from the wreck, an attachment was issued at the instance of one Martha Lambert, from the Superior Court of Carteret County, against said Lewis, and placed in the hands of the present defendant, sheriff of said county.

At the January Term, 1872, of the Court, judgment was rendered in favor of the plaintiff in the attachment, upon which execution issued, commanding the iron to be sold, etc. Before this execution came to the hands of the defendants, the plaintiffs commenced this action, claiming the iron, and giving the necessary undertaking, took the same into possession.

On the trial, the jury rendered a verdict in favor of the plaintiffs; and a judgment condemning the property to the use of the plain-
(19) tiffs, was entered up by the Court; from which judgment the defendant appealed.

J. H. Haughton and *Hubbard* for appellant.
Green for plaintiffs.

RODMAN, J. The main question is, did Lewis, by virtue of his (20) contract with the plaintiffs, acquire a property as a co-tenant with them, in the iron saved by him, which was liable to levy under execution against him? We think he did. It depends altogether on the intent and meaning of the written contract. It was contended that this did not amount to a sale of an undivided share of the iron, as, and when it was recovered and put in a place of safety, but that it was merely executory until the iron should be carried to Morehead and divided in the presence of Perry.

To seek for the meaning of the parties in a contract not accurately or technically drawn, by considering particular words or phrases in it, which incline more or less to either one side or the other, though in some cases necessary, rarely gives a clear and satisfactory result. It is in general safer to draw a conclusion from the circumstances of the contracting parties and the general provisions of the instrument. If, in this case, the plaintiffs had agreed to pay Lewis a certain sum per ton of iron saved, he would, in the absence of a contrary agreement, have had a lien upon the iron for the sum earned. The actual agreement was, that he should have an undivided share in lieu of a certain sum and a lien. But this share could not be a security in the nature of a lien, unless a property in the share passed to him at once. The provisions for the iron being carried to Morehead and there divided, or sent to Boston for sale, at the pleasure of Lewis, are not conditions precedent to the vesting of the property, but merely provisions for its division, and directing its disposition after it should have become common property. We consider that Lewis was a tenant in common with the plaintiffs in the iron, while it laid on Core beach. Now, it is settled law, that a sheriff may sell under execution the undivided share of a tenant in common in goods, and for that purpose he may seize the whole. *Blevins v. Baker,* 33 N. C., 291. His right is the same as respects the seizure, and as far as concerns this question, under an attachment, (21) as it would be under final process. In the case cited, the officer divided the common property and sold only the share of the defendant in execution. In England it is held that a sheriff, under an execution against one partner, may seize all the goods of the partnership, and may sell the interest of the insolvent partner in them, to be ascertained, on the taking of the partnership account, but that he ought not to deliver the goods to the purchaser, so as to exclude the possession of the solvent partners. Lindley on Partnership, 584. How this may be in North Carolina, and whether the same rule would apply to the case of

goods held in common, but not in partnership, it is unnecessary to inquire.

It is equally well settled that a sheriff who seizes goods under execution, acquires the property of the defendant in the execution in them. The defendant thus became *pro hac vice* a tenant in common with the plaintiff. It is also settled, that one tenant in common can not maintain any action to recover the possession of the common goods from his co-tenant. Each is equally entitled to the possession of the whole. *Powell v. Hill,* 64 N. C., 169.

The judgment below is reversed, and as the plaintiffs have obtained possession, the case is remanded to that Court, in order that a judgment may be given there, in conformity to this opinion, and that such further proceedings be had as the law requires. The defendant will recover his costs in this Court.

PER CURIAM. Judgment reversed.

Cited: *S. c.,* 70 N. C., 485; *S. c.,* 74 N. C., 78.

(22)

W. J. CRITCHER v. D. B. HODGES.

1. A charge, "that while in all cases, it was pleasant to reconcile testimony, here there was no chance to do so. That one or the other of the parties, it was plain, had committed perjury; and the jury must meet the case fairly, and decide which of the parties had sworn to the truth," gives no intimation whatever from his Honor, which witness the jury are to believe, and is, therefore, no ground for a new trial.
2. *Quaere*—Whether a defendant, in a summary proceeding to recover possession of land, can, by order of the Court, be compelled to give a bond.

APPEAL from *Henry, J.,* at Fall Term, 1872, of WATAUGA.

The action, a summary proceeding to recover possession of land, commenced in a Justice's Court, from whose judgment the plaintiff appealed. In the Superior Court, there was a verdict and judgment against the plaintiff, and he again appealed.

The facts are stated in the opinion of the Court.

Folk for appellant.
Todd, contra.

BOYDEN, J. This was a civil action, commenced before a Justice of the Peace, under the Landlord and Tenant act.

It was admitted, that the defendant entered into the premises, as the tenant of the plaintiff, under a written lease for twelve months, dated 7 October, 1870; that the term for which the defendant entered had expired, and that there had been a demand for possession and a refusal to surrender, before the commencement of this action.

The defendant in his answer admitted, that the written lease of 7 Oct., 1870, had expired, but alleged that he and the plaintiff, in September, 1871, had made a verbal agreement, continuing the lease for another term of twelve months. The plaintiff denied this second (23) lease.

The Justice decided the case in favor of the defendant, and the plaintiff appealed to the Superior Court. At the term when the appeal was filed, the plaintiff moved for an order that defendant enter into bond to pay the costs and damages, if he should fail to establish his defense. His Honor made the order. We are not aware of any authority for this order. The case states, that under the order, the defendant gave a bail bond. At the trial term, no objection was taken to the form of the bond given by the defendant, and the parties went to trial, and the jury gave their verdict in favor of the defendant. The plaintiff's counsel then moved the Court for judgment against the defendant, which was refused, for the reason, that the motion comes too late. As the verdict was against the plaintiff, he has lost nothing by the defendant's failure to give the bond, even if the Court had the right to make the order, which we do not admit.

The charge of his Honor, to which exception is taken, is in the following language: "That while in all cases, it was pleasant to reconcile testimony, here there was no chance to do so. That one or the other of the parties it was plain, had committed perjury, and the jury must meet the case fairly, and decide which of the parties had sworn to the truth." There is in this language not the slightest intimation on the part of his Honor which witness they should believe, as in *S. v. Thomas,* 29 N. C., 381, and in *S. v. Presley,* 35 N. C., 494. The plaintiff and defendant were the only witnesses. The plaintiff swore "there was no other lease, or agreement for a lease, written or verbal, by which the tenancy was or could be continued." While the defendant swore "to a verbal lease in September, 1871, continuing the tenancy twelve months longer." Upon this evidence, we regard the charge of his Honor the same as far as the verdict of the jury was concerned, as if he had said here is a direct conflict of testimony, which can not be reconciled, and it is for the (24) jury to determine which party they will believe. How was this charge calculated to prejudice the cause of the plaintiff? Could the defendant have assigned the same error, had the verdict been against him? Why not, if the plaintiff can, when it was against him? We think his Honor left the question fairly to the jury to decide which they would believe.

The cases cited by plaintiff's counsel have no bearing upon the point in this case.

PER CURIAM. No Error.

J. M. WEITH and GEORGE ARENTS v. THE CITY OF WILMINGTON.

1. The records of a public corporation are admissible in evidence generally. Their acts are of a public character, and the public are bound by them.
2. The corporate powers of cities and towns are emanations from the State, granted for purposes of convenience, and they are not allowed in the exercise of those powers to contravene the policy of the State, or exceed the powers conferred, and much less those which are either expressly or impliedly prohibited.
3. Therefore, where the city of W. in 1862, borrowed money from A and gave him a bond, which money was used indirectly in aid of the rebellion, and A, before the bond became due, transferred it to B without notice as to its consideration, and the city in 1867, by virtue of an Act of Assembly, took up the bond, and issue to B in its place other bonds with coupons attached, who afterwards sells the coupon bonds in open market, for a fair price, and without any notice as to the illegality of the original consideration, to C. In a suit by C. against the city, to recover the coupons on the bonds purchased from B.: *It was held*, that C could not recover, for the reason, that all bonds of a like nature had been declared void by the ordinance of the Convention of 1865, and the payment of the same was thereby, and by sec. 13, Art. VII, of the Constitution, prohibited, and as being against public policy.
4. Bonds issued by municipal corporations, under their corporate seal, payable to bearer, are negotiable, and are protected in the hands of the rightful owner, by the usages of commerce, which are a part of the common law.

(25) ACTION, tried at June Term, 1872, of NEW HANOVER, before *Russell, J.*

The plaintiffs commenced their action before a Justice of the Peace, demanding the payment of certain coupons attached to bonds issued by defendant, under "An Act to enable the City of Wilmington to provide for the debt of said city contracted prior to 1866," ratified 27 February, 1867. Judgment was rendered by the Justice in favor of the plaintiffs, and the defendant appealed to the Superior Court.

On the trial in the Court below it was in evidence that the plaintiffs purchased the bonds, to which the coupons sued on were attached, in open market in the city of New York, giving therefor full value (the market price), and that the purchase was made before the bonds or coupons became due; and that the plaintiffs had no notice of anything affecting the validity of the bonds or coupons, and were *bona fide* holders of the same, for value, without notice.

The defendant offered in evidence the record of the proceedings of the Mayor and Board of Aldermen of the city of Wilmington, for 1862 and 1867, for the purpose of showing, that the bonds before alluded to, were delivered to James Dawson, in payment of a bond made to John Dawson, 19 May, 1862, for $10,000; and that this bond of $10,000 was given to John Dawson for money advanced by him, to be used, and which was

used by the city in aid of the rebellion. To the reception of this evidence the plaintiffs objected. It was permitted by his Honor, and the plaintiffs excepted.

It was also in evidence for the defendant that the bond of $10,000, of 19 May, 1862, to John Dawson had been transferred to James Dawson, and that it was in payment of this bond, that the ten bonds for $1,000 each, were issued to James Dawson, and that the coupons sued on were detached from some of the same.

There was also evidence on the part of the plaintiffs, that (26) James Dawson purchased the bond ($10,000), from John Dawson, in June, 1862, before its maturity, and paid the full amount of the same, principal and interest, in Confederate money; that he purchased without any notice of the purpose for which the money had been loaned by John Dawson to the city, or to what use the money had been applied by the city, or without notice of anything affecting the validity of the bond. There was further evidence tending to show, that the claim of James Dawson had been referred to a committee of the Board of Aldermen to ascertain the consideration of the original $10,000 bond, and to determine whether it was a just and legal claim against the city. That the committee reported the claim to be due and owing by the city, and the Board after examination approved it, and exchanged the bonds (coupon) therefor.

Several instructions were asked by the counsel for both parties, all of which appear in the opinion of the Court.

His Honor charged the jury, "That if they should find that the bond of $10,000 given to John Dawson, of 19 May, 1862, was for the loan of money in aid of the rebellion, and should further find, that this bond had been transferred to James Dawson, and that if it was in payment of this bond held by James Dawson, that the city bonds sued on, were issued and disposed of by the Board of Aldermen, that then the said bonds were void and the plaintiffs could not recover."

His Honor also charged, that "the plaintiffs could not recover, even if the jury should further find, that James Dawson purchased the John Dawson bond before it became due, for full value and without notice, and that afterwards, in pursuance of the act of the Assembly referred to, the Board of Aldermen had audited and approved the James Dawson claim, and had issued the bonds sued on in payment thereof; and though the jury should further find, that the said bonds so issued as aforesaid, had come into the hands of the plaintiffs as inno- (27) cent holders, that they purchased the same in open market, for full value and without notice. For, the bonds being void in their inception, would be void into whosoever hands they might come." To this charge of his Honor the plaintiffs excepted.

The jury returned their verdict for the defendant. Rule for a new trial; rule discharged. Judgment against plaintiffs for costs, and appeal by them.

Strange, and *Wright & Stedman* for appellant.
London, contra.

READE, J. 1. The defendant offered in evidence the records of the proceedings of the city council, and the first question is, as to their admissibility.

Such writings are denominated in the books, "official registers," and are divided into two classes, viz.: official registers of corporations of a private nature, and official registers of corporations of a public nature.

The records of *private* corporations are admissible, as between the members thereof, but not as against strangers. This is the general rule, subject to some exceptions, which it is not necessary to consider. The records of *public* corporations are evidence generally. Their acts are of a public character, and the public is bound by them. 2 Greenl. Ev., 484.

Among the records so admissible, are expressly enumerated, "the books of record of the transactions of towns, city councils and other municipal bodies." The corporation of a city, and municipal (28) corporations generally, differ from private corporations. They more nearly resemble the Legislature, acting under a constitution prescribing its powers. Their acts are of a public character, and the confidence given to them is founded on the circumstance, that they have been made by authorized and accredited agents, appointed for the purpose, and on the publicity of their subject-matter.

We are of opinion that the records were properly admitted in evidence.

2. The second question is, whether the bonds sued on are void by reason of the illegality of the consideration.

The facts are, that John Dawson advanced money for the city of Wilmington to obstruct the river in aid of the rebellion, and that the city gave him a bond to secure the money so advanced, and that John Dawson transferred the bond to James Dawson for value, and without notice of the illegal consideration; and then the city of Wilmington gave to James Dawson the bonds sued on, in substitution for the John Dawson bond; and then the plaintiffs bought the bonds in the market for value, and without notice of any illegality.

We will first consider the case, as if it were between individuals—as if the city of Wilmington, the defendant and maker of the bonds, were an individual. We would then have this case: A executed to B a negotiable instrument, the consideration of which is illegal, so that it is

voidable by A as against B; and B transfers the instrument to C for value and without notice. Can C recover of A upon the instrument? It is settled that he can. The only exception is, where the illegality is by statute, which provides that the instrument shall be void, not only as against the maker, but into whosoever hands it may fall. And this is the only difference between considerations *malum in se,* and *malum prohibitum.* The maker is liable, under the law merchant, for the safety and benefit of trade and commerce. *Henderson v.* (29) *Shannon,* 12 N. C., 147; *Mercer Co. v. Hacket,* 1 Wallace, 83. And see other cases cited by plaintiff's counsel.

But if this were not so, if the assignee for value and without notice, of the negotiable paper, could not recover upon the original paper against the maker, the maker being an individual, still there is another view of the case to be considered. This action is not upon the original paper, but the original paper was surrendered to the defendant by James Dawson, the assignee of the obligee, and the present bond taken in its stead. That presents this case: A wins money of B at cards, and takes a bond. A assigns the bond to C for value and without notice of the illegality. And B gives C a new bond for the amount, and takes up the original bond. Can C recover of B upon the new bond? Clearly he can. There is no illegality in the consideration of the new bond. B did not give it to C to secure money won at cards, but he gave it to secure the money which C paid A for it. It is true B was not obliged to pay A, but then he had the right to pay him, if he chose not to insist upon the illegality; and C having paid A, B had the right to ratify the payment and to give C a new bond, not upon the original gaming consideration, but upon the new consideration of the money paid by C to A; and for this *Calvert v. Williams,* 64 N. C., 168, is an express authority.

Leaving out of view, therefore, the fact that the defendant is a corporation, the plaintiffs would be entitled to recover, whether he is to be considered as the assignee for value without notice, of the original bond, or whether he is to be considered in the still more favorable position of the assignee for value, and without notice, of the new bond which was given in consideration of the money advanced by James Dawson to John Dawson in payment of the original bond.

3. It is objected that no recovery can be had upon the bonds sued on, for the reason that they are not payable to any person on their face, but are payable to *bearer.* And such was the common law. (30) And in *Marsh v. Brooks,* 33 N. C., 409, it is said, that although a bill or promissory note may be made payable to A or bearer, yet a *bond* can not. That, being a deed, must be made to some *certain* obligee, to whom it may be delivered. But it would seem that this distinction is no longer observed, and the contrary doctrine is clearly established by numerous decisions and elementary writers. And in *Mercer Co. v.*

Hacket, 1 Wallace, 83, the Supreme Court of the United States is amusingly contemptuous and indignant at the idea that this "technical dogma of the Courts and of the common law" should be set up to defeat "modern inventions for the necessities of commerce."

"This species of bond is of modern invention," says the Court, "intended to pass by manual delivery, and to have the qualities of negotiable paper and their value depends mainly upon this character. Being issued by States and corporations, they are necessarily under seal. But, there is nothing immoral or contrary to good policy in making them negotiable, if the necessities of commerce require that they should be so. A mere technical dogma of the Courts, or the common law, can not prohibit the commercial world from inventing, or using, any species of security not known in the last century; usages of trade and commerce are acknowledged by Courts as part of the common law, although they may have been unknown to Bracton and Blackstone. When a corporation covenants to pay to bearer, and gives a bond with negotiable qualities, and by this means obtains funds for the accomplishment of the useful enterprises of the day, it can not be allowed to evade the payment, by parading some obsolete judicial decision, that a bond, for some technical reason, can not be made payable to bearer."

Without being favorably impressed by its severity against *ancient landmarks,* we follow the decision, as establishing a convenient
(31) and useful principle. It will be observed that the decision only extends to bonds of *corporations.* The seal of a corporation is not used so much to distinguish the *character* of the instrument, as it is to *authenticate* it. It takes the place of a witness. There is no force therefore in the objection, that the bonds are payable to bearer.

4. We come now to the main question: does the fact that these bonds were made by a corporation, distinguish them from the bonds of an individual? We have seen that if they had been the bonds of an individual, and had gone into the plaintiffs' hands as an innocent holder for value, the plaintiffs would be entitled to recover; for, an individual has the right to give a bond founded on an illegal consideration, and although he is not obliged to pay it, yet he is not obliged to plead the illegality, but may waive it, and may pay the bond; and if it goes into the hands of an innocent holder for value, then he is obliged to pay it, notwithstanding the original illegal consideration; and if he gives the innocent holder a new bond, it shall not be understood to be upon the old consideration, but upon the new consideration of the money paid for the bond. Yet, the question is, do these considerations hold good, where a *corporation* is the maker?

The general rule is, that a corporation can do only what it is authorized by law to do so. If it does anything else, its act is void; and that without regard to the question of turpitude. It is true, that where the

corporation has *power* to act in the subject-matter, irregularities or errors as to formalities, will not violate; but if the *power* to do the thing in any form be wanting, then, of course, the act is void, in whatever form done. We must inquire then, whether the city of Wilmington, the defendant, had the *power* to issue these bonds, or to renew them, or to pay them?

In considering this question, it is necessary to keep in view the following ordinances of the Convention of 1865, and the following provision of the State Constitution: "That all debts or obligations created or incurred by the State in aid of the rebellion, directly (32) or indirectly, are void, and no General Assembly of this State shall have power to assume or provide for, the payment of the same or any part thereof." Ord. October 19, 1865.

"No county, city, town or other municipal corporation shall assume or pay, nor shall any tax be levied or collected for the payment of any debt, or the interest upon any debt, contracted directly or indirectly in aid or support of the rebellion." Const., Art. VII, sec. 13.

It will be observed that the original bonds to John Dawson were issued in 1862, before either the foregoing ordinance or the constitution was adopted. It is proper, therefore, to consider how that fact affects the question.

Why was it that the Convention of 1865 ordained that the State should never pay any debt contracted in aid of the rebellion? And why was it provided, in the constitution of 1868, that neither the State nor any municipal corporation, should ever pay such debts? Evidently, because the considerations were illegal, and it was against public policy for the rightful government, after its rehabilitation, to pay, or allow to be paid by its municipal corporations, which are but parcels of the State, any debt contracted by the rebel authorities. Suppose, then, that there was no such ordinance, and no such provision in the constitution as quoted above, and suppose the city of Wilmington had issued its bonds, or levied a tax to pay the original claim of John Dawson; and suppose the question had come before the Court, either by the city refusing to pay the bonds, or by the tax-payers resisting the tax, would this Court, sitting to maintain and administer the laws of the rightful government, enforce the payment of the debt? Clearly not. And why not? Because it would be against public policy. And the Court would hold, that the city authorities had no power to issue the bonds, and no power to tax the citizens to pay them. But our case is (33) stronger than that; for although the debt was contracted, and the bond to John Dawson given before the ordinance of 1865, yet the policy declared was that it should not be *paid,* although it had been contracted. It is true that the ordinance only declares that the *State* shall not pay such debts, and does not, in terms, expressly include towns,

cities, etc. But towns and cities are parcels of the State; their corporate powers are emanations from the State for purposes of convenience, and it could never be allowed that they should contravene the policy of the State, or exercise powers not conferred, much less such as are either expressly or impliedly prohibited. But our case is even stronger than that; for the constitution in express terms includes towns and cities, and forbids them to pay, or levy any taxes to pay, any debt contracted in aid of the rebellion. It not only declares that it was unlawful to *contract* the debt, but that it shall be unlawful to *pay* it. And the tax-payers, by a proper proceeding, could enjoin its payment. This would not be so if the debt had been valid in its inception. In that case it would have been in conflict with the constitution of the United States to impair its obligations.

But the plaintiffs insist that the act of 1867, expressly authorizes the city of Wilmington to issue the bonds to pay its debts contracted prior to 1866, and that the bonds sued on were issued under that act. The plaintiffs must remember that this cuts both ways, as it deprives them of all advantages, from the fact that their bonds are upon a better footing than the original debt; for, if their debts are to be considered as contracted at the date of the bonds in 1867, then they do not fall under the class which the act authorizes the city to give bonds for. But we do not think that the act authorized the city to issue bonds to pay this debt; for the reason that the State had declared by a solemn or-
(34) dinance that such debts ought not to be paid. The act only intended such debts as the city justly owed and ought to pay.

6. And then it is insisted by the plaintiffs that it was for the city council to determine *what* debts it justly owed and ought to pay; and that its determination of that question is conclusive. It may be admitted that if it had so determined, its action would be *prima facie* evidence of the fact—nothing more. But it appears from the records of its proceedings that it found the facts to be precisely the other way. It set forth the fact that the debt was contracted in aid of the rebellion, viz: putting obstructions in the river, and then it issued bonds to pay it nevertheless.

By the proceedings 19 May, 1862, it is set forth that John Dawson had advanced money, $10,000, to obstruct the river, and it is ordered, that a bond issue to him for that amount. And by the proceedings of 7 November, 1867, it is set forth, that James Dawson enclosed a copy of the John Dawson bond to the city council and claimed to be the owner thereof. And it was referred to a committee to ascertain the primary consideration. And by the proceedings of 9 January, 1868, they order that the present bonds issue to James Dawson, in liquidation of the note held by him from the Commissioners of the town of Wilmington, dated 19 May, 1862, and the subject of a communication from him presented

to the Board, 7 November, 1867. It will be observed that the ordinance of 1865 not only forbids the *payment* by the State of debts contracted in aid of the rebellion, but it declares the debts *void*. If debts contracted by the State are void, are not like debts contracted by a city, which is parcel of the State, void? And have the city authorities the power to tax the citizens to pay a void debt? And when the act of 1867 authorized the city to issue bonds to pay its debts contracted prior to 1 Jan., 1866, did the act mean its *void* debts? Of course not.

The case has been considered, as if the plaintiffs were holders for value and without notice; and the case was so put to the (35) jury. But it is certainly a very liberal view for the plaintiffs; for the bonds recite that they were issued to secure debts contracted prior to 1 January, 1866, and as the rebellion had existed during four or five years preceding that time, common prudence would have suggested the inquiry, whether they were in connection with the rebellion. But our decision is not affected by that consideration.

PER CURIAM. No Error.

Cited: Glenn v. Bank, 70 N. C., 206; *Davis v. Commissioners,* 72 N. C., 445; *Brickell v. Commissioners,* 81 N. C., 243; *S. v. Tenant,* 110 N. C., 612.

THE FARMERS BANK OF N. C. v. R. W. GLENN and wife.

1. Our Courts as at present constituted, administer legal rights and equities between the parties, in one and the same action: *Hence*, in an action for a breach of covenant, it is competent for a defendant to show any equity affecting the measure of damages.
2. In an action for the breach of a covenant of seizin, the general rule, that the vendee recovers, as damages, the price paid for the land, with interest from the time of payment, is subject to many modifications, as where his (the vendee's) loss, in perfecting the title, has been less than the purchase-money and interest, he can only recover for the actual injury sustained.
3. And if, after the sale to the vendee, the vendor perfects the title, such subsequently acquired title inures to the vendee by estoppel; which, being a part of the title, may be given in evidence without being specially pleaded.

ACTION, tried at Fall Term, 1872, of GUILFORD, before *Tourgee, J.*

The case agreed by counsel for both parties, and sent to this Court as part of the record, is substantially as follows:

The action is brought to recover damages for the alleged breach of a covenant contained in a deed, made and delivered by the defendant Glenn and his wife to the plaintiff, an incorporated bank, on 28 De-

cember, 1868, for the expressed consideration of $2,000. The
(36) covenant, alleged to have been broken, reads, "and we do further covenant that we are seized of the premises in *fee simple* and have power to make and convey such an estate by this indenture, and have done the same by these presents."

The complaint of the plaintiff alleges, that, at the time the deed was made, the defendants were not seized in fee of the land purporting to be conveyed, and had no power to convey a *fee simple* therein for that they, the defendants, had on 28 December, 1867, one year before delivering the said deed to the plaintiff, executed and delivered a deed in *fee simple* for the same land to Wilson & Shober, to secure a debt due them by the defendant, R. W. Glenn, for $1,600, payable in ninety days. Upon failure of the defendant to pay this debt of $1,600 to Wilson & Shober at maturity, to-wit: within ninety days after 28 December, 1867, the deed to them was to become absolute and unconditional. That the debt was not paid at the expiration of the ninety days, and the deed became absolute as therein expressed.

In his answer, the defendant, R. W. Glenn, admits the execution of the deed as alleged, and the failure to pay the debt at maturity. But says that after the mortgage was made to Wilson & Shober, he, with their consent, sold 217 acres of the land, and applied $1,000 of the purchase-money to their debt, Wilson & Shober releasing to the purchaser their claim on the land so sold. And further that he afterwards sold to them a steam saw-mill, of value sufficient to extinguish the remaining balance of the $1,600 debt. That the plaintiff's agent knew these facts, and that the covenant, the breach whereof is complained of, was inserted in the deed to the plaintiff as a mere form, and was never intended to be relied upon. The defendant also produces from Wilson & Shober a release to him of their right and claim to said lands of date 19 February, 1870. This action was commenced 13 January, 1870.

(37) The other defendant, the wife of R. W. Glenn, files her separate answer, disclaiming any interest whatever in the land, except probably the contingent one of dower, and prays that the complaint be dismissed as to her with costs.

In his reply, the plaintiff denies the allegations of the answer as to knowledge of the deed to Wilson & Shober, and as to subsequent transactions set up by defendants as a defence and relying upon the covenant and warranty, demands damages $2,000 and interest.

On the trial the plaintiff read the deed to the bank, made by the defendants 28 December, 1868.

The defendants, as to the question of damages, offered to prove that the mortgage to Wilson & Shober was known to the plaintiff at the time the deed was accepted by the bank. This evidence was objected to by plaintiff, and ruled out by the Court. The defendants then offered

to prove that the debt to Wilson & Shober had been paid, and that on 19 Feb., 1870, they executed a release, and that this release had been tendered to plaintiff and rejected. This evidence was objected to, but admitted by the Court, and the plaintiff excepted. The defendants further proved that the plaintiff had leased the land during 1869 and 1870; and that in a certain deed of trust, made 23 February, 1871, by plaintiff to secure creditors, this same land was conveyed, and also the plaintiff's interest in any damages which might be recovered in this action. The introduction of this evidence was also objected to by plaintiff, but allowed by the Court and exception taken.

The plaintiff proposed to prove a want of knowledge as to the mortgage to Wilson & Shober; and that they sometime after still relied upon the mortgage as security for the payment of the debt due them. This evidence was objected to, and ruled out, and the plaintiff again excepted.

The plaintiff asked the Court to instruct the jury: 1. That the measure of damages due to the plaintiff for the breach of the (38) covenant assigned, was two thousand dollars with interest from the date of the deed, less sixty dollars received as rent; or, 2. At least the damages should be sixteen hundred dollars, with interest from the date of the mortgage deed. These instructions his Honor refused, and the plaintiff excepted.

His Honor instructed the jury, that the plaintiff was entitled to recover nominal damages only, as he had alleged and proved no special damage. In obedience to the instructions, the jury rendered a verdict in favor of the plaintiff, assessing the damages at one penny. Judgment for the same and for costs. Plaintiff appealed.

W. A. Graham, for appellant.
Dillard, Gilmer & Smith, and *Scales & Scales, contra.*

SETTLE, J. The plaintiff seeks to recover damages for a breach of a covenant of seizin. The breach is admitted, and the only question for decision is, one as to the measure of damages.

The record raises some questions of evidence, which, in our view of the case, it is unnecessary to consider; for the Courts, under our present system, administer legal rights and equities between the parties, in one and the same action; and as soon as the plaintiff established a breach of the covenant, it was competent for the defendant to show any equity which would affect the measure of damages.

As soon as the deed was delivered, there was a breach of the covenant, which entitled the plaintiff to sue, and recover such damages as he had sustained. As a general rule, the vendee recovers the price paid for the land, with interest from the date of payment, but this rule is subject to many modifications; for instance, when there is only a partial breach of

the covenant, in consequence of a want of seizin in a part only of
(39) the land conveyed; here, it is said that a jury should assess the damages, having regard to the circumstances of the estate, and deducting from the price paid the value of that portion of the land as to which there was no breach.

And again, if there be an outstanding, paramount title, which the covenantee purchases in, he is not entitled to recover the whole of the purchase-money, with interest, but only the amount paid to perfect the title, with interest from the date of payment. In other words, where the loss has been less than the purchase-money and interest, the plaintiff can recover only for the actual injury sustained.

Mr. Sedgewick, in his work upon the measure of damages, page 177, comments with approbation upon the ruling in *Baxter v. Bradbury,* 20 Maine, 260, which is an authority directly in point upon the case under consideration. In that case, the defendant perfected his title to a part of the land conveyed, after the execution and delivery of his deed to the plaintiff; and he perfected title, as in our case, to another part of the land after the plaintiff had commenced this action; and yet the Court held, that the plaintiff was entitled to nominal damages and nothing more, since he had not been disturbed in his possession. The subsequently acquired title was held to inure to the grantee by estoppel. The same objection to evidence was made in that case as in ours, but it was ruled to be admissible; the Court saying, "the estoppel being part of the title, may be given in evidence without being pleaded." The plaintiff does not stand in a very graceful attitude before the Court, when it seeks to recover the purchase-money after its title to the land has been perfected, and when it has, by a deed in trust, conveyed the same land to secure the payment of its debts. The bank is seeking to have the land and also the purchase-money. To allow it to do so, would be grossly inequitable.

PER CURIAM. No Error.

Cited: Farmer v. Daniel, 82 N. C., 159; *Price v. Deal,* 90 N. C., 295; *Hallyburton v. Slagle,* 132 N. C., 955; *Eames v. Armstrong,* 142 N. C., 517; *Walker v. Taylor,* 144 N. C., 178; *Eames v. Armstrong,* 146 N. C., 9; *Van Gilder v. Bullen,* 159 N. C., 296.

(40)

JAMES F. WINSTEAD and wife NICEY v. J. A. STANFIELD, Guardian, and others.

1. When a guardian makes no effort to invest his ward's money at a profit, but uses it in his own business, he converts it, and is liable for its value at the time of the conversion. And having received Confederate money and bank notes, he is liable for the value of the same at the date of receipt, the former to be ascertained by the scale, and that of the latter upon evidence.
2. The conversion by a guardian to his own use of bonds or notes belonging to his ward, renders him liable for their actual value, not the value expressed on the face of the same.
3. Upon the marriage of a *feme* ward, compound interest ceases, and she has no right to demand the same in a settlement with her guardian.

ACTION, tried at Fall Term, 1872, of PERSON, before *Tourgee, J.*

The suit was brought on the guardian bond given by the defendant, J. A. Stanfield, and the other defendants, his sureties, as guardian of the *feme* plaintiff, Nicey, wife of the other plaintiff, James F. Winstead, and was tried below upon exceptions filed by both parties to the report of the referee. His Honor sustained the only exception of the plaintiffs to the report which was not withdrawn, and overruled those of the defendants. The defendants appealed.

The points presented, with the exceptions, and the evidence pertinent thereto, are stated in the opinion of the Court.

W. A. Graham for appellants. (41)

No counsel for plaintiffs in this Court.

RODMAN, J. We have to remark, that the questions which it was intended to present are nowhere stated clearly and precisely. There is no collected statement of the facts either by the referee or the Judge; and to ascertain what they were assumed to be, it is necessary to compare the evidence and the report of the referee.

It appears from the evidence of the guardian himself (which appears to be the only evidence bearing directly on the questions), that on 24 December, 1862, he received in Confederate money $1,000, and in notes on individuals $492.65. On 2 November, 1863, he received $300 in Confederate money, and $228.66 in bank bills. On 1 January, 1864, he received $446.50, being negro hire, in Confederate money. One-half of these sums belonged to his ward, the present *feme* plaintiff. He also received for his said ward (when, does not appear), $300 for equality of partition. In January, 1864, he sold $150 of the bank bills for $412.58 in Confederate money. On 22 March, 1864, he invested $1,000 in a Confederate bond, in the name of his ward. The defendant further says that he did not keep the money of his ward separate from his own;

and that he loaned out some of it in his own name, and used some of it in his own business. He does not state how much of it he so loaned or used, as he might have done, and consequently it must be presumed most strongly against him. On this state of facts, the principles to be applied are sufficiently clear.

1. When a guardian makes no effort to invest his ward's money at a profit for her, but uses it in his own business, he converts it, and is liable for its value at the time of the conversion. In this case the guardian is chargeable with the value of the Confederate and bank
(42) notes which he received at their value at the time of receipt; that of the former to be ascertained by the scale, and that of the latter upon evidence. As it does not appear that he made any effort to loan them out, the conversion must be taken to have been contemporaneous with the receipt. As to the sale of the $150 in bank bills, for $412.58 in Confederate money, nothing need be said, because he had previously converted the bank bills, and made them his own, whereby he became liable for their value. For the same reason he is not entitled to any credit for the $1,000 Confederate bond. After conversion, the fund was at his risk and he was absolutely responsible for its safety.

2. As to the individual notes received by him, it does not appear when, or under what circumstances he collected them. His liability in respect to them, depends on circumstances which do not appear.

When we turn to the account, we find the first charge to be for one-half of $1,503.77, received 24 December, 1862. Although these figures do not exactly correspond with the amount of Confederate money and individual notes which the defendant says he received on that day; yet, we suppose they were intended to include those two amounts, treating the individual notes as equal to Confederate money. The charge then would be $751.88, which the referee, as we suppose, reduced by the scale to gold, and then by adding 12½ per cent for the depreciation of the present currency, made the amount $337.50. The plaintiff excepts to this method of treating it, and contends that the defendant is chargeable with the face value of the Confederate money and individual notes, instead of their actual value. His Honor sustained this exception, and after having modified the report accordingly, gave judgment for the plaintiff. As to the individual notes, we have stated above the rule applicable to them. As to the half of $1,000 received in Confederate money, we are somewhat at a loss as to the reason of his Honor's
(43) ruling. We suppose it was because the guardian had converted the fund. But we find no authority that a conversion by a trustee can make him liable for anything more than the actual value; and it seems unreasonable that it should. The ward should be in no worse or better plight than if the guardian had performed his duty. If indeed the guardian had acted *mala fide* in receiving Confederate money from

the executor, the question would be different, but there is no suggestion of that.

3. The defendants except that the ward was allowed compound interest after her marriage. The question is expressly decided in favor of the defendants in *Wood v. Brownrigg,* 14 N. C., 430.

The judgment below is reversed, and the case remanded for such further proceeding. The defendant will recover costs in this Court.

PER CURIAM. Judgment reversed.

ELI C. KEERANS and others, Ex'rs, etc., of JANE BROWN, and others, v. DEMPSY BROWN and others.

One of the subscribing witnesses to a will being asked on his cross-examination, if he had not, a short time before the execution of the will, exprssed to the other subscribing witness doubts of the capacity of the testatrix to make a will, and on that account hesitated to sign the will as a witness, and having denied using any such expressions: *Held,* that evidence contradicting the witness in regard to such conversation, was admissible, not on the ground of its tending to prove capacity or incapacity in the testatrix, but for the purpose of discrediting the witness, by showing that he had made different statements to his evidence on the trial, upon a matter pertinent to the issue.

DEVISAVIT VEL NON, tried before *Tourgee, J.,* at Spring Term, 1872, of RANDOLPH.

On the trial below, the caveators offered evidence, which being (44) objected to by the propounders of the will, was ruled out by the Court. To this ruling of his Honor the caveators excepted; and the jury finding the issues in favor of the will, it was adjudged by the Court to be established; from which judgment the caveators appealed.

Other facts in the case presenting the point decided, are fully stated in the opinion of the Court.

Ball & Keogh, and *Gorrell* for appellants.
Dillard, Gilmer & Smith, and *Scott, contra.*

READE, J. The complaint states that "the plaintiffs are ready to prove that the last will and testament of Jane Brown, deceased, was duly signed, sealed, published and declared by the said Jane Brown, on 13 September, 1866; and that a codicil to the same, ratifying and confirming the said last will and testament, and appointing an additional executor, was duly signed, sealed, published and declared by the said Jane Brown, on 4 January, 1871; and plaintiffs demand of caveators the ground of their opposition," etc.

The defendants answer, among other things, that the alleged testatrix was incapable of making a will.

And the main issue was,

"2. Was she mentally capable to do the act?"

The plaintiffs introduced the subscribing witnesses to the will of 13 September, 1866, and they testified that she was capable.

1. For the purpose of impeaching one of the subscribing witnesses, Rush, he was asked on the cross-examination if he had not, a week before he witnessed the will, expressed his doubt of the capacity of
(45) the testatrix to the other subscribing witness, Frazier, and hesitated to witness it on that account. He answered in the negative. Frazier was then called and asked, whether Rush had not told him so? The question was objected to by the plaintiff and ruled out by the Court.

The question is, as to the competency of the question. It presents the common case of conflicting statements of the same witness about the same matter, pertinent to the issue. The question was clearly proper. *Radford v. Rice,* 19 N. C., 39.

The argument at this bar was, that the issue was as to capacity at the time of signing the will, 13 September, 1866, and not as to her capacity a week before. True, but to prove that she was incapable a week before might at least *tend* to prove that she was incapable at the time of signing. But the object of the question was misconceived. It was not to prove the want of capacity a week before, but to discredit the witness, by showing that he had made statements as to her capacity a week before, which he denied on trial. And that was pertinent to the issue; as incapacity a week before *tended* to prove incapacity at the time of signing the will. And his denial on the trial of what he said about capacity shortly before the trial, tended to the discredit of the witness.

2. It was further insisted here that the evidence was immaterial, inasmuch as it was not necessary to prove the formal execution of the will of 13 September, 1866, or the capacity of the testatrix; because the codicil of 4 January, 1871, ratified and confirmed the will of 13 September, 1866. That may be true. It may be that if the plaintiffs had proved the codicil as required by law, they need not have offered the subscribing witness to the first will, or proved the capacity of the testatrix at the time of its execution, or offered any other evidence as to the original will, except to identify it as the paper referred to in the codicil.
(46) But then it does not appear that they proved the codicil at all, or that they offered any other evidence than the subscribing witnesses to the will of 13 September, 1866. But suppose they did offer evidence of the execution of the codicil, it may be that the testimony as to her capacity at the execution of the will of 13 September, 1866, had its influence with the jury in passing upon the codicil.

We think there was error in rejecting the evidence.

PER CURIAM. *Venire de novo.*

LEWIS M. POLLOCK v. THOMAS WILCOX and JOHN ANDREWS.

1. When the contents of a writing come collaterally in question, such writing need not be produced, but parol evidence as to its contents will be received.
2. Where two notes, a part of the consideration in the purchase of a tract of land, had been destroyed by the payer after a settlement, in the usual course of business: *Held*, that such need not be produced on a trial, impeaching the consideration of the deed for fraud, and that parol testimony of their contents was properly allowed. *Quære*, as to the admissibility of the evidence, if the notes had not been lost?

ACTION to recover possession of land and damages, tried before *Clarke, J.*, Fall Term, 1872, of JONES.

The plaintiff claimed the land in question under a deed from the Sheriff of Jones County, who sold the same under a judgment and execution for $1,004 against the defendant Wilcox, issued from the Superior Court of said county, at Spring Term, 1870. The plaintiff showed that Wilcox was in possession of the land at the time of the Sheriff's sale, and remained in possession until 1 January, 1872.

The defendant Andrews, who, on motion, had been made party (47) defendant, read in evidence a deed from the other defendants, Wilcox and his wife, made to him 24 November, 1868, for the land in dispute, which deed had been duly proved, and registered in December following; and in which a consideration of $1,750 was acknowledged to have been received. It was also in evidence, that immediately after the execution of the deed and the private examination of the wife, at the residence of one Mrs. Franks, the grantor and grantee, the present defendants, went to the house of W. H. Bryan, the Register of Deeds of Jones County, a short distance across the street, to get him to calculate the interest on two notes, which Wilcox, the grantor, had agreed to receive in part payment for the land that immediately upon the calculation of the interest, Andrews, in the presence of Bryan, paid Wilcox $200 in cash, and the balance of the first payment, to-wit: $250, he paid in the notes of Wilcox, and one Neathercut, the payment of the latter being by him, the said Andrews, guaranteed. At the same time, he gave Wilcox two notes, for $650 each. Plaintiff objected to the introduction of parol evidence concerning these notes, which objection being overruled, he excepted.

The defendant, Andrews, further proved, that in 1871, he paid Wilcox the amount of the two notes for $650 each, in the following manner, to-wit: $740 in cash; three notes on Wilcox for $90 each, given by him for the rent of the land for the years 1869-70-71, and a note on W. H. Bryan and Wm. Foy for the balance. The latter note was proved to be good. It was also in evidence that when Andrews took up the notes of

$650 each, he destroyed them. The plaintiff again excepted to his Honor's allowing the witness to speak of the notes, unless they were produced. It appeared from the evidence that $1,750 was a fair price for the land; that Andrews since his purchase of the land had rented a part thereof to Wilcox, who was his brother-in-law, for $90 per an-
(48) num, and that during his tenancy, Wilcox had set out a few apple trees on the place, which he obtained from a neighbor.

In reply to some of the foregoing testimony, the plaintiff proved that Wilcox had said to him, when he signed the note as surety, upon which judgment was obtained and the land sold and bought by the plaintiff, as appears in the beginning of this statement, that he, Wilcox, "never expected to pay it."

His Honor charged the jury, that the party alleging fraud is bound to prove it; and that the plaintiffs must by facts and circumstances show to the satisfaction of the jury, that the defendants have been guilty of fraud in devising and executing the deed from Wilcox to Andrews, which, if the plaintiff fail to do, he can not recover. Conveyances made to hinder, delay or defraud creditors are void. So, too, are all conveyances made by men in failing circumstances, as to creditors, to be looked upon with suspicion and jealousy; and likewise those between near relations. If the transaction is secret, or attended with other suspicious circumstances, if there be a gross inadequacy of price, if the seller continues in possession of the property, using it as his own, without any satisfactory explanation, all are viewed with suspicion when the rights of creditors are concerned. But no one of these suspicious circumstances or badges of fraud is sufficient of itself, simply and alone, to invalidate a conveyance. That the fact of their being creditors will not invalidate it, nor can it be left to a jury to find fraud from that circumstance. That our Supreme Court has held, in *White v. White,* 35 N. C., 265, "that a fraudulent conveyance for a fair price, *bona fide* paid, conveys a good title."

If then, upon a candid consideration of all the facts and circumstances, the jury shall be satisfied that the transaction between Andrews and Wilcox was a *bona fide* transaction, for a fair price, then
(49) they will find for the defendants, but if the jury find that the transaction was a sham, a fraud, or a device to cover up the property of Wilcox, for the purpose of defrauding or hindering his creditors in realizing their claims against him, then the plaitiff is entitled to their verdict.

Verdict for the defendants. Motion for a new trial; motion overruled. Judgment against plaintiff for costs, from which he appealed.

J. H. Haughton and *Hubbard,* for appellant.
Green, contra.

RODMAN, J. The plaintiff says, that the deed from Wilcox to Andrews was fraudulent as to the creditors of Wilcox; among other reasons, because no value, or an insufficient one, was paid. In reply to this, the defendant Andrews offered evidence to prove that immediately upon the execution of the deed, he paid to Wilcox certain money and certain notes previously made by Wilcox to other persons, and also executed to Wilcox two notes for $650 each, all of which taken together made a full price for the land. The evidence respecting these two notes was objected to by the plaintiff, because they were not produced or their absence accounted for. The question of the competence of the evidence is not affected by the rule, that parol evidence shall not be received to vary a written contract, for that was not the object of the evidence, and moreover, that rule applies only when the controversy is between the parties to a contract, and not to a controversy between strangers, or between a stranger and a party to the contract. 1 Gr. Ev., 275, 279. *Reynolds v. Magness,* 24 N. C., 26.

It is a general rule, however, that every party alleging a fact must prove it by the best evidence of which the case is in its nature susceptible. For example, if the question (even between strangers) be as to the contents of a writing, by the production of the writing (50) itself, if within his power. But if it be shown that the writing has been lost and can not be found after diligent search, or has been destroyed, or is in possession of the opposite party, who refuses to produce it, secondary evidence of its contents may be given, even when the contents are directly in issue. The exceptions are more numerous when the question is only a collateral one, as in this case. I find it decided, that one party may prove the admission of the opposite party, that he had a lease, or a note, etc. 1 Gr. Ev., s. 97; and also, when the contents of a writing come thus collaterally in question, the writing may be proved otherwise than by the subscribing witness. 1 Gr. Ev., s. 573, b. But I have found no authority to cover the precise point now made. Something might be said, in the way of reasons, on both sides of the question. But it is unnecessary to decide on it. For even if the evidence was improperly admitted, when it was first offered and objected to, it certainly became admissible as soon as it appeared that the notes had been paid and destroyed. At the stage of the trial when it was objected to a second time, the Judge was obliged, on the *prima facie* evidence of the destruction, to hold as he did, that the secondary evidence was admissible; and, it is evident, that it could make no difference to the plaintiff whether the evidence was admitted at the one stage of the trial or the other.

But, upon this point the plaintiff says, that the secondary evidence was incompetent upon a principle for which he cites 1 Gr. Ev., s. 558, as follows: "Where the party voluntarily destroys written evidence in his

favor, he can not be allowed to give evidence of the contents of such writing, in a suit in his own favor, founded upon the writing, without first introducing evidence to rebut any inference of fraud, arising from his destroying such written evidence." The reason on which this rule is founded, evidently is, that where a party voluntarily destroys
(51) written evidence in his favor, it is a *spoliation,* and could be done only for the fraudulent purpose of falsifying the contents of the document by parol evidence. 1 Gr. Ev., s. 31. The rule can not apply to a case in which the writing destroyed was destroyed when it was not, and was not likely to become evidence in the party's favor, and was destroyed in the usual course of business, and had no value; as for example, a note paid and delivered up to the maker. Such a destruction can not be held fraudulent.

2. The plaintiff excepts to the instruction of the Judge below. His Honor says: "Conveyances made to hinder, delay or defraud creditors are void, and all conveyances by men in failing circumstances are, as to creditors, to be received with suspicion and jealousy. So under the like circumstances, conveyances and transactions between near relations; so if the transaction is secret or attended with suspicious circumstances; so if there is a gross inadequacy of price; so if the seller continues in possession of the property, using it as his own without explaining the possession satisfactorily. *But no one of these suspicious circumstances is sufficient of itself singly and alone to vitiate a conveyance.*"

As a general statement of the law, this is correct. No one of the circumstances mentioned, in the absence of all others, is fraud in law, so as to authorize a Judge to pronounce a transaction in which it exists, necessarily void, or to instruct a jury that it must be, as evidence, conclusive with them. It is true, that we may conceive of a case where the inadequacy of consideration was so great as to be of itself as conclusive of fraud as if the conveyance was purely voluntary. But the Judge was speaking with reference to the evidence in the case, and it was in evidence that if the two notes were *bona fide,* and reckoned as part of the consideration, it was not inadequate. As to the other circumstances mentioned by the Judge, it is scarcely possible that they should
(52) exist alone, and unaffected by one or more of the others. For instance, a son in failing circumstances makes a conveyance to his father; it must almost necessarily appear whether or not a fair price was paid, and whether or not the vendor remained in possession, or some other circumstance bearing on the question. The law does not give an artificial or technical weight to any of these circumstances; they are matter of evidence, each and all to be weighed by the jury, and their verdict must be upon a consideration of all the facts in evidence. This we think was in substance the charge of his Honor.

3. The plaintiff further excepts to the charge of his Honor, that he erred in saying that this Court had held in *White v. White,* 35 N. C., 265, that "a fraudulent conveyance for a fair price, *bona fide* paid, conveys a good title." His Honor was misled by the inaccurate and rather unintelligible syllabus of the reporter to the case. The sentence is so obscure that it may be right or wrong, according to the meaning given to it. We think, that taken in connection with the rest of his instructions, which were sufficiently clear, the jury could not have been misled.

Defendant Andrews will recover his costs.

PER CURIAM. No Error.

Cited: S. v. Carter, 72 N. C., 101; *Mulholland v. York,* 82 N. C., 512; *Carrington v. Allen,* 87 N. C., 356; *S. v. Credle,* 91 N. C., 648; *S. v. Wilkerson,* 98 N. C., 699; *Faulcon v. Johnston,* 102 N. C., 268; *Carden v. McConnell,* 116 N. C., 877; *Ledford v. Emerson,* 138 N. C., 503.

Dist.: Wells v. Bourne, 113 N. C., 85.

(53)

JOHN LONG and others v. ISAAC HOLT.

1. By virtue of the provisions of the act of 1871-'72, chapter 30, parties have a right to have their suits heard, though such suits may have abated through their own inadvertence or from other causes.
2. In appeals from the former Superior Courts of Law, purely discretionary powers of such courts were never reviewed by the Supreme Court. Otherwise, in appeals from the Courts of Equity, in which every order and decree of such Court, affecting the rights of parties, were the proper subjects of review by the Supreme Court.

PETITION, to rehear a decree and former order by the Court of Equity of ALAMANCE, in 1868, in a petition of the present plaintiffs, *ex parte,* for the sale of land for partition, heard before *Tourgee, J.,* at Fall Term, 1872.

His Honor, upon hearing the petition, answer, affidavits, etc., being of opinion that the plaintiffs, through their own laches, had lost their right to have the order and decree reheard, dismissed the petition. From this order the plaintiffs appealed.

All other facts necessary to an understanding of the point decided, are stated in the opinion of the Court.

Dillard & Gilmer for the petitioners.
W. A. Graham, contra.

SETTLE, J. This was a petition brought to the Fall Term, 1860, of the Court of Equity for ALAMANCE, praying for a sale of the lands of

Conrad Long, deceased, and for a division of the proceeds amongst his heirs, some of whom were married women.

A sale was made and the report thereof confirmed at Spring Term, 1861; and thereupon an order was made for the collection of
(54) the purchase-money, but there was no order for the distribution of the same.

In 1866, an order was made upon the Master to report "what money he had collected, what kind, and from whom, and whether any and how much was still due and uncollected and from whom." The Master, who is the defendant in this proceeding, made his report to Spring Term, 1867, when an entry was made on the docket in pencil, "Report of Master filed."

At Spring Term, 1868, an entry was made upon the docket in words following, to-wit: "Report of the Clerk and Master as to the collection of purchase-money of land confirmed and approved."

At Spring Term, 1872, the cause was transferred from the old Equity docket of Alamance and placed upon the docket of the Superior Court of that county, in accordance with the provisions of the act of 1871-'72, chapter 30, and a petition was then filed to rehear the decree of 1868, which confirmed the report of the Master as to the collection of the purchase-money.

At Fall Term, 1872, the Master filed his answer, and his Honor dismissed the petition to rehear, declaring that "the plaintiffs had been guilty of such laches, in the prosecution of their claims, that they were not entitled to maintain their petition in this case." From this order the plaintiffs appeal to this Court.

This being an old cause in Equity, commenced before the adoption of our present system, we must deal with it according to the old rules of practice.

The decree in 1868 was not final, as there was no order for distribution of the funds collected, no order for title, nor for the disposition of costs, and was silent as to the disposition of a large sum still due and uncollected.

The preamble and sec. 1, Laws 1871-72, chapter 30, are as fol-
(55) lows: "Whereas, there are upon the dockets of the late courts of Equity in this State a considerable number of suits and petitions for the sale and partition of real and personal property, in which the rights and estates of infants, *feme coverts* and others are concerned, in which orders for collection, orders for distribution and other final orders and decrees have never been made, and which, through the inadvertence of parties, or from other causes, have not been transferred to the dockets of the present Superior Courts, but under existing laws may have abated; therefore, the General Assembly, etc., do enact, That in order to protect the interest of all parties concerned in such causes, and to save

costs therein, it shall be lawful for any party, plaintiff or defendant, in any such suit or petition, at any time within twelve months from the ratification of this act, to have such suit or petition transferred to the trial docket of the Superior Court, for the county in which the same was pending." Here, then, we have an express declaration of the Legislature in favor of the policy of hearing, trying and disposing of all such cases as the one under consideration, even though they may have abated through the inadvertence of parties or from other causes.

But his Honor dismissed the petition, on the ground of laches; and it is suggested that he only exercised a discretion, which this Court can not review.

In appeals from a Superior Court of Law, the Supreme Court has never reviewed the exercise of a purely discretionary power in the Superior Court, but has been confined to the correction of errors in law. But the Supreme Court sustained a very different relation to the Courts of Equity in this State; and as is said, in *Graham v. Skinner,* 57 N. C., 94, causes might be removed into it from the latter, to be heard for the first time, upon questions of fact as well as of law; and in appeals from the final decrees of the Courts of Equity, the causes were heard in the Supreme Court in the same way.

The Supreme Court had therefore the same materials for forming a correct judgment as the Court of Equity in every (56) case, and upon every question, whether discretionary or otherwise. Hence, we conceive, that every order of the Court of Equity, by which the *rights of the parties* may be affected, may be reviewed in the Supreme Court. The averments in the answer of the defendant may be material and proper to be considered of, on a trial before a jury or on a reference to a commissioner, but they should not have availed to dismiss the petition to rehear, and thereby cut off the plaintiffs from all opportunity of investigating the merits and justice of their cause.

PER CURIAM. Reversed.

Cited: Long v. Gooch, 86 N. C., 710; *Murrill v. Humphrey,* 88 N. C., 140.

JOSEPH C. PINNIX v. C. N. McADOO and MARK WILLY.

1. A sells a lot of tobacco to B, to be delivered at the depot by a certain day; A informs B of the delivery of the tobacco and requests him to come to the depot on the appointed day for a settlement, and if he, A, should be absent, to inquire of one F, the depot agent, for him; B arrives in the afternoon of the day appointed, after A had left, and as requested, inquires of F for A. F informs B that A had left with him a lot of tobacco for him, B, at the same time handing an invoice for the same, made out in A's handwriting; B pays F for the tobacco,

who, on the next day, remits the proceeds to A: *Held*, that these facts, standing alone, are *prima facie* evidence that F was the agent of A to deliver the tobacco and receive the money.

2. *Held, further*, that the agency being thus established, the invoice and receipt, as well as the declaration of the agent, were properly admitted as evidence of the settlement of the plaintiff's claim for the tobacco.

ACTION, tried at Fall Term, 1872, of ROCKINGHAM (to which it had been removed from CASWELL, on affidavit of defendants), before *Tourgee, J.*

On the trial below, the plaintiff recovered a judgment only for
(57) a part of the sum demanded in his complaint, from which judgment he appealed.

The other material facts in the case are fully stated in the opinion of the Court.

Bailey, for the plaintiff.
Scales & Scales, and *Dillard, contra.*

READE, J. Plaintiff had a claim against the defendants, and the defendants paid the claim to one Fitzgerald, as the agent of the plaintiff, and the plaintiff insists that there was no evidence to be left the jury, that Fitzgerald was his agent.

The facts are, that the plaintiff had sold to the defendants a lot of manufactured tobacco, in boxes of different weights and different brands and different prices and finished delivering the tobacco at the depot on 5 December, and wrote to the defendants, who lived at a distance from the depot, as did also the plaintiff, to meet him at the depot on 6 December, and receive the tobacco and pay for it. The defendants did not arrive at the depot until the evening of the 6th, after the plaintiff had left.

The defendants received a letter from the plaintiff, to the effect that if defendants did not find him at the depot when they got there, they must ask Fitzgerald, the depot agent, for him. The defendant did not find the plaintiff at the depot, and when they asked Fitzgerald for him, he, Fitzgerald, produced a stated account in the plaintiff's handwriting, containing a detail of the number of boxes and weights and prices, with the additions, and received the money of the defendants, receipted the account and sent the money the next day to the plaintiff, and delivered the tobacco to the defendants. We are of the opinion that these facts standing alone tend to prove, and *prima facie* do prove, that Fitzgerald was the plaintiff's agent to deliver the tobacco, and to receive the
(58) money. There was much other testimony tending to prove the same, which it is not necessary to state. How much was detracted from the weight of the evidence, by the fact that Fitzgerald could not remember whether the plaintiff had made him his agent or

not, and could not remember signing the receipt, although he knew the signature was his, was a question for the jury.

2. The aforesaid stated account, with the receipt to which the plaintiff's name was signed by Fitzgerald, was admitted in evidence, and the plaintiff objected, for the reason, that although Fitzgerald signed it, and thought he would not have signed it unless he had been authorized, yet there was no evidence that he was authorized. We have already said that we think there was evidence that he was authorized. And even if he had not signed the receipt at all, the account itself left with him under the circumstances aforesaid, is evidence tending to prove his agency. If I have a claim against a man, and name a day and place where and when I will meet him, to receive pay, and notify him that if I am not there, he may call on A B, and he finds A B there with my claim made out in detail in my handwriting, and ready for payment, and the property in his hands ready for delivery, is that no evidence that A B was authorized by me to receive the money? Certainly it would be some evidence, and it would seem to be plenary.

3. The defendants asked Fitzgerald, if he was in the habit of receiving money and signing receipts for persons without authority? And he said he was not. The plaintiff objected to this, and probably it was objectionable, standing alone. But the plaintiff had previously asked the witness whether he never sent money and packages left with him without the request of the parties to whom they were sent? And the witness answered he had; and it was in reply to this that the defendants asked their question. And we think it was proper. (59)

4. One of the defendants was introduced, and was asked by his counsel, whether he had paid Fitzgerald, and if he had, why he had done so? And he answered that he had paid Fitzgerald, and that he had done so, because Fitzgerald told him that plaintiff had gone home but had left the tobacco with him to deliver, and had left the account all made out for him to receive the money. The plaintiff objected to Fitzgerald's declarations. The objection is untenable, because if Fitzgerald was plaintiff's agent, what he said was of course evidence, and we have already said that there was evidence of his agency. Especially is what Fitzgerald said evidence, because the plaintiff had referred the defendants to him. "If I am not there ask Fitzgerald for me." We would not be understood as saying that the declarations of an alleged agent are evidence to establish his agency. The rule is the other way, but the agency being established, then the declarations are admissible.

5. His Honor charged the jury that it was for them to say, from all the evidence submitted whether Fitzgerald was the agent of the plaintiff to receive pay for the tobacco. And the plaintiff excepted to the charge. We think the charge was right. His Honor had already de-

cided the preliminary question, that there was *prima facie* evidence of agency, so as to let in the agent's declarations.

And then after all the evidence was in, it was proper to leave it to the jury to say how far the *prima facie* case had been disproved and what was the weight of the whole evidence. The jury found that Fitzgerald was the agent of plaintiff to receive pay for the tobacco. And thereupon the defendants would have been entitled to a verdict; but it was admitted that a part of the payment was in a check which the plaintiff never realized. And therefore the plaintiff was entitled to judg-
(60) ment for the amount of the check, and he had judgment accordingly, and appealed.

There is no error. As the plaintiff appealed and recovered no more here than he recovered below, there will be judgment here for the plaintiff for the amount recovered below, and there will be judgment in favor of the defendants for costs.

PER CURIAM. No Error.

STATE v. EDWARD WILLIAMS.*

On a trial for murder, a witness for the State has a right to relate to the jury the whole of a conversation which took place between the witness and the accused on the day after the alleged homicide; although in that conversation the witness, in answer to questions asked by the accused, expresses the belief, giving the reason for such belief, that the prisoner committed the homicide.

MURDER, tried at the Fall Term, 1872, of PITT, before *Moore, J.*

The evidence introduced by the State, and excepted to by the prisoner, is fully set out in the opinion of the Court.

There was a verdict of guilty. Rule for a new trial; rule discharged. Judgment of death, and appeal.

The rule of evidence is, that a witness testifying to a conversation which took place in his or her presence, and in the presence of
(61) the accused, should be confined strictly to such matters as directly concern the prisoner; or in other words, to such facts or statements as would go to exculpate or inculpate the prisoner; and that all hearsay evidence, or opinions of the witness, should be excluded as irrelevant. The witness was introduced by the State, and the irrelevant testimony called out by the State before any cross-examination by prisoner's counsel.

Johnston & Nelson and *Smith & Strong* for appellant.
Attorney-General, contra.

*This case was before the Court at the last Term, when a *venire de novo* was granted. See 67 N. C., 12.

BOYDEN, J. This being a capital case, the Court has examined with care the record, and find that no exception can be taken to it.

We have also examined the authorities cited by the counsel, to-wit: *S. v. Arnold,* 35 N. C., 184, and the case of *Bailey v. Pool, Ib.,* 404, and we are of opinion that they have no tendency to establish the position urged by defendant's counsel.

Both exceptions are as to the admissibility of the evidence of the witness, Dorcas Tripp. This witness testified as follows: "That about noon, on the day after the homicide, Edward Williams, the accused, went to her house, in company with his mother, and said, "Miss Dorcas, how came you to tell Joe Ballard that you would swear I killed Silas Avery?" To which, witness answered: "I did not tell Joe Ballard that I would swear that you killed Silas, but I did tell him that I believed you killed him; and I believe so still." Prisoner then asked the witness: "Why do you believe I killed him?" To which, witness replied: "I believe it, because you were at my house yesterday with a pistol, and fired it off twice; but would not let anybody see it." His mother then said: "He (the accused) says he gave the pistol to Mary Ann (the wife of the deceased, and the party indicted as accessory before the fact with the prisoner), on Sunday evening before the homicide was committed; did you not say so, Ed?" He replied: "Yes, I did." To (62) which, witness replied to the prisoner: "You did not do any such thing, because you had the pistol at my house all day Sunday, and would not show it, when they all wanted to see it." This witness further stated to the prisoner: "Another reason why I believe you killed Silas, is, because Mary Ann said she had rather be caught in bed with him, the prisoner, than walking along the road with Silas"; to which the prisoner replied: "He could not help what Mary Ann said; that John Jones was as much concerned as he was, and why should they pester him and not John Jones?" All the above conversations, deposed to by the witness Tripp, took place the day after the homicide, in the presence and hearing of the accused, and principally with the prisoner himself.

That all this evidence was admissible, is too plain a principle of law to require the citation of authority. But it is urged in behalf of the prisoner, that his Honor permitted this witness to give to the jury her then opinion of the guilt of the accused. Had his Honor permitted such an opinion to be given to the jury, it would have been manifest error. The counsel is mistaken in supposing his Honor permitted such evidence. He merely permitted this witness to relate to the jury the whole conversation had with the accused on the day after the homicide, and in which the witness, in answer to questions put to her by the prisoner himself, expressed her then opinion of his guilt and her reason for such belief.

PER CURIAM. No Error.

Cited: S. v. Wilson, 158 N. C., 600.

(63)

J. FRANCIS KING v. JOSIAH E. WINANTS.

When a party in a proceeding introduces new matter not contained in his complaint, and supports it by his own or other affidavits, the opposite party is entitled of right to be heard in reply to such new matter by his affidavit, or the affidavits of others; and the right thus to reply to new matter introduced on either side is only restricted by that rule in pleading which forbids a departure.

ACTION brought to Fall Term, 1872, of NEW HANOVER, before *Russell, J.*, for the dissolution of a copartnership, and for an account; and in the meantime the plaintiff moved for an injunction and the appointment of a receiver.

His Honor granted the injunction at the time of the plaintiff's filing his complaint, to-wit: 2 November, 1872, which was continued to Fall Term, 1872. Upon the motion of the plaintiff for the appointment of a receiver, heard before his Honor at chambers, 4 January, 1873, the plaintiff read his complaint, and the defendant his answer, verified by affidavit and also a number of other affidavits in support of his answer.

The plaintiff in reply, read affidavits in support of his complaint, and then offered to read his own affidavit, which was objected to by the defendant, but allowed by the Court.

The defendant then moved to be allowed to read his own affidavit, or the affidavits of others, in reply to so much of the plaintiff's affidavit as alleged new matter in support of the complaint, and which was not set forth in the complaint. The motion was refused, and the defendant excepted. His Honor refused to vacate the injunction, and granted the motion of the plaintiff, and appointed a receiver. From which order the defendant appealed.

(64) *Strange* for appellant.
London, contra.

PEARSON, C. J. 1. "The plaintiff, in reply, read several affidavits in support of his complaint, and then offered to read his affidavit. Objected to, but allowed. This ruling is sustained by *Clark v. Clark,* 63 N. C., 150; *Howerton v. Sprague, Ibid.,* 451.

2. "The defendant then moved to be allowed to read his own affidavit, or the affidavits of others, in reply to so much of the plaintiff's affidavit as alleged *new matter,* in support of the complaint, and *which was not set forth* in the complaint."

This motion was overruled by his Honor.

The two cases above cited do not touch the point made by this exception; and we differ with his Honor upon "the reason of the thing." When a war of affidavits is carried so far as to become trifling and vexatious, the presiding Judge has a discretion to put a stop to it; but

when one of the parties introduces *new matter* the other party is entitled, in fairness, and of course as a legal right, to be heard in regard to it; and it can make no difference how far the proceeding may be carried, so long as new matter is offered on the one side, the other must in his turn be heard; but in practice, new matter can hardly ever be offered to the second or third stage. The rules of pleading in courts of law furnish an analogy for protracting special pleadings, as long as new matter can be brought forward *without a departure;* if the plea is by way of traverse, that ends the pleading, but if it brings forward matter in avoidance, the plaintiff may reply, and if new matter be averred, the process goes on to the rejoinder, sur-rejoinder, rebutter and sur-rebutter, and as much further as it can be drawn out by new matter, restricted by the rule which forbids a departure. Probably his Honor, in our case, might have resorted with propriety to the principle which forbids a departure; for the introduction of new matter which can (65) not at the hearing be of any avail without an amendment of the complaint, certainly tended to obscurity and confusion.

PER CURIAM. Reversed.

THOMAS D. McDOWELL, Admr. *cum test. annexo* of Lucy Ann Brown, deceased, v. WILLIAM H. WHITE.

A direction in a will to divide an estate real and personal, is not a direction to sell the real estate for a division: *Hence*, the words, "The rest and residue of my estate, whether real or personal, I give to be divided between the legatees herein mentioned, in proportion," etc., confer no power on the administrator *cum testamento annexo* to sell such real estate for the purpose of a division.

CASE AGREED submitted to *Russell, J.*, at Spring Term, 1872, of BLADEN.

The case as disclosed by the record sent to this Court, is as follows:

Lucy Ann Brown died in the State of Mississippi, having first made and published her last will and testament, which was admitted to probate in the county of Lowndes, in that State, in April, 1871. An exemplification of this will, duly authenticated and certified, was exhibited before the Judge of Probate of Bladen County, N. C., in which the testatrix had property, and was filed and recorded as prescribed by law, and the plaintiff appointed administrator with the will annexed. In her said will, the testatrix, after making sundry other bequests, concludes as follows: "The rest and residue of my estate, whether (66) real or personal, I give to be divided between the legatees herein named, in proportion to the sums herein given." The plaintiff, after qualifying as administrator, and upon due notice, sold the real and per-

sonal estate of his testatrix, at which sale, the defendant purchased a house and lot in Elizabethtown, in said county, for $1,003. When payment was demanded in accordance with the terms of the sale, he refused to pay his bid, alleging that under the will the plaintiff had no power to sell the real estate of the testatrix and make title to the purchaser.

It was submitted, that if his Honor should be of opinion that the will of the said Lucy Ann Brown gave the plaintiff, as her administrator with the will annexed, power to sell her real estate situated in North Carolina, then judgment should be rendered in favor of the plaintiff for the amount of the purchase-money and for costs; otherwise, judgment should be given in favor of the defendant.

His Honor being of opinion, that under the will, the plaintiff was invested with power to sell the house and lot as he had done, directed the Clerk to enter judgment in his favor, for the amount of the purchase-money and for costs. From this judgment, the defendant appealed.

No counsel for appellant in this Court.
Busbee & Busbee, contra.

SETTLE, J. The question in this case is, did the administrator with the will annexed have the power to sell land?

The testatrix, after making bequests of money to divers persons, concludes her will as follows: "The rest and residue of my estate, whether real or personal, I give to be *divided* between the legatees herein named in proportion to the sums herein given."

The will was made and duly admitted to probate in the State of Mississippi, and this being made to appear to the Probate Court
(67) of Bladen, letters of administration with the will annexed, were granted to the plaintiff, who sold a house and lot in Elizabethtown, being the only real estate belonging to the testatrix in this State, to the defendant, who now resists the payment of the purchase-money, on account, as he alleges, of a want of power in the plaintiff to sell the real estate of the testatrix. His Honor in the Superior Court gave judgment in favor of the plaintiff. In this there was error, inasmuch as the will does not, either expressly or by implication, confer a power to sell upon the executor. A simple direction in a will to *divide* an estate, real and personal, is by no means a direction to *sell* the real estate for division.

Nor, can it make a difference, because the real estate happens to be only one acre of land, while the legatees are numerous, for rules of law must be fixed and can not be made to expand or contract to suit the circumstances of an estate. The case relied upon before us to establish the power of sale is, *Foster v. Craig*, 22 N. C., 209. We have examined

this case and also the authorities cited to support it, with care, and find that they all rest upon either an express or plainly implied power to sell, and none of them go to the extent of implying a power from such language as we have in the will under consideration. In *Foster v. Craig,* the words of the will are as follows: "The balance of my property to be applied to the payment of my just debts. Should there be a surplus, it is my will and desire, that it be divided equally among the heirs of my deceased brother, Samuel Foster, and the heirs of David Craig"; and DANIEL, J., in sustaining the power to sell, bases his opinion upon the fact that the testator had made his property, which includes lands, *a fund to be applied in the payment of his debts;* and he says, "it can not be applied in that way without a sale, a sale is therefore ordered by the testator himself, and the executors had an implied power to convey." (68)

In the case before us, there is nothing said about the payment of debts, nor is there any other expression from which a power to sell can be implied; and the court will never compel a purchaser to take a clouded or doubtful title.

The clause of the will under consideration makes all the persons named as legatees in the former parts of the will, tenants in common, who, if they see proper, can take proceedings and have the land sold for division, and thus convey a perfect title.

Judgment reversed, and judgment here that defendant go without day.

PER CURIAM. Reversed.

Cited: *Vaughan v. Farmer,* 90 N. C., 610; *Mabry v. Brown,* 162 N. C., 224.

STATE v. HENDERSON ADAIR.

1. General statutes do not bind the sovereign, unless for that purpose the sovereign is expressly mentioned in them.
2. The act of 1868-'69, chap. 116, sec. 37, was not intended to interfere with any right of the State to use condemned prisoners as witnesses whenever the Solicitor deemed it for the interest of the State to do so: *Therefore, held,* to be error in the Court below to refuse a petition for a *habeas corpus ad testificandum,* to bring up a prisoner confined in jail under sentence of death for murder, in order that such prisoner might testify in a trial for felony then pending in said court.

PETITION for a writ of *habeas corpus ad testificandum,* heard before *Logan, J.,* at Fall Term, 1872, of RUTHERFORD.

Solicitor Bynum, for the State, presented the following petition to the court below, to-wit:

(69) "STATE OF NORTH CAROLINA,
RUTHERFORD COUNTY,
Superior Court, Fall Term, 1872.

S. v. Henderson Adair et al.

To the Honorable Geo. W. Logan, Judge of the 9th Judicial District, sitting for Rutherford County, in said District:

The petition of W. P. Bynum, Solicitor for said District, prosecuting in behalf of the State, showeth that one Henderson Adair is now confined in the jail of said county, on a charge of the murder of William H. Steadman, *alias* Lee, and others, all of said county.

That one Martin Bainard is a material witness in behalf of the State, on the trial of said prisoner, without whose testimony he can not safely try said action.

That a bill of indictment against said Henderson Adair, is now pending before the Grand Jury of said county at the present term, and can not be safely proceeded with without said testimony.

That said witness, Martin Bainard, is confined in the common jail of Henderson County, under sentence of death for murder.

Wherefore, the petitioners ask your Honor to grant the State's writ of *habeas corpus ad testificandum,* commanding the sheriff of Henderson County to have the said Martin Bainard before the said Court *instanter,* to testify in behalf of the State in said criminal action as aforesaid.

W. P. BYNUM, *Solicitor.*

Sworn to before me this 1 October, 1872.

G. W. LOGAN, *J. S. C.*

(70) The Court refused to grant the prayer of the petition, from which judgment the State appealed.

Attorney-General Hargrove, for the Sate.
No counsel in this Court for the defendant.

BOYDEN, J. In this case, the Solicitor of the Eighth Judicial District made application to his Honor, Judge Logan, while holding the Superior Court of Cleveland, for a writ of *habeas corpus ad testificandum* for one Martin Bainard, then under sentence of death in the jail of Henderson County, alleging as a reason that the said Bainard was a material and necessary witness for the State, in a case pending in said Court against said Adair and others, for the crime of murder.

In regard to the general question as to the right of parties litigant to a writ of *habeas corpus ad testificandum* for witnesses under sentence for a felony, the Court entertains no doubt that parties litigant have no

right to the writ. Laws 1868-'69, chapter 116, section 37, we hold, forbids such writs to issue in favor of parties in any suit, as that would in a measure defeat the sentence of the law pronounced against a felon. But the Court is of opinion that this provision applies only to parties strictly so called, and not to the State.

In *S. v. Garland,* 29 N. C., 48, RUFFIN, C. J., says, "it is a known and firmly established maxim, that general statutes do not bind the sovereign, unless expressly mentioned in them. Laws are made *prima facie* for the government of the citizen, and not of the State itself." And his Honor further says, "that the very action then under discussion has a provision which furnishes an example of the rule that the sovereign is not to be brought within the provision of a statute by general words, but only by being expressly named."

The provision in the statute under consideration was 40 and (71) 42 sections, ch. 31, Rev. Stat., which provides that if a suit be commenced in the Superior Court for a less sum than $100 due by bond, it shall be dismissed, and that when a suit is dismissed, or the plaintiff is nonsuited, on the ground that the case is not within the jurisdiction of the Court, the plaintiff shall pay all costs. The State was plaintiff in the case, having brought suit upon a bond for a less sum than $100. Upon this state of facts, his Honor further remarks, "that no one would say that there could be judgment for costs against the State in any case." The Court held the action properly brought. This, then, being the well-established rule in the construction of statutes, we are of opinion that his Honor erred in refusing to grant the prayer of the petition as asked for by the Solicitor for the State, to whose discretion such matters are by our law confided.

Before the Act of 1866, no felon after judgment could testify against anyone, he being regarded as infamous. But it is within the recollection of some of the Court that after a conviction for a capital felony, the Court under the old system, has suspended pronouncing sentence for some three terms at the request of the Solicitor, in order that the convicted prisoner might be used as a witness on the part of the State against his accomplices in the crime, of which he had been convicted. We are satisfied that the act of 1868-'69, did not intend to interfere with the right of the State to use condemned prisoners as witnesses, whenever the prosecuting officer deemed it for the interest of the State to do so.

PER CURIAM. Reversed.

Cited: Harris ex parte, 73 N. C., 66; *Guilford v. Georgia,* 112 N. C., 38.

(72)

BENJAMIN RUSH v. HALCYON STEAMBOAT COMPANY.

1. In our practice, both before and since the establishment of the Constitution of 1868, the Supreme Court has all the powers which a Court of Errors had at common law: *Hence it follows*, that as a writ of error is not a continuation of the original suit, but is a new suit by the party against whom judgment is rendered, to reverse that judgment, an appeal vacates the judgment below, and this Court will give such judgment as the Court below should have given.
2. No judgment against the sureties to an appeal from a justice of the peace can be given, until after a return of the execution against the principal, unsatisfied. Code of Civil Procedure, sec. 542.

MOTION by defendants after due notice to the plaintiff, to set aside the judgment rendered at the last (June), Term of this Court, and the execution thereon issued. See 67 N. C., 47.

The grounds for the motion is sufficiently set out in the opinion of the Court.

Hinsdale, for plaintiffs.
B. & T. C. Fuller for defendant.

RODMAN, J. At the last term of this Court, judgment was given against defendants (67 N. C., 47), and the clerk, without any particular directions from the Court, and without the matter having been considered, but in pursuance of the practice before C. C. P., entered judgment as of course, also against the sureties of the defendant on his appeal from the justice of the peace, both for the plaintiff's demand, and for the costs of this Court.

The defendants now move:

1. To vacate the judgment both as against them and as against their sureties, because this Court has no power in any case on an appeal, to give such judgment as ought to have been given in the Court be-
(73) low, but if it reverses the judgment of the inferior Court, it must remand the case with its opinion, so that the proper judgment may be given there.

2. To vacate the judgment as against the sureties for the defendants, on their appeal from the justice.

1. In support of the first motion, the counsel for the defendants contended, that the Supreme Court existing prior to the Constitution of 1868, had the powers in question *solely* by virtue of Rev. Code, ch. 33, sec. 6, which expressly direct it. To sustain this view, he relied on the cases of *Caroon v. Rogers,* 51 N. C., 244, and *Rodman v. Davis,* 53 N. C., 134. And he further argues, that inasmuch as the present Constitution gives this Court an appellate jurisdiction only, and as no statute directs or empowers it to give such judgment as the Court below ought to have given, therefore it possesses no such power.

This Court has habitually acted upon the presumption that it had such a power. The course of practice was brought to our attention in *Isler v. Brown,* 67 N. C., 175, and is discussed in that case upon that assumption. This is the first time that it has been questioned, or its source particularly called to our attention. We have given to the argument a careful consideration, and if it appeared to us that we had inadvertently stepped over the limits imposed on us, we should not hesitate frankly to confess the error and to retreat.

Fortunately the question is more important than difficult. The authorities cited do not sustain the position that the former Supreme Court thought it derived the power *solely* from the statute. *Rodman v. Davis,* decides only that a case at law could not be brought up by consent, but only by appeal after final judgment. In *Caroon v. Rogers,* the Court incidentally refers to the statute as conferring the power; but there was no question of it, and no necessity for tracing its source, and the interpretation now given to it could not have (74) been in the mind of the Court.

The Constitution of 1868, Art. IV, sec. 10, says: "The Supreme Court shall have jurisdiction to review upon appeal any decision of the Courts below, upon any matter of law or legal inference, but no issue of fact shall be tried before this Court, and the Court shall have power to issue any remedial writs necessary to give it a general supervision and control of the inferior Courts."

Now what is meant by reviewing an appeal? At the common law, appeal meant a criminal prosecution by a private person for a crime committed to his injury. Comyn's Dig. Appeal. Bac. Abr. Appeal. Until recently it was never applied to the proceeding by which a Superior Court of law obtained jurisdiction to review the judgment of an inferior one. It is not used in this sense in the legislation of the United States, nor as far as I know in England to this day. In this sense, the word was taken from the civil law; and was applied to proceedings in Courts of Chancery, and other Courts not proceeding according to the course at common law. Powell Ap. Prac., 38, 44.

By an appeal in its early and proper meaning, as applied to proceedings in equity cases, the judgment was vacated and the appellant was entitled to a new trial on the merits including the facts as well as the law. Powell, *ubi sup.*

Recently (I speak comparatively), in many of the United States, and especially in their Codes of Civil Procedure, the word has got to be used, as comprehending every mode by which a case is carried up from any inferior to any Superior Court, whether it be a case in law or a suit in equity, or an action generally under a Code.

The effect of the appeal, and whether it is an appeal in the original equity sense of the word, or in substance a writ of error, depends in

almost every case upon the statutes and rules, regulating the practice of the appellate Court.

(75) Under our system as existing before 1868, either party to an action at law might appeal from a judgment of a Superior Court to the Supreme Court. It was called an appeal and in some respects resembled one. It vacated the judgment appealed from; but did not necessarily vacate the verdict or entitle the appellant to a new trial. The case was invariably treated in the Supreme Court as if it had been brought up by writ of error, which was not abolished, but continued a contemporaneous mode of getting a judgment reviewed in the appellate Court. A few instances of writs may be found in our Reports.

When the Constitution of 1868 created a Supreme Court, with power to review, on appeal, the judgments of the Superior Courts, the word was used in the sense which it had acquired in our legislation for many years back; as in substance, a writ of error. The Court was (for cases of this sort at least), a Court of Errors. This view is confirmed by the consideration, that the Constitution prohibits this Court from trying any issues of fact, which a Court of appeal in its original sense, as applied to proceedings in Chancery must do.

If this view be correct, it follows that this Court has all the powers which a Court of Errors had by the common law, unless they have been curtailed by some disabling statute, which is not contended, and it only remains to inquire whether the power in question is of that class.

A writ of error is not a continuation of the original suit, it is a new suit by the party against whom judgment was given to reverse that judgment. The original judgment stands until reversed. If the original judgment was against the defendant and he brings a writ of error (or appeals in North Carolina), the judgment shall be only to reverse the judgment complained of, for that is the only object of the writ. "But if judgment be given against a plaintiff, and he bring a writ of error, the judgment shall not only be reversed, but the Court

(76) shall give such judgment as the Court below should have given, for the writ of error is to revive the first cause of action, and to recover what he ought to have recovered by the first suit, wherein erroneous judgment was given." Bac. Abr. Error, M., 2.

This doctrine is also held in *Ins. Co. v. Boykin,* 12 Wall., 433, where authorities are cited which must be conclusive.

The first motion is refused.

2. The second motion of the defendant is allowed. Sections 541, 542, C. C. P., clearly forbid judgment against the sureties to an appeal from a justice of the peace, until after the return of an execution against the principal.

PER CURIAM. Judgment accordingly.

Cited: Murrill v. Murrill, 90 N. C., 123; *S. v. Webb,* 155 N. C., 431.

ELIZABETH and WINNIFRED LEE, by their Guardian, and others, trustees of the Baptist Church of New Bern, v. WM. H. PEARCE and wife, ELIZABETH.

1. The innocence of a party who has profited by a fraud will not entitle him to retain the fruit of another man's misconduct, or exempt him from the duty of restitution.
2. Our Courts, under our present system, give relief not merely to the extent and in the cases where it was heretofore given by the Courts of Law, but also to the extent, and in the cases where it was heretofore given by Courts of Equity; thus preserving the principles of both systems, the only change being, that the principles are applied and acted on in one Court and by one mode of procedure.
3. Certain known and definite fiduciary relations, that, for instance, of Trustee and *Cestui que trust*, Attorney and Client, Guardian and Ward and General Agent, having the entire management of the business of the principal, are sufficient under our present judiciary system, to raise a presumption of fraud as a matter of law, to be laid down by the Judge as decisive of the issue, unless rebutted. Other presumptions of fraud are matters of fact to be passed upon by a jury.
4. It is error, for a Judge to charge a jury, that fraud must be proved by the party alleging it, "beyond a reasonable doubt." The rule being, if the evidence creates in the minds of the jury a belief that the allegation is true, they should so find.

(77)

ACTION, tried before *Clarke, J.*, at Fall Term, 1872, of CRAVEN.

The plaintiffs claim certain real property in the town of New Bern, under the will of Mary A. Lindsay, the aunt of the *feme* plaintiffs, Elizabeth and Winnifred. The will was dated 15 October, 1869, and admitted to probate 23 April, 1870. Besides the real estate given to her nieces, and to the Trustees of the Baptist Church, of which the testatrix had been a member for a number of years, she bequeathed to the nieces her personal property.

In their complaint the plaintiffs state, that the property in dispute is in possession of the defendants, who claim under a deed purporting to have been made by the testatrix to Elizabeth, the wife of the other defendant, 1 October, 1867. This deed, the plaintiffs allege, is a fraud, and demand judgment, that it be so declared, and that the defendants be compelled by a proper order of the Court to convey to them. To support the allegation of fraud, the complaint alleges that the defendant, Wm. A. Pearce, was the confidential agent of the testatrix, and imposed upon her to sign the deed, when she thought she was signing a will. That he procured the deed to be written by one Wm. G. Bryan, who went to the house of the testatrix with him and witnessed her signing it; that it was a voluntary conveyance, without any consideration, and kept by the defendants for nearly three years before it was registered. And further, that the testatrix (the grantor in the deed) was an ignorant

and illiterate woman, nearly sixty years of age, easily imposed upon, and spoke frequently of the writing she had given to Pearce, as her "will"; and asked, when she executed the will of 15 October, 1869, if it did not revoke (destroy) the one which she had made to him, she
(78) at the time being angry with him; that the deed was made to Pearce's wife, for the reason he was in embarrassed circumstances, and soon after went into bankruptcy.

The defendants, in their answer, deny the allegations of fraud and improper dealing in obtaining the deed made to the wife; alleging that the same was so made in consideration of the friendly feelings she entertained towards them, for the many acts of kindness and attention rendered on their part. They further deny the power of the persons named, to take under the will, as Trustees of the Baptist Church, as they are not incorporated; and that Z. Slade, one of the witnesses to the will, and a Trustee of the Church, could not prove the devise, being interested as such trustee.

It appeared from the evidence, that the defendants were frequently at Mrs. Lindsay's, the testatrix, and that Pearce, the husband, acted often as her agent, buying wood, etc. That his place of business was close to her dwelling, easily accessible from his back door. That the testatrix, before she fell out with him, spoke of Pearce as being her friend, and that she preferred him to her relations. After the disagreement, she wanted the witness Slade to write her will, giving her property to the church. This he refused to do, when she informed him she would get C. C. Clark to write it for her. This will, witness and one Amyett witnessed. She, the testatrix, wanted to know if the will would revoke the one made to Pearce; that she always spoke of it as a will, and never as a deed.

Bryan testified, that he wrote the deed for Pearce, that he carried it to Mrs. Lindsay and read it over to her carefully, she signed it and he witnessed it. At the time, she said she wanted Pearce to have her property on account of his kindness to her. After leaving her room, the witness perceiving the revenue stamps were not canceled on the deed, he carried it back to her, and had them canceled. She again
(79) reiterated to witness the obligations she felt under to Pearce, when they were alone. There was no money paid.

The plaintiffs asked his Honor to charge the jury, that if they believed that W. H. Pearce was the confidential agent and manager of the affairs of Mary A. Lindsay at the time the deed was executed, it was void, without other evidence of fraud, and that the jury should find for the plaintiffs. This, the Court declined to do; and instructed the jury that if they were satisfied that Pearce was the confidential adviser and agent of Mrs. Lindsay, that he was like a steward in England, and that he stood in the intimate relation of attorney and client,

so that he was implicitly trusted, and looked to for advice and direction, then it was a strong badge of fraud, if he procured a conveyance of property for his own benefit, as in the case of a conveyance to his wife, and *with other evidence* may justify you in finding fraud; but the proof must be clear and satisfactory.

Verdict for the defendants. Plaintiffs moved for judgment *non obstante veredicto*. Motion refused. Plaintiffs again moved for a new trial. Motion overruled. Judgment for costs, and appeal.

Green for appellants.
Justice and *Haughton, contra.*

PEARSON, C. J. "The innocence of a party who has profited by a fraud will not entitle him to retain the fruit of another man's misconduct, or exempt him from the duty of restitution." Adams Eq., 176. So the case may be relieved from complication, by the fact that the deed is made to Mrs. Pearce, and may be treated as if it had been made to Pearce, to whom the fraud is imputed.

The provision in our present Constitution, by which the distinction between actions at law and suits in equity is abolished, and the subsequent legislation affects only the mode of procedure, and (80) leaves the principles of law and equity intact. The courts as now constituted, give relief, not merely to the extent and in the cases where it was heretofore given by the courts of law, but also to the extent and in the cases where it was heretofore given by courts of equity; in other words the principles of both systems are preserved, the only change being, that these principles are applied and acted on in one court and in one mode of procedure. For illustration, under the old system, if there was fraud in the *factum, i. e.,* when one paper is substituted in the place of another, or when the party executes a paper through actual fear of death, or great bodily harm, the instrument is void, never was the deed of the party, and is treated in a court of law as a nullity. This was the extent to which courts of law, by reason of their peremptory judgments and regard for deeds, gave relief.

But the courts of equity can mould and shape decrees so as to mete out exact justice between the parties, and regard deeds merely as a high species of evidence, and for these reasons give relief beyond the point at which courts of law stopped. So when there was no fraud in the *factum,* and no physical duress, a court of equity would take the case in hand and give fitting relief if the execution of the deed be procured by fraud or moral duress; if a bond, by having it canceled; if a conveyance by a decree, treating the deed as having passed the legal title, and converting the party into a trustee, who is ordered to reconvey upon such terms as conscience requires. Under the present system, the

same court gives relief in all of these cases, and the judgment is framed to suit the case. C. C. P., 216, "a judgment is the final determination of the rights of the parties in an action." The equities of the parties being involved in this final determination, as well as their legal rights, it follows that the Court must now give such judgment as will determine these equities and legal rights, in such manner as has heretofore been according to the course of the courts respectively; for example,
(81) a *cestui que trust* conveys to his trustee at an inadequate price; the decree would have been, that the trustee reconvey on repayment, subject to an account for the profits. The judgment now is, that the plaintiff recover the land and damages and have a reconveyance on repayment of the price received, whether a consideration has been paid or the conveyance be a mere act of bounty. Owing to our registration laws, the judgment for land should direct a reconveyance to make the title appear on the Register's books.

As ancillary to the jurisdiction, to avoid deeds obtained by fraud, undue influence or moral duress, courts of equity established the doctrine that in certain fiduciary relations, if there be dealing between the parties, on the complaint of the party in the power of the other, the relation of itself and without other evidence, raises a presumption of fraud, as a matter of law, which annuls the act unless such presumption be rebutted by proof that no fraud was committed, and no undue influence or moral duress exerted. The doctrine rests on the idea not that there *is* fraud, but that there *may be* fraud, and gives an artificial effect to the relation beyond its natural tendency to produce belief. It may be harsh to presume fraud, and to take it for granted that every man dealing with one who is in his power, acts the rascal, unless he is able to prove to the contrary, which it is hard to do; but the doctrine was adopted from motives of public policy, to prevent fraud as well as to redress it, and to discourage all dealings between parties standing in these fiduciary relations. It may be said, with truth, that it is in most cases, as difficult for one in the power of another, to prove the many acts and contrivances by which he has been taken advantage of, as it is for the other party, to prove a negative; so there is no sufficient reason for not enforcing a doctrine, by which all dealing between the parties, is discontinued—both bargains and bounties.

In the case before us, the instruction asks for the application
(82) of this doctrine. The learned Judge refused to give the instruction, but assuming a certain intimate relation to be proved, left the allegation of fraud, as an open question of fact for the jury, treating the relation of the parties simply as an important link in the chain of evidence.

This ruling may have been put on the ground, that the doctrine of presuming fraud from the fiduciary relations of the parties, as a matter

of law, is peculiar to Courts of Equity, where it is the province of the Chancellor, to decide the facts as well as the law; and that the provision of the Constitution, by which all issues of fact are to be tried by a jury, in common with the Act 1796—abrogates this doctrine, and confines the Judge strictly to the law, leaving the facts exclusively to the jury.

It is true, in tribunals where the Court decides the issues of fact, as well as issues of law, there is an inclination to adopt rules, by which matters of fact are connected with matters of law, and the rule is applied whenever a given state of facts is made out by the evidence; and if the presumption of fraud falls under that class of rules, this view would have great weight. But we are satisfied that the presumption of fraud, from certain fiduciary relations, is not a mere rule of evidence. It is, as we have seen, a doctrine of the Courts of Equity, resting upon public policy, and the necessity of giving protection to the weak and confiding, against the strong and crafty. It is an important principle, by which fraud is *prevented* as well as *redressed,* and by the aid of which Courts of Equity carried "the protection of rights," much beyond the point to which Courts of law were able to reach. It is enough to know this doctrine has been established and acted on as a principle of equity for more than a century; or the ruling may have been put on the ground, that the relation proved, does not bring the case within the application of the doctrine.

This imposes upon us the duty of marking distinctly the dividing line between fiduciary relations, which raise the presump- (83) tion of fraud, as a matter of law, and relations which raise a presumption of fraud, as a matter of fact; the duty is made especially important by the change in the tribunal for the trial of issues of fact.

Upon an examination of the cases, we find our task very difficult, owing to the fact, that as the Chancellor decided the facts as well as the law, it seemingly made no difference whether he put the decision on the law or the facts; and provided he was satisfied of the fraud, there was seldom occasion to discriminate and set out, whether the conclusion was arrived at as an open question of fact, or by the aid of the presumption of fraud, as a matter of law. In very many of the cases, the evidence and presumption of law are both discussed, and it is left in doubt whether apart from the other evidence, the Chancellor would have declared his opinion to be, that the fiduciary relation was of such a character, as to raise a presumption of fraud as a matter of law; for a sample, *Williams v. Powell,* 36 N. C., 460, a guardian, in three months and fifteen days after the ward arrived at age, procured the execution of a deed for his land.

CH. J. RUFFIN, in the opinion, assumes the doctrine of the presumption of fraud, as a matter of law, when a guardian deals with the ward

just upon his coming of age, cites several cases, and then discusses the evidence and treats the allegation of fraud as an open question of fact. Whether this was because the interval of time, was supposed to prevent the application of the doctrine, or because the evidence opened a tempting field for discussion, by which the fraud could be demonstrated, does not appear; and it is left in doubt on which side of the line that case lies.

Adams, a writer remarkable for clearness, uses this expression in treating of the principle on which dealings between persons hold-
(84) ing fiduciary relations, are set aside in equity, when the only relation is that of friendly habits, etc. "But no rigorous definition can be laid down so as to distinguish precisely between the effects of natural and often unavoidable kindness, and those of undue influence or undue advantage." Adams' Eq., 185. Every rule of law must be "rigorous," that is, fixed and definite, and must "distinguish precisely." Certainty is the very essence of a rule of law. So these words are only appropriate to presumptions of fact.

Again on page 184, "where any person stands in a relation of special confidence, etc., he can not accept a personal benefit, without exposing himself to the risk, in a degree proportioned to the nature of their conviction, of having it set aside as unduly obtained"; again, "a minister of religion may be bound by it, with even greater stringency. The same general principle applies to all the variety of relations, in which dominion may be exercised by one person over another; but in proportion as the relationship is less known and definite, the presumption of fraud is less strong." *Ibid.*

A presumption of law can not be graduated by degrees of force. The relation relied on to raise a presumption as a matter of law, must of itself and without other evidence, either be sufficient for the purpose or not sufficient; if it be sufficient, the law raises the presumption and that ends the matter, unless the presumption be rebutted; if the relation be not sufficient, the instant you let it go and reach out for other matter to aid in proving the fact alleged, it ceases to be a presumption of law, and becomes a presumption of fact, to pass for what it is worth and no more; and the tribunal trying the issues of fact, may consider it as having a slight or strong tendency to produce belief, according to which, its degree of force will be graduated. Now, if Adams intends presumption of law, they cover all the variety of relation in life, and the doctrine would seem to be without limit.

(85) This apparent want of clearness in the learned treatise, is explained by the fact, that the author was making deduction from cases, where the Chancellors seldom distinguish between presumptions of law and presumptions of fact, and when he says: "The presumption of fraud is less strong," to avoid absurdity, he must be taken

to have reference to a presumption of fact. Indeed, in most of the cases, other facts besides the relation of the parties are taken into consideration, and the presumption is used as one of fact. It is only in a few cases, comparatively speaking, where the relation being a known and definite one, is allowed *per se,* to have the effect to raise a presumption of fraud as a matter of law.

A recurrence to the doctrine of presumptions in Courts of law will serve to elucidate. Presumptions are of four kinds:

1. Irrebuttable presumptions of law.

2. Rebuttable presumptions of law. These are acted upon by the Court itself as a part of the law.

3. Mixed presumptions; called mixed, because the Court lays down the law and the jury acts upon it.

4. Presumptions of fact subdivided into slight and strong presumptions, according to their effect upon the burden of proof.

These are exclusively for the jury.

"Mixed presumptions consist chiefly of certain inferences, which, from their strength, importance and frequent occurrence, attract, as it were, the observations of the law, and from being constantly recommended by Judges and acted on by juries, become, in time, as familiar to the Courts and occupy nearly as important a part in the administration of justice as the presumption of the law itself. They are in fact *quasi* presumptions of law." Best, on the Principles of Evidence, 329. They are in fact a part of the law. After the Act of 1796, which prohibits a Judge from intimating an opinion as to the weight or sufficiency of the evidence, it was every day's practice for Judges (86) to tell the jury that the lapse of twenty years raised a presumption of payment and established the fact, unless rebutted. The Act 18 —recognizes this presumption as part of the law and reduces the time to ten years. Presumptions of law and mixed presumptions are allowed in courts of law, "an artificial effect beyond their natural tendency to produce belief." The lapse of time is sufficient to establish the execution of a release or surrender when required to support the title. The oath of a mother, as to the paternity of her bastard child, unless rebutted, fixes the fact as a matter of law, without reference to the credit due her. The putative father may think it hard, to be required to prove a negative, but the presumption is based on public policy, to relieve counties of the charge, not on the ground that he is, but that he may have been, the father, and it is found in practice that few women are base enough to swear a child to a man who may not have been the father. See Patten's case. This instance furnishes an analogy for the presumption of fraud in Courts of Equity, as a matter of law. It is obvious, that Courts of Equity could have no "mixed presumptions," for the intervention of a jury was not required, and the Chancellor decided the

cases himself. Nor did the courts have as a distinct class "presumptions of fact." Certain inferences of frequent occurrence were established, as presumptions to be acted on by the Court, as a part of the law, and to these an artificial effect was allowed beyond their natural tendency to produce belief. Other inferences were treated as presumptions, to be considered in connection with other evidence, and were deemed slight or strong, according to their natural tendency to produce belief, which is the characteristic of presumptions of fact, but the cases do not make a distinct classification.

Such being the condition of the subject in the books, on its coming out of the hands of the Chancellors, it is ours to fix the limits
(87) of the doctrine in regard to the presumption of fraud from the fiduciary relations, and to see to what extent it can be used, and is obligatory in courts where the Judge is confined to the law and the issues of fact are exclusively for the jury, to fit the old system to the new, by assigning such of its parts as had become rules of law, to be acted on by the Judge, and such of its parts as raise presumptions, entitled to more or less weight, according to circumstances, to be acted on by the jury.

After a full consideration of the authorities and "the reason of the thing," we are of opinion, that only "the known and definite fiduciary relations," by which one person is put in the power of another, are sufficient under our present judiciary system to raise a presumption of faaud, as a matter of law to be laid down by the Judge, as decisive of the issue unless rebutted.

For instances, and by way of illustration: 1. Trustee and *cestui que trust* dealing in reference to the trust fund. 2. Attorney and client, in respect to the matter wherein the relationship exists. 3. Guardian and ward, just after the ward arrives at age. 4. When one is the general agent of another and has entire management, so as to be in effect, as much his guardian as the regularly appointed guardian of an infant. There may be other instances. Fiduciary relations that do not fall under the first class, raise a presumption of fraud as a matter of fact, to pass before the jury for what it may be worth. For instance: 1. Family physicians; 2. A minister of religion; 3. Parent and child; 4. When the only relation is that of friendly intercourse and habitual reliance for advice and assistance, and occasional employment in matters of business as agent.

Our case would seem, from what appears by the statement sent, to come under this last instance; for there is no evidence, that Pearce was the general agent of Mrs. Lindsay, entrusted with the management of all of her affairs of business although he was looked up to by her, and
(88) relied on for advice and assistance, and frequently acted as her agent in buying wood and leasing her property; all of which evi-

dence should be passed upon by a jury, as raising a presumption of fraud or undue influence, and as being a link in a chain of circumstantial evidence.

From the manner in which the case is stated and the remarks at the bar, there seems to have been a difference of opinion, as to the mode of trying a case, turning upon the application of principles of equity, in a Court having both law and equity jurisdiction; and in which the mode of pleading in Courts of Equity, to wit, by complaint and answer is adopted; and the mode of trial in points of law, to wit, by a jury, is ordained by the Constitution.

From the exposition of the subject, that I have taken the pains to make, it appears, in certain known and fiduciary relations, the Chancellors, according to the mode of trial in Courts of Equity, made a presumption of fraud as a matter of law; in other relations the Chancellors made a presumption of fact, which, with other evidence, might create belief of fraud.

According to the evidence sent to us, there is nothing to show that Pearce was the general agent of Mrs. Lindsay, having charge of all of her affairs, like a guardian in respect to his ward.

So the instruction asked for, was properly refused; but his Honor assumes, that there may have been such a general agency, and upon that supposition, gives to the relation the effect of a strong badge of fraud, which, with other evidence treating it as an open question of fact. Under this condition of things, we feel it to be our duty, to order a second trial, upon issues to be agreed on by the counsel, or settled by the Court in pursuance of the rule fixed by this Court.

But apart from this, the plaintiff is entitled to a *venire de novo,* for error in the charge in this; his Honor, after instructing the jury, that fraud must be proved (which is true except when from cer- (89) tain relations fraud is presumed as a matter of law) and after explaining the *onus probandi,* tells the jury that to justify a verdict finding fraud, they must be satisfied "beyond a reasonable doubt."

It is very questionable whether this formula, which has been acted upon in the trial of capital cases has answered any useful purpose; but it has never been extended to civil actions. There the rule is, if the evidence creates in the mind of the jury, a belief that the allegation is true, they should so find.

Goldsborough v. Turner, 67 N. C., 403, was cited on the argument in support of the manner in which this case is made up. In that case issues were found by a jury fixing the allegations of fraud; and no consideration of the remarks of Justice Rodman is admissible, which would impose upon this Court the province of trying "issues of fact," as distinguished from questions of fact. *Heilig v. Stokes,* 63 N. C., 612; for such a construction is opposed by the Constitution. Art. IV., sec.

10, "No issue of fact shall be tried before this Court." Nor is a construction admissible, which would impose on the Judge of the Superior Court the duty of trying issues of fact except when by consent of parties, the Judge is substituted for a jury, for such a construction is opposed by the Constitution, Art. IV, sec. 18, "In all issues of fact joined in any Court, the parties may waive the right to have the same determined by a jury," &c., in the absence of such waiver "all issues of fact" under the new system must be tried by a jury. These are constitutional provisions, and the provisions of C. C. P. and all other legislative acts must be construed in reference to the Constitution.

PER CURIAM. *Venire de novo.*

Cited: Hutchinson v. Smith, post, 355; *Harris v. Carstarphen,* 69 N. C., 419; *McRae v. Battle, Id.,* 106; *Haughton v. Newberry, Id.,* 460; *Lee v. Lee,* 71 N. C., 144; *Timmons v. Westmoreland,* 72 N. C., 592; *S. v. Graves, Ib.,* 485; *Vestal v. Sloan,* 76 N. C., 129; *Egerton v. Logan,* 81 N. C., 176; *Morris v. Willard,* 84 N. C., 296; *McLeod v. Bullard, Id.,* 531; *Katzenstein v. R. R., Id.,* 695; *Wessell v. Rathjohn,* 89 N. C., 383; *Worthy v. Shields,* 90 N. C., 194; *Sims v. Bray,* 96 N. C., 89; *Brown v. Mitchell,* 102 N. C., 369; *Harding v. Long,* 103 N. C., 411; *Orrender v. Chaffin,* 109 N. C., 425; *Bergeron v. Ins. Co.,* 111 N. C., 51; *Hood v. Sudderth,* 111 N. C., 224; *Stoneburner v. Jeffreys,* 116 N. C., 86; *Bank v. Gilmer, Id.,* 704; *Mauney v. Redwine,* 119 N. C., 536; *Trust Co. v. Forbes,* 120 N. C., 359; *Hines v. Outlaw,* 121 N. C., 53; *Howard v. Early,* 126 N. C., 173; *Troxler v. Bldg. Co.,* 137 N. C., 58, 60; *Pinchback v. Mining Co., Ib.,* 179; *Perry v. Ins. Co., Ib.,* 404; *Sprinkle v. Wellborn,* 140 N. C., 174; *Smith v. Moore,* 142 N. C., 296, 297; *Moseley v. Johnson,* 144 N. C., 268; *Balthrop v. Todd,* 145 N. C., 113; *Smith v. Moore,* 149 N. C., 198; *Sumner v. Staton,* 151 N. C., 201; *Calvert v. Alvey,* 152 N. C., 614; *Owens v. Hornthal,* 156 N. C., 22; *Pritchard v. Smith,* 160 N. C., 85; *Alford v. Moore,* 161 N. C., 386; *Shepherd v. Lumber Co.,* 166 N. C., 133.

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(90)

ELIZABETH and WINNIFRED LEE, by their Guardian, and others, trustees of the Baptist Church of New Bern, v. WM. H. PEARCE and wife, ELIZABETH.

This case also comes to the Supreme Court upon the appeal of the defendants. It will be seen from the following opinion of the Chief Justice, that the points raised in the Court below, by the defendant, are unnecessary to be stated, especially after the decision on the plaintiff's appeal.

Justice & Haughton for appellants.
Green, contra.

PEARSON, C. J. The only mode by which the exceptions of the defendants to the ruling of his Honor on the question of admissibility of evidence could be presented to this Court, was by a motion for a *venire de novo*. There having been a verdict and judgment in favor of the defendants in the Court below, and the motion for a *venire de novo* being allowed, upon the exceptions and appeal of the plaintiff, there is nothing presented by the appeal of the defendants for this Court to act on. Indeed, if both sides asked for a *venire de novo,* there was no reason why the new trial should not have been allowed as of course.

The appeal is dismissed as being improvidently taken.

PER CURIAM. Appeal dismissed.

Cited: S. v. Graves, 72 N. C., 485.

(91)

ISABELLA ROWARK v. A. R. HOMESLEY and wife, E. J. HOMESLEY.

A plaintiff who is allowed to sue, *in forma pauperis*, has no right to an order of arrest, without first filing the undertaking required in sec. 152 of The Code of Civil Procedure.

MOTION to vacate an order of arrest, heard before *Logan, J.,* at Fall Term, 1872, of CLEVELAND.

The action was for slander, and the plaintiff was permitted, upon filing the proper affidavit, to sue *in forma pauperis*. Having also filed the affidavit required by sec. 149, C. C. P., that the action was for an injury to her character, the Court issued an order of arrest and the defendants gave bail. At Fall Term, 1872, the defendants moved to vacate the order of arrest, and discharge the bail given by them in obedience to said order. Motion allowed; whereupon the plaintiff appealed.

Hoke, Lee & Durham for appellant.
Schenck & Bynum, contra.

PEARSON, C. J. In the absence of any other provision, the privilege of suing *in forma pauperis* might by implication include the right to appeal and to have the provisional remedies also, *in forma pauperis;* that is, without giving an undertaking with sureties. But C. C. P., sec. 152, provides, "Before making the order (of arrest), the Judge

shall require a written undertaking on the part of the plaintiff, with sureties, to the effect," &c. This express provision excludes the implication, that a plaintiff who is allowed to sue without giving a prosecution bond, is also to have the right to an order of arrest without a written undertaking. See, also, C. C. P., sec. 174.

(92) There is no error in the ruling by which the order for the arrest is vacated.

PER CURIAM. Order confirmed.

SAMUEL R. BIRDSEY v. WILLIAM HARRIS.

A Judge has no power to set aside a judgment granted by a justice of the peace, which had been docketed in the Superior Court of the county where the same was obtained. Much less has a Judge of another judicial district any power to set aside or interfere with a similar judgment, though the same is likewise docketed in the Court of a county within his district, and execution issued from that Court.

MOTION to vacate and set aside an order, enjoining the collection of sundry executions in favor of the plaintiff and against the defendant, heard before *Clarke, J.*, at Fall Term, 1871, of WILSON.

The plaintiff obtained, before a Justice of the Peace in the county of New Hanover, on 29 June, 1871, judgments against the defendant for certain sums in three separate actions and for costs. On the same day the plaintiff obtained from the justice transcripts of the judgments, and had the same duly docketed by the clerk of the Superior Court of New Hanover County. A few days afterward, the plaintiff sends a transcript of the record of the New Hanover Superior Court to the clerk of the Superior Court of Wilson County who also dockets the judgments in his office, and issues executions thereupon. The executions being levied upon the property of the defendant, he applies to Judge Clarke at Chambers on 4 July, 1871, for an order to restrain the collection of the executions, &c. His Honor, upon the affidavits

(93) of the defendant and others, granted an order notifying the plaintiff to appear before him on 14 July, and show cause why the judgments and executions should not be vacated and set aside, and also giving notice to the sheriff to appear at the same time with the executions, &c. His Honor on the 14th of July, granted the motion of the defendant, set aside the judgments and executions, and restrained the sheriff from proceeding further under them and ordered further, that the papers be returned to the clerk of the Superior Court of Wilson County, and the plaintiff be notified to appear at the Fall Term thereafter of said Court, and show cause why the orders should not be made

final. The plaintiff appeared as notified, filed an affidavit, and moved to vacate the order above set out; which motion was refused .

His Honor ordered the "cause to be transmitted to the clerk of the Superior Court of New Hanover County, to be submitted upon issues to a jury," &c., from which order the plaintiff appealed.

L. W. Barringer for appellant. (94)

No counsel in this Court, *contra.*

SETTLE, J. The plaintiff's counsel, Mr. L. W. Barringer, insisted upon the argument that the record disclosed several defects, any one of which was fatal to the defendant's case in this Court.

Without pausing to consider his other objections, the authorities cited to sustain the last are so directly in point as to enable us to dispose of the case in a few words.

The foundation of these proceedings is a judgment of a Justice of the Peace of NEW HANOVER, docketed first in the office of the Superior Court Clerk of that county, and then regularly transmitted to, and docketed in the office of the Superior Court Clerk of WILSON.

New Hanover is in the 4th and Wilson in the 3d district. So the Judge of the 3d district, upon motion, undertook to set aside a judgment originally docketed in the 4th district, and ordered "the cause to be transmitted to the Clerk of the Superior Court of NEW HANOVER, to be submitted upon issues to a jury and to be placed upon the docket of said court, to be tried in the due course and order of the said court, or to abide the orders of the Judge of the 4th Judicial District."

The Judge of the 4th district, in which the original judgment was rendered, could not have made this order, and certainly the Judge of another district cannot do so.

In *Ledbetter v. Osborne,* 66 N. C., 379, it is held, that where a judgment was obtained before a Justice of the Peace, and docketed in the office of the Superior Court Clerk, the Court has no power upon motion, to set aside said judgment and enter the cause upon the civil issue docket. If a party has been aggrieved in a trial before a Justice of the Peace and has been denied the right of appeal, he may obtain relief by a writ of *recordari.*

But waiving all difficulties which may be suggested as to a (95) Justice's judgment, and assuming, for the argument, that the judgment was originally rendered in the Superior Court still the defendant has mistaken the county in which he should have sought relief.

In *Hutchinson v. Symons,* 67 N. C., 161, Chief Justice PEARSON reviews all the cases upon the subject, and shows conclusively that a case cannot be constituted in two or more counties, at the same time, in either of which motions may be made, as on a case pending. The case

remains of record in the court of the county in which the original judgment was rendered, and all motions in the cause must be made in that court; and it is pending until the judgment is satisfied in the county where it is rendered.

Let it be certified that there is error, to the end, etc.

PER CURIAM. Judgment reversed.

Cited: *Broyles v. Young,* 81 N. C., 319; *Cannon v. Parker, Id.,* 322; *Morton v. Rippey,* 84 N. C., 612; *Bailey v. Hester,* 101 N. C., 540; *Whitehurst v. Transportation Co.,* 109 N. C., 345; *Hamer v. McCall,* 121 N. C., 198; *Moore v. Moore,* 131 N. C., 372; *Oldham v. Reiger,* 148 N. C., 550.

Dist.: *Cotton Mills v. Cotton Mills,* 116 N. C., 649.

EFFIE C. McLEAN, Executrix of H. M. McLean, v. JAMES T. LEACH and others.

1. **A is sued by the executrix of B, on a note given for the purchase of land sold by the executrix for assets; on the trial, A offers as a set off, a judgment paid by him as B's surety: *Held,* in administrations granted prior to 1 July, 1869, not to be a counter-claim.**
2. **In administrations granted prior to 1 July, 1869, the creditor who first proceeds upon his judgment *quando,* and fixes the administrator with assets, must first be paid, without any regard to priority of judgments.**

ACTION tried before *Buxton, J.,* at the Fall Term, 1872, of HARNETT.

The following is the case stated by his Honor and sent to this
(96) Court with the transcript of the record of the Superior Court.

Suit was commenced 10 July, 1871, upon a note for $588.60, due twelve months after the 2d April, 1869, given by the defendant, Dr. James T. Leach, with the other defendants as his sureties, payable to the plaintiff, as executrix of her deceased husband, Hector M. McLean, for the price of a tract of land, sold by her under an order of Court, for the purpose of assets, and bid off by Dr. Leach.

The allegations of fact contained in the complaint, answer and replication are not controverted. Additional facts, matters of record, were put in evidence by defendants, as follows:

The plaintiff qualified as executrix of Hector M. McLean, at December Term, 1863, of Harnett County Court. She filed her petition and obtained license to sell the land of her testator, for assets, at December Term, 1866. The sale was made 2 April, 1869, on a credit of twelve months, with interest from date. The land was sold in eight separate lots or parcels, and the aggregate of sales was $3,270.45. Lot No. 8

was bid off by Dr. Jas. T. Leach for $588.60, who gave note and security, as did the other purchasers.

The sale was reported at Fall Term, 1869, of Harnett Superior Court, was approved, and orders for collection and title, upon the payment of the purchase-money were made. It also appeared in evidence, as matters of record, that there were outstanding judgments against the estate of the testator, to the amount of $6,251.84, then pending in Harnett Court, all being in the nature of judgments *quando*. Two of these, one for $164.81, and another for $1,445.09, amounting to $1,609.90, were given against the executrix in 1867, the remainder being rendered at Fall Term, 1869, and were all upon notes of the testator, except one which was upon an open account. The judgment set out in the answer of the defendants, and insisted upon as a counter claim, is recorded against her as executrix of Hector M. McLean, principal, and Dr. Jas. T. Leach, as surety for $500 principal money, (97) and $158.83 interest, and $40.40 costs, was so far as she, the executrix was concerned, absolute as to $5 thereof only, and for costs, and *quando* for the balance. Dr. Leach paid the whole of it.

Upon this showing, the defendant insisted that while admitting the two judgments rendered in 1867, amounting to $1,609.90, had priority over his claim, yet by payment by Dr. Leach, as surety for Hector M. McLean, of the judgment recovered in the Circuit Court of the United States in 1868, that he was, by virtue of the statute, placed upon a footing as judgment creditor of the said McLean, and as such was entitled to priority over the judgments recovered in 1869; and as the aggregate sales of the land amounted to $3,270.45, that deducting therefrom $1,609.90, there still remained $1,660.56 applicable to the counter claim. And inasmuch as his counter claim for money paid was in excess of the claim made by the plaintiff, that the defendants were entitled to a verdict and judgment for the excess in favor of Dr. Leach, and for costs, and the defendants asked his Honor so to charge.

The plaintiff insisted:

1. That while admitting that the defendant, Dr. Leach, by the payment of the judgment in the Circuit Court of the United States, and by force of the statute referred to, was placed upon the footing of a judgment creditor of the estate of the testator, yet the said judgment was but a judgment *quando*, as to all but $5 and costs, and was only entitled to be paid *pro rata*, along with other judgments of a similar character, outstanding against the estate, and that the plaintiff was entitled to receive the proceeds of the land sold to make the apportionment.

2. That the sale notes for the other seven lots sold might never be realized, and until that was done, the executrix would not have assets in hand, to meet the two judgments recovered in (98) 1867, which were admitted to be entitled to priority.

His Honor charged the jury that upon the case presented, the plaintiff was entitled to recover the amount of the note, principal and interest. Defendants excepted.

The jury returned a verdict for the plaintiff. Rule for a new trial; rule discharged. Judgment, and appeal by defendants.

Fuller, and *Moore & Gatling* for the appellants.
McKay, Jr., contra.

BOYDEN, J. Let it be granted, as settled in the case of *Ransom v. McClees,* 64 N. C., 17, that when it is admitted by the plaintiff, or when it otherwise clearly appears, that the assets are fully sufficient to discharge all the debts of the testator, or all of the same dignity, the defendant would be entitled to his counter claim or set off; still in the principal case, the defendant would not be entitled to the relief demanded, for the reason that it would take from the executor the right to prefer claims of equal dignity, and confer that right upon the creditor. *Brandon v. Allison,* 66 N. C., 532. And for the further reason, that it would involve a full account of the administration of the estate, as far as the same had progressed, before it could be determined whether the defendant was entitled to any part of his counter claim; and if any, what part thereof; and so on through the whole administration, in every case where such counter claim was relied on, the same account would be required. In the case of *Henderson v. Burton,* 38 N. C., 259, it is said that *quando* judgments were to be paid according to their priority. That was a case of a creditor's bill filed after the rendition of the *quando* judgments, where no further steps could be taken against the executors, and where all those creditors in the *quando* judgments were en-
(99) joined from further proceedings on their *quando* judgments.

The Court in that case, instead of the rule that equality was equity, and paying all *pro rata,* adopted the principle that the most vigilant was to be preferred, and therefore decided that the *quando* judgments were to be paid according to priority. But this decision does not cover the case of *quando* judgment creditors where they must proceed to fix the executor with assets before they can have execution for their debts; and we hold upon the very principle upon which that case was decided, that the creditor that first proceeds upon his *quando* judgment and fixes the administrator with assets, must be first paid without any regard to the priority of judgments. As our whole system in this regard has been changed, this opinion can affect only such cases as are yet to be decided under the law where administration had been granted previous to 1 July, 1869.

PER CURIAM. Affirmed.

Cited: Dancy v. Pope, post, 152.

JANE C. HINTON v. DAVID HINTON.

1. Among other things a testator wills: "My executors are fully empowered to sell the balance of my estate or any part of it they may think best for the interest of my family, or retain the balance after paying my just debts, should they think it more to the interest and welfare of my family. I desire in either case, the property or proceeds shall be kept together until the oldest child shall arrive at a lawful age or shall marry, then the whole of my estate shall be divided between my wife and children. I desire further, that my wife shall have at all times sufficient funds for the maintenance and education of my children, of principal, if the interest should not be sufficient for that purpose": *Held*, that the discretion as to amount of the expenditure beyond the income, or of the extent of the encroachment to be made upon the principal, must be exercised by the executor.
2. The general rule is, that where a discretion is given to a trustee the Court has no jurisdiction to control its exercise, if the conduct of the trustee be *bona fide*. If, however, the trustee acts *mala fide*, or refuse to exercise the discretion, the Court is obliged from necessity to interfere and take upon itself the discretionary power.

(100)

APPEAL from *Watts, J.*, at Fall Term, 1872, of WAKE, upon the following case agreed:

"1. Lawrence Hinton died on 26 September, 1864, leaving a last will and testament which was duly admitted to probate in said county of Wake; and from which the plaintiff, at May Term, 1866, of Wake County Court dissented. (So much of the will as is pertinent to the point decided, is fully stated in the opinion of the Court.)

2. That said Lawrence Hinton left him surviving a widow, the plaintiff, and the following children, to wit: Isabella, who was born on 10 July, 1852; Annie M., who was born on 6 November, 1853; Ransom, who was born on 26 April, 1858, and Mary L., who was born on 18 October, 1863.

3. That said children have resided with their said mother since the death of the testator she paying for their tuition and clothing and furnishing them with food at her own table, as per exhibits, etc.

4. That the estate of the said testator consists of $4,055.37, proceeds of the sales of land, now invested in bonds and notes, and about 570 acres of land (294 acres of which have been assigned to plaintiff for dower), of the estimated value of $6,000.

5. There has been paid to plaintiff, during the year 1868, $218.50, and during the year, 1871, $640.75, which are admitted to be all, or very nearly all, the rents and profits arising from said land and interest on said money, during the time embraced by the charges made in said exhibits. These sums have proved insufficient to pay the charges preferred by the plaintiff.

The plaintiff insists:

(1.) That the defendant, as executor is directed, in case the
(101) annual income derived from the said estate is not sufficient for the maintenance and education of the children, to furnish to the plaintiff for that purpose, sufficient funds from the principal thereof.

(2.) That although the sums expended or charged for tuition, clothing and board for the children respectively shall be unequal, yet the sum total of all such expenditures and charges, is a charge upon the estate, and not by the portions of the same to which each child would be entitled if equally divided, and this shall be done until the oldest of said children should become of age or marry.

(3.) That the articles furnished by the plaintiff were proper, and such as were contemplated by the testator in making his said will.

It is submitted to the court to decide:

1st. Whether the plaintiff is entitled to be paid any part of her demand out of the principal of the fund raised from the sale of the lands.

2d. If she is so entitled, whether such part of her demand shall be paid out of said funds, as a common fund, or the proper charges and expenditures of each child shall be paid out of his or her equal portion of said funds.

3d. If the Court shall be of opinion, that the plaintiff is entitled to be paid any part of her demand in either way, then the demand shall be referred to a referee, to ascertain what portion or items of the same is a proper charge as well in the aggregate against all of the children, as separately against each child.

It is admitted, that since the institution of this suit, one of the children of the testator, Isabella, married on or about 1 December, 1872.

His Honor, after argument, gave judgment for the plaintiff, from which the defendant appealed.

(102) *Moore & Gatling* for appellant.
Mason and *Devereux, contra.*

RODMAN, J. Lawrence Hinton died on 26 September, 1864. He left a will, in its material parts as follows: "1. I desire my executors shall sell such portions of my estate as they deem best, and pay my just debts and funeral expenses, at such time as they may think best. 2. My executors are fully empowered to sell the balance of my estate or any part of it they may think best for the interest of my family, or retain the balance after paying my just debts, should they think it more to the interest and welfare of my family. I desire, in either case, the property or proceeds shall be kept together until the eldest child shall arrive at a lawful age or shall marry, then the whole of my estate shall be divided between my wife and children. I desire, further, that my wife shall

have at all times sufficient funds for the maintenance and education of my children, of principal, if the interest should not be sufficient for that purpose."

He appointed two executors, of whom the defendant only qualified. The testator left surviving him a widow (the plaintiff) and four children, of whom the oldest has married since the institution of this action; the others are infants. The widow dissented from the will and had dower assigned her. The personal estate was exhausted in the payment of debts. Some of the lands were sold by the executor; one tract in which the widow has dower and which is worth about $6,000, remains unsold. A part of the proceeds of that sold was supplied to the widow for the maintenance of the children prior to 1868; how much is not stated, and as there is no controversy respecting that, it is not material. After this payment there remained and still remains in the hands of the executor $4,053.37, as principal. The interest since 1868 to the amount of $859.25 he has paid to the widow for the maintenance of the children. The plaintiff has spent for the children, during 1868, 1869, 1870 and 1871, $4,185.35, in very unequal proportions as among (103) them. The eldest has received during that time $1,417.85; the second, $1,497.71; the third, $621.09; and the fourth, $576.95.

The plaintiff claims in this action, that the executor shall pay her the sums above named, or as much as remains in his hands for the purpose of indemnifying her for the payments she has made in behalf of the children. The children are not made parties to the action.

The questions presented by this case may be considered under these heads:

1. In whom was the discretion vested by the will to expend a part of the principal of the estate for the maintenance and education of the children.

2. The extent of the discretion, and how far it can or will be controlled by the courts; and, what strictly is included under this second head, but will be most conveniently considered separately.

3. Whether on the final division of the property the children for whom less has been expended are not entitled to have the difference equalized, by dividing the original fund equally and deducting from the share of each what has been expended on him.

1. The testator makes no devise of his lands. He permits them to descend to the heirs. But he gives the executor a power to sell and of course to receive the proceeds; the executor is to keep the property together and divide it when the eldest child marries or comes of age. After these provisions, the testator adds a direction (for so it must be regarded), that his wife shall have a part of the principal of his estate for the maintenance and education of his children, if the interest should not be sufficient.

The wife is to control the manner of the expenditure, but she is to receive the money for the purpose from the executor, and it
(104) seems to follow that the discretion as to the amount of the expenditure beyond the income, or of the extent of the encroachment to be made upon the principal, must be exercised by the executor.

Besides, if the widow be regarded as the donee of the discretionary power, it must be held, that by dissenting from the will she renounced all gifts whether of estates or powers under it; at least of such powers as imply a personal trust and confidence as this does. *Mendenhall v. Mendenhall,* 53 N. C., 287.

The decision of this question is not practically important under the present state of facts existing in this case, but it seemed best to present our view of it, because it will render clearer the views we take of the other questions.

2. It is clear that a discretion is given to the executor to exceed the income; it is equally clear that the testator did not intend that the whole fund should be expended. Something substantial was certainly intended to be left to be divided upon the event which has happened. These are the limits of the executor's authority.

The general rule undoubtedly is, that where a discretion is given to a trustee, the Court has no jurisdiction to control its exercise, if the conduct of the trustee be *bona fide.* Lewin on Trusts, 538-543, citing as to discretionary maintenance; *Livesay v. Harding,* Tam., 460 (Cond. Eng. ch. R.); *Collins v. Vining,* Coop. Eq., 472; see, also, *Kekeinch v. Marker,* 3 Macnaghten and Gordon, 311, and cases cited in note; *Cloud v. Martin,* 18 N. C., 397.

If, however, the trustee acts *mala fide,* or refuses to exercise the discretion (Lewin, 543), the Court is obliged from necessity to interfere and take upon itself the discretionary power. In this case there is no *mala fides* either on the part of the widow or the executor. No doubt both have acted with a sincere desire to promote the interests of the children. Neither does the executor absolutely decline to exercise his discretion. As we understand his answer and the case agreed,
(105) he does not deny, that under all the embarrassing and difficult circumstances of the case, the expenditures by the widow were within reasonable limits. At least he does not allege that they grossly exceeded such limits. But for his own protection he requires the sanction of the Court to an expenditure by him for the indemnity of the widow. If the executor, in the fair exercise of his discretion, had refused to sanction and pay these expenditures, the Court would not compel him to do so. For the Court will not assume a jurisdiction, which it is so little able to administer usefully, except with reluctance, and only when it is necessary to do so, to prevent fraud, abuse, or a total disappointment of the intentions of the testator.

Under the pleadings and case agreed, we think our decision must be governed by the same principles as if the executor himself had made the expenditure, and now called on the Court to sanction it. Under the general doctrine relating to discretionary trusts, we are inclined to think that we should do so to the extent of giving him credit in account with the children for the sums expended for them respectively. But we cannot now decide the question, because the children are not parties, and no judgment of ours would bind them.

3. For the same reason, we can do no more than state the present inclination of our opinion upon the question presented under the third head.

Since the commencement of this action, the eldest child has married, and thereby the event has occurred upon which an equal division of the estate is required to be made, upon such division the power of the executor will be determined. Nothing more will remain for him to do in that character. The shares of the infant children will be delivered to their respective guardians, who will have no discretion, but must be governed by the rules which the law has established for the management of their ward's estates. *Johnston v. Coleman,* 56 N. C., 290. (106) How shall this division be made in order that it may be equal, as it is directed to be? If there is divided only what shall remain of the estate, after deducting from it the aggregate expenditure for the children, and each child is given an aliquot share of that, it is plain that the two oldest children will have received considerably more of their father's estate than the two younger ones. The former will have received a sufficient education, while there may not remain enough to give such an education to the latter. Upon an intestacy, equality of distribution is the rule, but that equality is obtained by requiring all advancements to be brought in and accounted for. That is a principle of equity sanctioned by the statute, and the same principle would seem to apply to a case like this.

Advancements (technically so called) are made by a parent before his death, by which event his estate becomes equally divisible among his children. In the present case, advancements (not technically such) are made by his direction after his death, and in anticipation of the period which he has fixed on for an equal division. The analogy seems close enough to sustain the application of a common principle of equity to both cases.

If these views be correct, no division can be equal which does not include either all of the common property, or at least so much of it as will be of sufficient value to enable each child to receive (including as receipts the advancements made to each), an aliquot share of the estate as it stood at the father's death, less, of course, the debts, etc., and the widow's dower.

Without giving any judgment upon the merits of the case, it is remanded, in order that a supplemental complaint may be filed setting forth the marriage of the eldest child, with such other matters as the parties may be advised, and demanding a division of the property,
(107) to which all the children may be parties.

The costs of this Court will await the final judgment.

PER CURIAM. Order accordingly.

SMITH & MELTON v. THE N. C. RAILROAD COMPANY.

1. The contents of a writing, which if it ever existed, has been lost or destroyed, and which can not be found after diligent search, may be proved by parol.
2. What an agent says in the course of doing an act in the scope of his agency, characterizing or qualifying the act is admissible as part of the *res gestæ*. But if his right to act in the particular matter in question has ceased, his declarations are mere hearsay, which do not affect the principal.
3. The power to make declarations or admissions in behalf of a company as to events or defaults that have occurred and are past can not be inferred as incidental to the duties of a general agent to superintend the current dealings and business of the company.
4. To establish the weight of 19 bales of cotton burned on defendant's railroad, it is competent for a witness to state the average weight of the lot of 33 bales, of which the burned bales were a portion, and thus fix the weight of the 19 bales by approximation.
5. There is an exception to the general rule against hearsay evidence, by which a matter of general interest to a considerable class of the public, may be proved by reputation among that class: *Therefore*, it is competent for a witness to state the price of cotton, from information received through commercial circulars, prices current and correspondence and telegrams from his factor.
6. The by-laws of a corporation are not evidence for it against strangers who deal with it, unless brought home to their knowledge and assented to by them.

APPEAL from *Moore, J.*, at July (Special) Term, 1871, of MECKLENBURG.

The plaintiffs sued the defendants, before the change in our system of pleadings, in CASE, declaring against the Company as a com-
(108) mon carrier for an overcharge of freight, and for the nondelivery of nineteen bales of cotton which were put upon the defendant's road. Verdict for plaintiff. Defendant appealed.

(113) *Wilson* and *Bailey* for appellants.
Dowd, contra.

RODMAN, J. The case comes up on exceptions by defendants for the admission of evidence.

Exc. 1 is not sustained. The contents of a writing, which if it existed, has been lost or destroyed, and which cannot be found after diligent search, may be proved by parol.

Exc. 2. The plaintiffs gave evidence to prove that they had delivered to the defendants thirty-three bales of cotton to be carried from Chester, S. C., to New York, and that Wilkes was general superintendent of defendants' road. They were then allowed to give in evidence that Wilkes had said that nineteen bales of the cotton had been burned on 22 May, 1866, at Harrisburg station, on the defendants' road. This conversation was after the alleged burning, but it does not appear how long afterwards, except that it was in the same year.

What an agent says in the course of doing any act in the scope of his agency, characterizing or qualifying the act, is admissible as part of the *res gestæ*. For this purpose the possession of property for the principal is an act, and what the agent says while in pos- (114) session, characterizing his possession, or characterizing any act then being done to the property, is admissible, 1 Green. Ev., 113.

But if his right to act in the particular matter in question has ceased, his declarations are mere hearsay, which do not affect the principal, *Ibid.* Cases in support of these propositions may be found in abundance with but little industry. See *Williams v. Williamson,* 28 N. C., 281; *Howard v. Stutts,* 51 N. C., 372, and *R. R. Co. v. Brooks,* 57 Penn., 339.

These general principles cover the present case. When the declarations of Wilkes were made the property had passed from his possession, and had been burned in the course of transportation, it may be, some months before. He was not engaged in any act as general agent, which his declarations qualified or explained. They purported to give an account of an event which had passed. Neither were they distinct objects of proof, having a value as his declarations, apart from his agency; their whole value is as admissions which he was authorized by the company to make for it.

Two exceptions have been asserted to the general rule. The first in the case of a conductor or baggagemaster, whose duty it was assumed to be to answer inquiries concerning missing baggage if made in due time. *Moore v. R. R.,* 6 Gray (N. H.), 450. If it had appeared in evidence in that case that it was the duty of the conductor not only to answer inquiries concerning baggage in his possession, or as to its being in his possession or not, but also as to how and when baggage not in his possession had been lost or damaged, the decision could not be questioned. But it may be doubted whether that duty was properly implied from his employment. See *Bank v. Steward,* 37 Maine, 519. The cashier of a bank told a surety to a note which had been discounted by

the bank that it had been paid, whereby the surety was induced to release property which he held to indemnify himself, when in fact the
(115) note had not been paid. The declarations of the cashier were held inadmissible. Surely, if in any case the duty of answering inquiries could be implied from the employment, it would have been in this, and it was so held in *Bank v. Wilson,* 12 N. C., 485.

The second exception contended for is in the case of a president or general agent of a company, whose declarations respecting *any* business of the company, it is said, must be considered within the scope of his agency. The only authority cited for this is *R. R. v. Blake,* 12 Rich. Law, 634. Greenleaf says the decision is questionable.

The power to make declarations or admissions in behalf of a company as to events or defaults that have occurred and are past, cannot be inferred as incidental to the duties of a general agent to superintend the current dealings and business of the company. No such power is expressly given by the by-laws of the defendants' company, and a general power so unusual and so unnecessary in the ordinary business of a company must require a clear and distinct grant. This exception is sustained.

Exc. 3. The witness testified that he weighed the whole thirty-three bales of cotton and knew the total weight of the nineteen bales said to be lost. That the bales differed in weight very little. Defendant excepted. This mode of arriving at the weight of the lost bales was not exact, but it was as near an approximation as could be arrived at under the circumstances. It was open to contradition by defendant, who may be presumed to have known the weight of the bales as well as plaintiff did. This exception is not sustained.

Exc. 4. It was agreed that if plaintiff were entitled to recover anything on account of the lost cotton the measure of damages was the value of the cotton in New York at the time when it ought to have arrived there, less the expense of transportation, etc. The plaintiff
(116) in testifying said, that he only knew the value in New York by accounts of sales received from his factors informing him of sums placed to his credit, being the proceeds of sales, by telegrams, circulars and correspondence. His testimony was objected to, but received, and he stated the price in New York at the time mentioned. There is an exception to the general rule against hearsay evidence by which a matter which is of general interest to a considerable class of the public may be proved by reputation among that class. 1 Green Ev., s. 127. It is on this ground that reputation in a family is received as evidence of pedigree. *Morgan v. Purnell,* 11 N. C., 95; and public reputation as evidence of marriage (except in certain cases); *Moffitt v. Witherspoon,* 32 N. C., 185; *Archer v. Haithcock,* 51 N. C., 421; of character, solvency, *State v. Cochrane,* 13 N. C., 63; of the ancient name of a town, *Toole v.*

Peterson, 31 N. C., 180, etc. These last could not in general be proved in any other way. And so with regard to the price of a commodity at a certain time and place; a single sale would be slight evidence, for it might be under exceptional circumstances; whereas the result of all the sales of the day, or of a period shortly before or after, embodied in a reputation among dealers in the article, is the best evidence which the nature of the case admits of. The reputation thus formed and circulated by telegrams, commercial circulars and the prices current in newspapers, is such evidence as is acted on without hesitation by all dealers in their most important transactions. One who deals in the particular commodity must be regarded in the same light as a scientific expert, whose opinions are admissible, although they are partly derived from books of science, which are not admissible. Best on Evidence, s. 346. It would be against the ordinary principles on which the rules of evidence are founded to reject such evidence. This exception is not sustained. (117)

Exc. 5. Supposing that there was evidence that Ghio was an agent of the defendants; the evidence of the contract made with him was clearly competent. His own representations that he was agent, would by themselves, amount to nothing. But the fact that the cotton was received by defendants at Chester, and that its transportation was begun was some evidence of his agency. Whether the declarations of Wilkes as to Ghio's agency were admissible, would be governed by the principles already stated, which it is unnecessary to report.

Exc. 6 was abandoned by defendants.

Exc. 7 raises no questions of law.

Exc. 8. The by-laws of the company enact that no contract shall be binding on the company unless ratified or approved by the President or Board of Directors. It is evident that this was not intended to apply to the ordinary contracts for freight and passage, which, from their nature and number, could not be so ratified, but only to contracts beyond the usual business of the company. Besides, the by-laws of a corporation are not evidence for it against strangers who deal with it, unless brought home to their knowledge and assented to by them. Angel & Ames' Corp., s. 359, page 380. This exception is not sustained. As the instructions of the Judge were not excepted to, it is unnecessary to notice them. Besides, nearly all the questions which could be raised on them are passed on in this opinion.

PER CURIAM. *Venire de novo.*

Cited: McComb v. R. R., 70 N. C., 180; *Fairley v. Smith,* 87 N. C., 371; *Branch v. R. R.,* 88 N. C., 575; *Suttle v. Falls,* 98 N. C., 395; *Leak v. Covington,* 99 N. C., 565; *Southerland v. R. R.,* 106 N. C., 105; *Rumbough v. Improvement Co.,* 112 N. C., 752; *Egerton v. R. R.,* 115

N. C., 648; *Williams v. Telephone Co.*, 116 N. C., 561; *Craven v. Russell*, 118 N. C., 566; *Darlington v. Tel. Co.*, 127 N. C., 450; *McEntyre v. Cotton Mills*, 132 N. C., 600; *Avery v. Stewart*, 134 N. C., 291; ———, 140 N. C., 153; *Ives v. R. R.*, 142 N. C., 138; *Moseley v. Johnson*, 144 N. C., 270; *Younce v. Lumber Co.*, 155 N. C., 241; *Gazzam v. Ins. Co., Ib.*, 341; *Styles v. Mfg. Co.*, 164 N. C., 377; *Robertson v. Lumber Co.*, 165 N. C., 6.

R. J. McDOWELL v. ALEX. CLARK, Executor of A. Clark, Sr.

1. The return to an execution, "wholly unsatisfied," is not a sufficient return, as it does not conclusively appear thereby that no goods of the testator were to be found. After an absolute judgment against executors, the proper return to an execution issuing thereon, is "no goods or chattels of the testator to be found."
2. The office of executorship is joint, and if one or two executors die, the office survives, and the survivor is entitled to take into possession all the estate of the testator, so as to finish the administration of the estate.
3. The executor of one of two executors of a person deceased, can not be sued without joining the surviving executor, in whose hands the assets of the testator are supposed to be.

(118) APPEAL from *Mitchell, J.*, at Fall Term, 1872, of IREDELL.

In his complaint the plaintiff alleged, that at Spring Term, 1869, of Iredell Superior Court, he obtained "an absolute judgment" against the testator of the defendant, and one T. B. Neill, who were executors of John Neill, and also against one Falls, and that the assignee of Falls had paid one-half of the judgment. That Clark, the testator of the present defendant, and one of the executors of Neill, is dead, and that defendant, by his will is the executor.

The plaintiff further alleges, that execution issued against Clark, Sr., and Neill, the executors of John Neill, and was returned "wholly unsatisfied."

To this complaint the defendant demurs, and for cause says:

1. That the plaintiff does not allege in his complaint that the execution was returned *"nulla bona."*

2. That at the time of "issuing this writ, there was and is now a surviving executor of John Neill, deceased, to-wit: one T. B. Neill, who is alone, both to be sued in this action"; and defendant avers that said surviving executor was, and still is, within the jurisdiction of the Court. And for further cause, the defendant showeth, that there was, and is now a suit pending in this Court for the same cause of action.

(119) On the trial below, the defendant moved to dismiss the action, on the ground that the plaintiff's only remedy was by a motion in

the cause, wherein his judgment against the executors of John Neill was obtained. This motion was refused.

No evidence was offered as to any action pending by plaintiff against the defendant, when this action was brought, and it appeared there was no such action (except that named in complaint). It was admitted that Neill, one of the executors of John Neill, was insolvent, and living in Iredell county when the plaintiff sued.

The Court overruled the demurrer, and gave judgment against the defendant for the amount of the plaintiff's claim and for costs. From this judgment the defendant appealed.

Armfield, for appellant.
W. P. Caldwell, contra.

PEARSON, C. J. The first ground upon which the demurrer is put cannot be sustained. The return to the execution "wholly unsatisfied," is not a sufficient return, as it does not conclusively appear thereby that no goods of the testator were to be found. After an absolute judgment against executors the usual course is to issue an execution and have it returned, "no goods or chattels of the testator to be found." Upon *sci. fa.* or defendant suggesting a *devastavit,* the judgment shows that the executor had assets, and the return of the sheriff that the assets cannot be found, fixes the executor with a *devastavit;* but if the plaintiff in the judgment chooses to take upon himself the *onus* of providing a *devastavit,* by proof *aliunde,* there is no necessity for an execution to issue and be returned *nulla bona,* provided the executor can be fixed with a *devastavit* by other proof. After an action of ejectment, the usual course is to issue a writ of possession and have it returned "executed" before issuing a writ for mesne profits; but the writ may be issued without such execution and return, provided the plaintiff is prepared to (120) prove that he had obtained possession before the commencement of the action.

2. The second ground upon which the demurrer is put is well taken. The office of executorship is joint, and if one of two executors dies, the office survives, and the survivor is to take into his possession all of the estate of the testator so as to finish the administration of his estate. The presumption of law from the rights of the surviving executor is, that after the death of Clark, Sr., all of the estate of the testator, which had not been administered, passed into the hands of Neill the surviving executor. It follows, that Clark, Jr., the executor of Clark, Sr., can not be sued without joining the surviving executor, in whose hands the assets of the testator are supposed to be, or rather into whose hands the assets are supposed to have passed. If such be the fact, the executor of Clark, Sr., is not responsible, as his testator is not fixed with a *devastavit.* So

the merits of the case depend upon whether Clark, Sr., was guilty of a *devastavit,* or whether at his death the assets passed into the hands of the surviving executor, and although he be insolvent, the executor of Clark, Sr., is entitled to have him made a party to the action.

Indeed, it might be made a question, whether a creditor of the first testator could at law maintain an action against the executor of a deceased executor, and was not left to his action against the surviving executor, who represents the estate. It is clear from the authorities that he can not sue him alone, and must join the surviving executor.

The insolvency of the surviving executor does not alter the case; if the assets have passed into his hands they are lost, if he has not got them in hand, the remedy of the creditor is in equity, to prevent the executor of the deceased executor from paying them over to the surviving
(121) executor, and having them applied to his judgment debt, and in case of a *devastavit,* having the *onus* fixed on the party who committed it.

Judgment reversed, and judgment that the writ be quashed.

PER CURIAM. Reversed.

W. T. BLACKWELL v. MATILDA CUMMINGS and others.

Where a mortgage is impeached for fraud, in that, the execution of it was obtained through false and deceitful representation, it is competent for the mortgagee (the plaintiff) to prove that the mortgagors executed the same of their own accord, and without solicitation on his, the mortgagee's part, as facts and circumstances to go to the jury for the purpose of disproving the allegations of fraud. The weight to be given to such evidence is altogether a question for the jury.

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

The suit was brought by plaintiff to foreclose a certain mortgage made by defendant Matilda and her husband, since dead, to secure the sum of $2,000, of which there was due at the time the complaint was filed $1,440.80.

The answer of the defendant Matilda, the other defendants being her children, and heirs at law of James B. Cummings, deceased, her husband, alleges that the mortgage described in the complaint of plaintiff was void on account of fraud, and was obtained to defraud her husband and herself of their homestead by the false and fraudulent representations of the plaintiff.

On the trial, to support the allegation of fraud, the defendant, Matilda, testified that she was induced to sign the mortgage, for the
(122) reason that the plaintiff promised to advance to her husband, to be used in his business, the sum of $700 over and above a judgment which he, the plaintiff, had obtained against them; and that when

applied to, a day or two after, refused to comply with his promise, giving as a reason that certain property was not transferred in the mortgage, which her husband, plaintiff, said had previous to its execution, promised should be contained in it; that she applied to plaintiff again for the $700, and he again refused to pay the same, alleging the same reason.

A. J. Loftin, for the defendant, testified that he was the plaintiff's attorney at the time the mortgage was drawn; that the mortgage was read to the parties, and that the plaintiff objected to it, for the reason that certain property in New Bern was left out of it, and there was no power of sale; that plaintiff consulted with him, the witness, and upon being advised that it would be sufficient, he finally accepted it.

The plaintiff himself testified that the mortgage was made at the instance of the defendants, and that he agreed to pay the $700 to the defendants, and was ready to do so; but that the defendant came to him and told him that her husband was drinking and that she did not want the $700 paid to him; that afterwards both defendant and her husband came to him and told him they did not wish the money ($700) paid; that the judgment was as much as they could redeem. He further testifieed that the defendant, since the death of her husband, had expressed her gratification to him, the plaintiff, that the $700 had not been paid, as it would have been an entire loss. That he was boarding with defendant when the mortgage was executed, and had been for twelve or eighteen months.

It appeared in evidence that the defendant superintended her husband's business, and had control of his money.

The plaintiff then offered to prove that the defendant and her husband proposed to make the mortgage of their own accord, without any solicitation whatever from him, as facts and circum- (123) stances to go to the jury for the purpose of disproving the allegations of fraud contained in the answer to the complaint. This was objected to, and ruled out by the Court. Plaintiff excepted.

Plaintiff insisted and requested his Honor so to charge, that if the jury should be of opinion from the evidence that the sum of $700, which the defendant alleges was demanded by her before signing the mortgage, was subsequently relinquished by her and her husband, and the plaintiff relieved from paying the same upon her request, then they should find for the plaintiff. This request was omitted by the Court, it not having been made when the Judge charged the jury.

There was a verdict for the defendants. Motion for a new trial; motion refused. Judgment and appeal by the plaintiffs.

Phillips & Merrimon for appellant.
Smith & Strong, contra.

BOYDEN, J. In this case the defendant alleged that the deed of mortgage made to the plaintiff by the defendant and her husband was fraudulent and void for several reasons and among other reasons, says, "that the plaintiff, for the purpose of securing a judgment for thirteen hundred dollars, he had obtained against the husband of the defendant, falsely and deceitfully, for the purpose of obtaining the real estate in controversy as a security for his judgment offered to lend to her husband $700 in cash, if her said husband, together with defendant, Matilda, would join in a mortgage of the real estate now in controversy, to secure the payment both of the judgment and the seven hundred dollars then offered to be advanced; and that having implicit confidence in the plaintiff, they at length yielded to his solicitations, and executed the mortgage in controversy." The plaintiff offered to prove, "that the
(124) defendant and her husband proposed to make the mortgage of their own accord, without any solicitation whatever from the plaintiff, as facts and circumstances to go to the jury for the purpose of disproving the allegations of fraud, as alleged in the answer and sworn to by the defendant." This evidence was objected to by the defendant and rejected by the Court. In this there was error, as we hold that upon the question of fraud made by the defendant, this evidence was clearly competent; but how much weight the jury would have given to it was a question for them.

This disposes of the case in this Court and renders it unnecessary to natice the other questions made in the cause.

PER CURIAM. *Venire de novo.*

STATE v. JAMES W. ELLIOTT.

On cross-examination, a witness on a trial for murder, stated that she "Did not tell Mrs. L. on the day of the homicide, that the deceased was sitting up, and she did not think he was hurt as bad as he pretended to be": *Held*, that the State calling out this evidence was bound by it, and could not call Mrs. L. to contradict the statement.

INDICTMENT for murder, tried before *Cloud, J.*, at Fall Term, 1872, of DAVIDSON.

The defendant was indicted for killing one Jesse F. Harris. On the trial in the Superior Court, a number of exceptions were taken to the rulings of his Honor on points arising, both in relation to the selection of the jury and to the admission of evidence, and also to his Honor's
(125) charge to the jury after the evidence and arguments had closed. These exceptions to the evidence and the charge of his Honor, it

is unnnecessary to state, as they are wholly irrelevant to the point upon which the case was decided in this Court and the evidence objected to and received by the Court below, raising the question, the decision of which disposes of the case on this appeal, is fully set out in the opinion of the Court.

The jury returned a verdict of guilty. Motion for a new trial; motion refused. Judgment, and appeal by defendant.

Gorrell and *Scott & Scott* for the defendant.
Attorney General Hargrove, with whom was *Bailey,* for the State.

SETTLE, J. On the trial, the prisoner introduced as a witness Mrs. Beck, who testified: "I am a sister of the prisoner's wife; on the afternoon of the day of the homicide, I saw the prisoner come out of his house with a bottle of camphor, in a great hurry. I went with the prisoner to the deceased; prisoner rubbed the deceased with camphor a great deal, did all he could for him. I did not rub the prisoner any. My mother, Mrs. Rainey Owen, brought water from the spring and put it on his head. I went as fast as I could to the place, when I heard what was the matter; saw a rock close by on the ground that would weigh four or five pounds; the prisoner sent Joyce Owen for Mrs. Harris and Alfred Owen for the doctor. The prisoner and deceased always appeared very friendly, and visited frequently.

On cross-examination, she stated that she did not tell Mrs. Ellen Lane on the day of the homicide, that the deceased was sitting up, and she did not think he was hurt as bad as he pretended to be. The State then called Mrs. Lane to contradict Mrs. Beck. The prisoner objected to this evidence, but it was received by the Court, and Mrs. Lane testified that "Mrs. Beck and herself had a conver- (126) sation on the day of the homicide, when she asked Mrs. Beck how deceased was, and Mrs. Beck replied: 'I sit him up against the fence and washed the blood off him. I do not think he is hurt very bad; he makes out like he is hurt a great deal worse than he is.' "

It is very clear that the State questioned Mrs. Beck as to a collateral matter, and by a well-established rule of the law of evidence, was bound by her answer. There are exceptions to the general rule, that the answers of a witness as to collateral matters drawn out by cross-examination are conclusive, and these exceptions are discussed in *S. v. Patterson,* 24 N. C., 346; and *S. v. Kirkman,* 63 N. C., 246, but they have no application to our case. In *Clark v. Clark,* 65 N. C., 661, it is said: "When the cross-examination instead of being general, descends to particulars, then the party is bound by the answer and cannot be allowed to go into evidence *aliunde,* in order to contradict the witness, for it would result in an interminable series of contradictions

in regard to matters collateral, and thus lead off the mind of the jury from the matter at issue."

If the rule be such in a civil case, certainly it would apply with greater force in a criminal prosecution. We cannot weigh the effect that this contradiction of Mrs. Beck, on a collateral matter, may have had with the jury; it may have so prejudiced the prisoner's case as to lead to his conviction; but be that as it may, we are to apply to the case a well-established rule of the law of evidence, which entitles the prisoner to a *venire de novo.*

PER CURIAM. *Venire de novo.*

Cited: *Burnett v. R. R.,* 120 N. C., 519.

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(127)

H. D. CARRIER v. J. JONES, J. M. CRATON, JOHN GILKEY and M. H. KILPATRICK, Admr., etc.

A, the holder of a promissory note given by H, and indorsed by B and others, gave B a receipt, not under seal for $23.90, and stating therein, that it was for "his, B's, part of a note I hold on H": *Held,* that such receipt was no release to B from his liability to pay the balance of the note, nor did it operate to release any other indorser from such liability.

APPEAL from *Logan, J.,* at Fall Term, 1872, of RUTHERFORD.

The suit originally was brought in a Justice's Court on a note for $100, given by one Hamilton to the Trustees of the Methodist Church at Rutherfordton, the payment of which had been guaranteed by the defendants. The plaintiff, who now is the party in interest, recovered before the Justice, and the defendants appealed to the Superior Court.

On the trial below, it appeared that the note sued on was of the following tenor:

"On 1 January, 1860, I promise to pay to the Trustees of the Methodist Church in Rutherfordton, one hundred dollars. 12 Nov., 1859.

BENJ. HAMILTON."

On this note was the following indorsement, signed by the defendants and others, to wit: "We make ourselves responsible to the within note. 1 March, 1860."

The following credits were likewise indorsed thereon: "Received of John Gilkey, twenty-three dollars and ninety cents, his part of the within note. 6 April, 1866." And "Received of James Kilpatrick, twenty-four dollars and eighteen cents, his part of the within note. 8 July, 1866."

The defendants relied upon the indorsement of these credits and upon receipts for the sums paid, in the following words, etc.: "Received of James Kilpatrick, $24.18, in full for his part of the Hamilton parsonage note, 8 July, 1867," signed, "H. D. Carrier"; and (128) "Received of John Gilkey twenty-three dollars and ninety cents, his part of the note I hold on B. Hamilton, which he assigns to me, going to the Methodist Church. 6 April, 1867. H. D. Carrier."

In answer, the plaintiff denied discharging any one from responsibility on the note, and disclaimed any intention of discharging any one, and offered to prove that the defendants were members of the Methodist Church, and the note was given in part payment for a parsonage lot; that the plaintiff made a calculation of the amount of each of the guarantors, who were considered solvent at the time the credits were made, ought in justice to pay, and that he expected to collect the note without suit or trouble; that he had no intention of discharging any of the parties. The evidence was objected to and ruled out by his Honor. Plaintiff excepted.

There was a verdict against the defendants, Jones and Craton, under his Honor's instructions to the jury, and in favor of Gilkey and Kirkpatrick, finding that the receipts above set out fully discharged them, but did not operate as a discharge in favor of Jones and Craton. Judgment of the Court accordingly, from which judgment the defendants, Jones and Craton, appealed. Plaintiff also appealed. See *post*.

Argo & Harris and *Dupree* for appellant.
No counsel in this Court for plaintiff.

BOYDEN, J. Jones and Craton plead that they have both been released and discharged by the plaintiff, and they rely upon the following two receipts to establish this defence. The receipt of Gilkey is as follows:

"Received of John Gilkey, twenty-three dollars and ninety cents, his part of a note I hold on B. Hamilton, which he assigned to me going to the Methodist Church, 6 April, 1869. (129)

H. D. CARRIER."

The other receipt is in these words:

"Received of James Kirkpatrick, twenty-four dollars and eighteen cents, in full for his part of the Hamilton parsonage note, 8 July, 1867.

H. D. CARRIER."

These two receipts are not releases, as they are not under seal, neither are they covenants not to sue, for the same reason. So the defendants have both failed in establishing their plea of release and discharge. *Russell v. Adderton*, 64 N. C., 417.

These receipts do not purport even to release the parties to whom they were given; they are mere statements of the amount paid by Gilkey, and Kirkpatrick's intestate; the sum paid by each being what was then estimated to be the aliquot part each of the solvent guarantors would have to pay to discharge the note. There is no promise not to sue the parties to whom these receipts were given, and if such promise had been made in the receipts, they not being under seal, would not have discharged the parties to whom they were given, as the promise would clearly have been without consideration and therefore void. In this case, it will be remembered that the debt was over due at the time of the payment, and that each one was liable not only to pay what he did, but also to pay the balance of the debt then due. Had the debt not then been due, the case might have been different; and if the plaintiff had accepted a horse estimated at so many dollars, though less than the sum due, in discharge of the whole debt, then this acceptance of a horse or of any other article of property, could have been pleaded as an accord and satisfaction. But it is well settled in our State, that the payment in money of a sum less than the amount due, (130) although receipts are in the language used in these receipts, does not discharge the parties to whom they are given, nor the other guarantors, but all are still liable to pay the balance due on the note. This is decisive of the case against Jones. Kirkpatrick did not appeal.

The judgment against Jones is affirmed, with costs.

PER CURIAM. Affirmed.

H. D. CARRIER v. J. JONES, J. M. CRATON, JOHN GILKEY and M. H. KIRKPATRICK, Admr., etc.

1. **The rejection of evidence not material to maintain or disprove the point in issue, is no ground for a new trial.**
2. **It is error in the Judge below not to instruct the jury, that a receipt, produced as evidence and relied upon by the defendant to whom it was given, to operate as a discharge of him from all further liability, *was not such a release*, nor did it free the defendant from the payment of whatever balance of the debt remained unpaid.**

This is the plaintiff's appeal in the foregoing case. No facts, except those therein stated, were elicited upon the trial; and the ground of the plaintiff's appeal, as appears from the transcript, and as is set out in the case wherein the defendants appealed is, for the rejection of certain evidence offered by him on the trial. From the decision of his Honor, rejecting the evidence, the plaintiff appealed.

No counsel for the appellant in this Court.
Argo & Harris, and *Dupre, contra.*

BOYDEN, J. The opinion in the case of the plaintiff against Jones, *supra,* is decisive of this case, and must govern it. In that case it is decided, that the receipts to Gilkey and Kirkpatrick did not release or discharge Jones or Kirkpatrick, nor did they dis- (131) charge the parties to whom they were given. The rejection of the evidence of the plaintiff constituted no error as it was wholly immaterial, and in truth amounted to nothing more than what appeared by the receipts.

But his Honor was in error in not instructing the jury that the receipts of the defendants did not discharge them from the balance still due, and only entitled them to the credit for the amounts stated in the receipts.

PER CURIAM. *Venire de novo.*

Cited: Churchill v. Lee, 77 N. C., 346; *Comr's v. Lash,* 89 N. C., 165; *Jones v. Call,* 93 N. C., 179.

C. C. VEST v. J. W. COOPER and others.

The discretion of a Superior Court Judge to set aside a report of a referee, on the ground of newly discovered testimony, can not be reviewed in the Supreme Court.

APPEAL from *Cannon, J.,* at Fall Term, 1872, of CHEROKEE, upon a motion to re-refer an account.

The suit was brought by the plaintiff, a former sheriff, against the defendants, who were the sureties of one of his deputies, for taxes collected and not accounted for. At Spring Term, 1872, it was referred to L. W. Davidson to take an account, etc. Upon the coming in of the report of the referee, at the ensuing Fall Term, the defendants moved to set it aside and again open the account, upon the ground that they had discovered new and material testimony, since the filing the report of the referee in Court, supporting the motion by (132) affidavits. The plaintiff moved to confirm the report.

His Honor refused the plaintiff's motion, and ordered the report to be set aside, and the cause be re-referred to the same referee, upon the payment by the defendants of the costs heretofore accrued. From this judgment plaintiff appealed.

No counsel for appellant in this Court.
A. S. Merrimon, contra.

READE, J. The matters in controversy were referred to a referee to state an account and report, etc. The referee examined the evidence, stated an account and reported. At the coming in of the report, the defendant upon affidavit moved to refer the matter back with instructions to open the account, on account of newly discovered evidence. His Honor in the exercise of his discretion, granted the motion, at the cost of the defendant, and the plaintiff appealed. The question is, does an appeal lie in such a case.

C. C. P., section 299, allows an appeal from every "order, etc., involving a matter of law or legal inference which affects a substantial right," etc., "or grants or refuses a new trial."

It is as well settled as anything in the practice, that the Judge who tries a case may set aside a verdict and grant a new trial for newly discovered evidence, or because the verdict is against the weight of the evidence, or because the damages are excessive, etc.

And the same is true in regard to a report, which is in the nature of a verdict. And this is done in the exercise of his *discretion,* from which no appeal lies. Judging from the numerous appeals which have lately come up in such cases, we suppose that the profession have misunderstood the clause in the Code, *supra,* "or grants or refuses (133) a new trial." There seems to be an impression that there may be an appeal from every motion for a new trial; and the fact is overlooked that it must "involve a matter of law or legal inference," and not a mere matter of discretion. This will illustrate: Plaintiff recovers of defendant $1,000. Defendant files affidavit that since the trial he has discovered that he can prove the debt has been paid. His Honor says, I believe your affidavit and I grant a new trial, or I do not believe it, and I refuse a new trial. This is a matter of discretion and no appeal lies. But if he had said, I believe the affidavit, and if I had the power, I would grant a new trial, or I do not believe it, but still the law compels me to grant a new trial, this would involve a matter of law, and an appeal would lie. And in such case, all we could do would be to say, You have the power and you must exercise your discretion.

PER CURIAM. Affirmed.

NOTE TO THE PROFESSION.

It is apparent that a very short record would have been all that was necessary to present the case to this Court, yet there are thirty-five pages of legal cap, the greater party of which is the testimony taken by the referee, his report, etc. All of which is of no conceivable use, and involves considerable cost and gross injustice to suitors. This case is only one of many. And we adopt a rule in every case, that the appellant shall pay all cost of irrelevant matter in the record, unless it appears that he objected to its being put in. READE, J.

Cited: *Moore v. Edmiston,* 70 N. C., 482; *Brink v. Black,* 74 N. C., 330; *Carson v. Dellinger,* 90 N. C., 229; *Breaid v. Lukins,* 95 N. C., 125; *Davenport v. Terrell,* 103 N. C., 54; *Edwards v. Phifer,* 120 N. C., 406; *Faison v. Williams,* 121 N. C., 153; *Henderson v. McLain,* 146 N. C., 333.

(134)

E. M. ADAMS v. R. E. REEVES and M. C. REEVES.

1. A voluntary payment, with a knowledge of all the facts, can not be recovered back, although there was no debt; a payment, under a mistake of fact, may.
2. If one knowing that he has no claim upon another, sues out legal process against him and seizes his person or property, and the defendant, acting upon the false representations of the plaintiff, and not being able at the time by reasonable diligence, to know or to prove that such representations are false, pays the demand, he may recover it back in a subsequent action.
3. If the instructions asked on a trial in the Superior Court and given in the precise words asked for by the Court, are so vague and obscure as to admit of two different constructions, one of which may possibly mislead the jury, it is error, and a good cause for a *venire de novo.*

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

The action is brought to recover money which the plaintiff alleges he paid to defendants through their fraudulent representation, and paid under the compulsory process of law. On the trial certain issues were submitted to the jury, to wit:

1. Was J. H. Richards the agent of the defendants in the sale of the tobacco mentioned in the pleadings?

2. Did the defendants or either of them induce the plaintiff, by false representation, to pay defendants any money, the proceeds of the sale of the tobacco?

3. What is the amount of the plaintiff's damage, if any?

Richards, the alleged agent, in relation to his agency, among other things testified: That in a conversation he had with R. E. Reeves, one of the defendants, at Dobson, in the summer or fall of 1871, he asked Reeves, "Do you deny that I was your agent to buy and sell tobacco for your firm?" That Reeves answered: "No, I will admit it before any court or jury." Again he asked him: "Did you deny that you employed me, as your agent, to sell the tobacco sold by me to Adams (the plaintiff) as my own, and to do the best I could (135) with it?" To which, Reeves replied, "I have never denied it"; that the conversation took place in the presence of one White. White being examined on the trial, corroborated Richards, and further testified, that he knew Reeves and that Reeves knew him, had conversations with him, etc.

R. E. Reeves, the defendant, in regard to this conversation testified that he had a conversation with Richards at the time and place, giving a different version of it, and denying the truth of Richard's statement; but that no such man as White was present, that he did not know him, nor had he ever seen him until the day before the trial, when he was pointed out to him as being one of the witnesses. On his cross-examination, Reeves, was asked if he had not seen White with one Bass at his own house (Reeves') last Christmas; and did he not at that time offer to purchase White's crop of tobacco. Reeves recollected seeing Bass there about that time, but had no recollection whatever of White, or his offering to buy tobacco from him; nor did he ever see him at other times.

In reply to Reeves, White was recalled, and asked about being at Reeves' house, etc. Defendant objected to this question. Objection overruled. White stated that Bass and he were at the house of Reeves last Christmas; that Reeves knew him, called him by name, and offered to buy his tobacco. Bass being examined, sustained White.

It was further proved on the part of the plaintiff, that Reeves told him, the plaintiff, that Richards was not his agent, nor had any authority to sell the tobacco, nor had he any control of it. That Richards was a great scamp, and was only permitted by the firm to go along with their wagon, to visit his relations in Virginia; that Richards had practiced a fraud upon the plaintiff and himself, and offered to assist the plaintiff in bringing Richards to justice.

(136) For the defendants, it was further proved, that they had brought suit against the plaintiff in Danville, Va., and had attached some funds of his, the plaintiff's, which were in bank; that this suit was compromised by the plaintiff's paying the amount to defendants for the tobacco sold by Richards. The defendants insisted that the money was paid upon a compromise of that suit, and not by reason of any misrepresentation.

There was other evidence introduced, which is not material to the points involved. The instructions asked by the parties, and those given by his Honor, are fully set out in the opinion of the Court.

The jury returned a verdict for the plaintiff. Rule for a new trial; rule discharged. Judgment and appeal by defendants.

Scales & Scales for appellants.
Blackmer & McCorkle and *Masten, contra.*

RODMAN, J. A voluntary payment, with a knowledge of all the facts cannot be recovered back, although there was no debt. But a payment under a mistake of fact may be. *Pool v. Allen,* 29 N. C., 120; *Newell v. March,* 30 N. C., 441; *White v. Green,* 50 N. C., 47; *Mariot v. Hampton,* 2 Smith L. C., 237, and notes.

And this is not the less true if the mistake as to fact was caused by the false representation of the defendant; provided, the plaintiff could not by reasonable diligence under the circumstances, have informed himself of the truth. It is on this principle that the plaintiff puts his right to recover in this case.

It is said however for the defendants, that money paid under compulsion of legal process cannot be recovered back, and for this is cited *Marriot v. Hampton, ubi sup.,* and other cases which have followed in its track. In that case the defendant had recovered (137) judgment against the plaintiff for a sum which plaintiff alleged he had paid, but he was unable to produce any evidence of the payment, and paid the demand, at what stage of the action does not appear; afterwards he found the defendant's receipt, and brought his action to recover back the money.

It was held, on the principle that there must be an end of litigation, that the plaintiff could not recover. The decision has been repeatedly followed, and it is settled law as a general rule, that if one compromises a demand after action brought, by paying it in whole or in part, he cannot in a subsequent action, recover back the money paid, upon any ground of which he might have availed himself as a defence to the original action. But this rule is subject to the qualifications: 1. That the process was *bona fide* sued out, and was not accompanied by circumstances which amounted to duress or extortion. 2. That the debt demanded was not false to the knowledge of the plaintiff. Probably the two qualifications are in substance the same; but for the present purpose, the division is convenient.

In the present case, the fact which is an essential part of the plaintiff's case, viz.: that Richards was the authorized agent of the defendants to sell the tobacco, would, with other facts which do not seem to be disputed, have been a complete defence in the original action.

There was no evidence of actual duress or oppression. The mere facts that the original action was begun by an attachment of property, or that property was attached in the course of it; or, that it was brought in a neighbor though foreign State, do not of themselves constitute or imply duress. We must assume that the plaintiff, although a resident of North Carolina, would have received in the courts of Virginia the same justice that he would have received in his own State. These matters are mentioned only to be put out of the way as not affecting the case. It remains only to consider whether the second qualification of the rule above stated can be supported in law, and (138) whether it is applicable in the present case; and in that connection the fact of the attachment of the plaintiff's property may be considered.

The principles stated above in the shape of a qualification to a gen-

eral rule, may be stated as an affirmative proposition, thus: If one knowing that he has no claim upon another, sues out legal process against him and seizes his person or property, and the defendant acting upon the false representation of the plaintiff, and not being able at the time by reasonable diligence, to know or to prove that such representations are false, pays the demand, he may recover it back in a subsequent action.

As to authority, in nearly every case in which the general rule is laid down, it is coupled with the qualification—if there be no fraud. Notes to *Marriot v. Hampton; Hamlet v. Richardson,* 9 Bing., 644; *Milnes v. Duncan,* 6 B. & C., 679; *Tartwell v. Horton,* 28 W. (2 Williams), 370.

As an affirmative proposition, the cases illustrating it are clear and numerous. The leading one is *Cadaval v. Collins,* 4 A. and E., 858 (31 E. C. L. R.). There the plaintiff, a Spaniard, ignorant of the English language, was arrested in England at the instance of the defendant for a fictitious debt of a large amount, and to procure his liberation paid the defendant £500. Afterwards he brought an action to recover it back. The jury found that the defendant knew that his claim was false, and the plaintiff was held entitled to judgment. Patterson, J., says, "I admit in general that money paid under compulsion of law cannot be recovered back as money had and received. And further, where there is *bona fides,* and the money is paid with full knowledge of the facts, though there be no debt, still it cannot be recovered back. But here there is no *bona fides,* and on that, I ground my opinion.

When a man sues to recover back money paid under compulsion
(139) of law, it lies upon him to show that there was fraud. Has the plaintiff shown that here?" After briefly stating the facts, he says, "To say that money obtained by such extortion cannot be recovered back, would be monstrous." Applying the same doctrine to various conditions of fact are the following cases: *Pitt v. Combes,* 2 Ad. and Ell., 459; *Alter v. Backhouse,* 3 M. and W., 633; *Unwin v. Leaper,* 1 M. & Gr., 752; *Wilson v. Ray,* 10 A. and E., 82; *Wakefield v. Newton,* 6 Q. B., 280; *Oates v. Hudson,* 6 Excheq., 343; *Rheel v. Hicks,* 25 N. Y. (11 Smith), 289; *Tartwell v. Horton,* 2 Wms. (28 W.), 379; *Gardner v. Mayor, of Troy,* 26 Bart. N. Y., 423; *Sheldon v. School District,* 24 Conn., 88.

These principles would be applicable to the case which the plaintiff has set up in his complaint, and which he claims to be established by the finding of the jury. We have then to inquire if such a case has been established, and if the jury were properly instructed as to the bearing of the evidence upon the issues. The defendants except to the instructions for error.

The only fact that seems to have been really disputed between the

parties, is, as respects the authority of Richards to sell the tobacco, *when and where he did,* viz.: on his way to Danville and before his arrival there. This question is not presented with much precision in the first issue, although it may be held sufficient. The Judge in his first instructions, leaves the question to the jury in the general language of the issue. He tells them "that they must be satisfied from the evidence that Richards was the agent of defendants, and as such authorized to sell the tobacco," meaning of course at the time and place of the actual sale. So far there is nothing erroneous or objectionable in the Judge's instructions, and if the jury had thereupon found for the plaintiff we should not have felt bound to disturb their verdict. Afterwards, however, the Judge at the request of the plaintiff, instructed the jury as follows: "If the evidence satisfies the jury that the (140) defendants employed Richards to go with their tobacco as their agent, and to carry the same to Pace's warehouse in Danville, Va., and authorized him to sell the same as his own, and to do the best he could with it, then the defendants would be bound by the sale made by Richards to Adams, although the contract was made at Reidsville, when Richards was on his way to Danville."

These instructions are so lacking in precision that it is difficult to put any certain construction on them. If they mean (as they may), merely that the jury in passing on the authority of Richards to sell at Reidsville, might consider not only the direction to him to go to Danville, but also as qualifying that the direction to sell the tobacco as his own, and to do the best he could, the instructions were right.

But in that sense they would be in substance only a repetition of what the Judge had just before said. We think therefore that we must understand them as meaning and intending to convey to the jury the idea, tha if Richards was ordered o carry the tobacco to Danville and sell it *there,* yet by force of the other directions to sell it as his own, etc., he had, *as a conclusion of law,* authority to sell at Reidsville; we do not think that it is a *legal* inference upon which the Judge could authoritatively instruct the jury. The words taken, either by themselves or in connection with the circumstances may bear that meaning. But they do not necessarily or plainly do so. And although generally the meaning of words in a contract, whether written or oral, is for the Court; yet when the proof of words is not clear and their meaning is uncertain, and may be affected by the attending circumstances, it must necessarily be left to the jury to find it. *Islay v. Stewart,* 20 N. C., 160; *Young v. Jeffries, ibid.,* 216; *Horton v. Green,* 66 N. C., 596.

In such a case, the contract of the parties becomes a mixed question of fact and law in which it is impossible to separate the (141) elements.

With some hesitation we are of opinion that these instructions may

naturally have misled the jury in their finding on the first issue. We are the more disposed to this conclusion because they were given in the words requested by the plaintiff, and if a party prays special instructions, it is his duty to make them plain and precise; and if they are vague and obscure, and may as fairly be understood in a sense which would make them erroneous, as in one which would make them proper, that construction must be adopted which is against the party.

PER CURIAM. *Venire de novo.*

Cited: Com'rs v. Com'rs, 75 N. C., 241; *S. v. Alphin,* 84 N. C., 748; *Lyle v. Siler,* 103 N. C., 265; *Fagg v. Loan Asso.,* 113 N. C., 368; *Jones v. Jones,* 118 N. C., 447; *Bank v. Taylor,* 122 N. C., 571; *Worth v. Stewart, Ib.,* 261 *Jones v. Assurance Society,* 147 N. C., 544; *Simms v. Vick,* 151 N. C., 80.

Dist.: Brummitt v. McGuire, 107 N. C., 355.

JOSEPH H. HISLOP v. S. S. HOOVER.

1. A promise to pay certain debts by the purchaser of goods, which the owner of the goods at the time owed, is a sufficient consideration to support the sale, if the contract was *bona fide* made, notwithstanding the purchaser, when the contract was entered into, was an infant and without means.
2. An insolvent debtor, in a deed made by him, may prefer one creditor to another, if he does it *bona fide* and with no fraudulent intention. Such a preference being fraudulent and void only in case proceedings to have the debtor adjudicated a bankrupt are commenced within six months afterwards.
3. To allow a witness, after objection, to give a history of how he became indebted to a party in a suit, when such indebtedness had no relation to the point in issue, is error, and is a proper ground for a new trial.

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

In his complaint, the plaintiff alleges that he was in possession of a stock of goods on and before 19 February, 1869, which were in (142) store at Grier's storehouse, consisting of a general assortment of the value of about $1,200. That the defendant unlawfully took the goods, carried them away and still detains them.

The defendant denies the allegation contained in the complaint, and makes this statement in regard to the matter now in controversy. That the goods in question were the property of one Gallant, who had been selling goods in the same store for some years past, and that the plaintiff was his clerk. That Gallant owed him, the defendant, about $330;

and to avoid paying this debt, made a fraudulent and pretended sale of the goods to the plaintiff, who was without means, and in fact no sufficient consideration whatever passed between the plaintiff and Gallant, and that the whole transaction was a sham and fraud. That he, the defendant, sued out a writ of attachment, levied the same upon the goods in question and that the sheriff still has possession of them, the estimated value of the same being about $600.

There was a verdict for the plaintiff. Rule for a new trial; rule discharged. Judgment, and appeal by defendant. (145)

Dowd and *Guion* for appellant.
Wilson and *Bynum, contra.*

RODMAN, J. The action is brought to recover damages for a trespass in taking the plaintiff's goods. The defendant pleads that he recovered a judgment and had execution against one Gallant, to whom the goods belonged, and who had conveyed them to plaintiff with intent to defraud his creditors, and he justifies the seizure of the goods under the execution.

It was admitted that a part of the goods had belonged to Gallant, and there was evidence tending to show that Gallant being insolvent had sold them to the plaintiff, an infant without pecuniary means or property, in consideration of his promise to pay certain debts which Gallant owed, to the value of the goods.

If this contract of sale was *bona fide,* there was a sufficient consideration in the contract of the plaintiff, notwithstanding his infancy and want of means, to support it. The contract of an infant is voidable, but not void. It is a precarious and uncertain consideration, the nature of which must be considered by the jury as bearing on the question of *bona fides;* but the law does not say it is so perfectly valueless as to be no consideration, and to make a sale founded on it necessarily fraudulent.

As to the objection that a sale of goods worth only $703 to a man of no means must necessarily be fraudulent as to the creditors of the vendor, because he thereby puts it in the power of the vendee to defeat a recovery of the price by setting up his personal property exemption, that cannot concern the defendant, because he has no claim against the plaintiff, not being one of the creditors whose debts (146) he assumed.

The only question in this case was as to the *bona fides* of the transaction, which was one entirely of fact. There was evidence from which the jury would have been justified in finding that the sale was fraudulent, or that it was not. We cannot revise their verdict. All the circumstances put in evidence seem to have been fairly submitted to the

jury. The charge of the Judge was sufficiently clear, and we see no error in it. He directed them to inquire: "1. Was the sale by Gallant to Hislop a *bona fide* transaction; or, was it a simple transaction to carry on the business in the name of a new man? If it was a sham trade, done with a view to fraudulently defeat the legitimate purposes declared at the time, viz.: the honest payment of his (Gallant's) debts, then it was void," etc.

His Honor was requested to hold, that a sale by an insolvent debtor, made with the intent to prefer one creditor to the others, was fraudulent and void, by force of the Bankrupt Act. This he declined to do. Whatever the law in that respect may be, such a preference is fraudulent and void only in case proceedings to have debtor adjudicated a bankrupt are commenced within six months afterwards, which it does not appear was done. In the absence of such a proceeding, a deed is not avoided merely by reason that it gives a preference, and an insolvent debtor may prefer if he does it *bona fide* and with no fraudulent intention. This has been often decided, and the law has not been altered by the Bankrupt Act, except upon the condition mentioned. See *Lewis v. Sloan,* 557, *post.* There was a verdict for the plaintiff, and defendant appealed.

It is to be regretted that we are under the necessity of giving a new trial in a case, in which the matter in controversy is so small in proportion to the costs.

(147) Gallant was examined as a witness for plaintiff, and "was permitted to give a history of the transaction by which he became indebted to the defendant after objection by defendant's counsel, when he went on to state that the note was given for money borrowed at fifteen *per cent per annum,* a usurious rate of interest," etc.

We are at a loss to conceive on what ground the Judge conceived this evidence competent. It could not avoid the defendant's judgment. It was not in any way pertinent or relevant to the issues on trial, and could only tend to raise a prejudice against the defendant by holding him out in the odious character of a usurer. It may be that it had little or no influence, but we cannot see that it had not any; and if a plaintiff will hazard his case, by pressing in evidence at the same time irrelevant and prejudicial to the defendant, he cannot complain of losing the benefit of his verdict, in consequence.

For this error the judgment is reversed.

PER CURIAM. *Venire de novo.*

Cited: S. v. Shields, 90 N. C., 695.

JOHN S. DANCY, Admr. of Jacob Higgs, deceased, v. FRANCIS A. POPE, JOHN J. LONG, ROBERT L. JOYNER and others.

1. Letters of administration granted to one in 1867, who is removed in the fall of 1869 and another appointed in his place, are governed by the law as it was prior to July, 1869.
2. An absolute judgment is a lien not only upon the assets in hand, but also upon such assets as may come in hand after its rendition. It is a lien upon the estate of the deceased debtor, and must be first paid, according to the date of the judgments respectively.
3. *Quando* judgments are to be paid in the second instance out of the fund, according to the date of judgments respectively, *quando* judgments on specialties taking preference of those obtained on simple contract debts.
4. A decree in equity declaring a debt, and held for "further directions," is to all intents and purposes a *quando* judgment and entitled to the same *status* in the distribution of assets.

(148)

ACTION, in the nature of a bill of interpleader, heard before *Cloud, J.*, at the Special (January) Term, 1873, of HALIFAX.

The facts involved in this case, as found by the Judge of Probate of Halifax County, and the issues of law joined thereon and sent to the Judge of the Superior Court to be determined, and which bear on the decision made by this Court, are substantially as follows:

Jacob Higgs, a citizen of Halifax County, died intestate in 1866, leaving a considerable estate, real and personal. At the February Sessions of the County Court, 1867, of said county, one William Fenner was appointed administrator of intestate's estate, gave bond and entered into the administration of the same. Certain creditors of the estate at once brought suit against the administrator, Fenner, and obtained judgments therein for various amounts absolutely, the administrator failing to plead, having at the time of the judgments personal assets, which he subsequently wasted. Other creditors subsequently obtained *quando* judgments against Fenner, the administrator, and one Robert L. Joyner, who had been a ward of the intestate, in a suit in equity for a settlement, obtained a decree "of assets *quando*," for a large amount.

Some of the judgments entered up against the estate of the intestate were upon specialties, others based upon open unsigned accounts; and the proceeds of the personal estate being wholly inadequate to pay the same, Fenner, the administrator, filed a petition to sell the real estate of Higgs, the intestate, for the purpose of assets.

Fenner, the first administrator, becoming insolvent, and having wasted and misapplied the assets belonging to the estate of Higgs, was removed, and Dancy, the present plaintiff, appointed in his (149) stead. Under the proceedings instituted by the first administrator, the plaintiff sold the land, and a part of the proceeds being realized, he now seeks the advice of the Court as to how the same shall be applied.

His Honor, upon the points submitted to him, adjudged, that the absolute judgments obtained by Fenner's failing to appear and plead, are to be satisfied out of the personal assets alone, and are entitled to no part of the assets derived from the sale of land.

That the decree in equity is to be regarded as of the same dignity as a judgment on a bond; and in regard to its satisfaction, it stands upon the same footing as a judgment rendered on a bond.

The judgments *quando* rendered on bonds are to be preferred, in the application of assets derived from the sale of real estate, to the absolute judgments.

The judgments *absolute,* rendered in cases first pleaded to, or first taken without plea, are entitled to be first satisfied out of the personal assets.

The judgments *quando* rendered on bonds are entitled to preference in the order of time in which they were pleaded to, except when indulgence of time was granted; in which case the judgment is entitled to the same preference as if the judgment had been rendered at the term when the indulgence was granted.

From this judgment the defendant, Long, appealed.

Moore & Gatling and *Batchelor, Edwards & Batchelor* and *Conigland* for defendants.

Battle & Son, contra.

PEARSON, C. J. This is an action in the nature of a bill of interpleader, in which the administrator brings the fund into Court,
(150) and asks that it may be distributed under the advice of the Court, according to the rights of the judgment creditors, all of whom are made party defendants. It differs from "a creditor's bill" only in the particular, that in such a bill the debts are to be ascertained and paid in a due course of administration, where, as in this action, the debts have already been ascertained by judgment, and the only question is in regard to the legal priority of the judgments.

Upon the argument, the counsel seem to have misconceived the nature of the action, and all of the learning and the cases cited, where the object is to charge the personal representative, *individually,* for a *devastavit,* or for false pleading or for bad pleading; as when an administrator under the plea, "fully administered," offers to show "former judgments," in order to which he ought to have pleaded "former judgments and no assets—*ultra,*" have no bearing upon our question; for the purpose of this action is not to charge the administrator, but to have the fund distributed according to a due course of administration.

The case is governed by the old law, for Fenner took out letters of administration in 1867, and the substitution of the plaintiff in his

stead does not bring the case within the operation of the act of 1869; for the appointment of the plaintiff as administrator is merely a continuation of the former administration.

The recent legislation, by which all of the debts of persons deceased are to be paid *pro rata,* without regard to the dignity of the debt, as it was termed, and provision is made for putting the estate into liquidation much in the mode of bankruptcy, has made these questions of no general practical importance.

I will, therefore, without a discussion of the cases, merely state the conclusions to which the Court has arrived, upon general principles of the law. Ever since the case in 2 N. C., 530, *Anonymous,* where the Judges, Haywood and Stone, differ in opinion, it has been the opinion of the profession that an absolute judgment was a lien (151) not only upon the assets then in hand, but upon the assets that come to hand afterwards; as Judge Haywood says, "the executor may have suffered it, knowing assets would afterwards come to his hands sufficient to satisfy it, by admitting assets he has made himself absolutely liable for the debt." Land is now liable for the payment of all of the debts of the deceased debtor, after the personal estate is exhausted. Suppose an administrator confesses assets, or suffers judgment by default which fixes him with assets, this is an absolute judgment, and other creditors take judgments *quando;* afterwards the land is sold and assets come to hand; if the creditor having an absolute judgment cannot reach the proceeds of the sale of the land, he is thrown back upon his resort to the individual liability of the administrator, and if he is insolvent loses the debt for his folly in taking an absolute instead of a *quando* judgment. This is too plain to talk about. A creditor who has obtained an absolute judgment is entitled to have his judgment satisfied out of the estate and stands number one. If he gets satisfaction out of the administrator *de bonis propriis,* well; if not, he may look to assets that afterwards come to hand, on the principle that his judgment is a lien upon the estate of the deceased debtor. We are of opinion that the defendants who have absolute judgments are to be paid in the first instance out of the fund, according to the date of the judgments respectively.

We are also of opinion that the defendants who have *quando* judgments are to be paid in the second instance, out of the fund, according to the date of the judgments respectively. But the defendants who have *quando* judgments upon simple contract debts are not entitled to any part of the fund until the defendants who have *quando* judgments upon specialty debts are fully paid. A *quando* judgment fixes the debt but does not bind the assets; hence, the rendition of judgment does not change the dignity of the debt, and the creditor gets no (152) lien upon the estate until his judgment is made absolute; and as

is decided, *McLean v. Leach,* 95, *ante,* "the creditor who first proceeds upon his *quando* judgment and fixes the administrator with assets, must be first paid, without any regard to the priority of judgments."

In our case, none of the creditors by judgments *quando* "have fixed the administrator with assets." This is not a proceeding to fix him with assets, but to distribute the fund under the direction of the Court.

We regard the decree in favor of Joyner as a *quando* judgment. It was for some time questioned, but is now settled, that a decree in equity is to be treated as a judgment at law in a due course of administration of the legal assets; hence a decree that declares the debt and is "held up on further directions," is to all intents and purposes a *quando* judgment, or rather it is entitled to the same *status* in the distribution of the fund.

In regard to the part of the fund consisting of bonds payable to Turner, as guardian, and the proceeds of such as he collected and paid over to the plaintiff, there will be a reference, with a view of allowing the defendant Joyner the benefit thereof, and the right to come in for the balance according to his priority in the distribution of the fund, and we concur with his Honor that he stands as a bond creditor.

The judgment below is reversed, and it is referred to the Clerk of this Court, to state an account, distributing the fund according to this opinion.

We agree with his Honor in three points out of four, but upon the first and main point, there is error.

PER CURIAM. Judgment accordingly.

Cited: Gaither v. Sain, 91 N. C., 307; *Brittain v. Dickson,* 104 N. C., 550.

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(153)

B. F. CHEATHAM v. MARK P. JONES and others.

A debtor is entitled to a homestead in an equity of redemption, subject to the mortgage debts.

APPEAL from *Watts, J.,* at the Fall Term, 1872, of WARREN, upon the following case agreed.

"On 12 April, 1870, the defendant, Mark P. Jones, executed a mortgage to the defendants, Peter R. Davis and C. T. Sims, conveying to them a tract of land therein described, to secure two bonds in favor of the defendant, L. G. Ward, guardian, and against said Mark P. Jones, as principal, and said Peter R. Davis and C. T. Sims, as sureties; one in the sum of $1,777.69, with interest from the 19th January, 1870;

and the other for $2,222.31, with interest from the 1st May, 1870. * * * No payment has been made upon either of said bonds, except a payment of $48, made upon the first-mentioned bond, on 19 April, 1871. The said mortagage was duly registered on the day of its date, and creates a lien on said land that day. On the 3d June, 1871, and after the judgments were docketed in Warren County, on which the executions hereinafter mentioned were issued, a homestead was laid off to the said Mark P. Jones, in a portion of said land, the boundaries whereof are set forth in a paper filed with his answer," etc.

"On 7 October, 1871, the sheriff of Warren having certain executions in his hands against the said Mark P. Jones and others, which are set forth in the complaint, and having previously levied the same on the equity of redemption of the said Mark P. Jones, in all of said land except the homestead, sold the said equity of redemption at auction, after due advertisement, when the plaintiff became the purchaser, and took a deed therefor, which has been duly registered.

"The said Mark P. Jones is insolvent, and the land conveyed in said mortgage is of value, more than sufficient to pay the debts (154) therein secured.

"The plaintiff, before the commencement of this suit, tendered to the said L. G. Ward the amount due on the said bonds, and requested him to assign the same to him; and he refused to receive the money or to make the assignment.

"The plaintiff insists that he is entitled to have the bonds secured in the mortgage satisfied by a sale of that part of the mortgaged premises in which the said Mark P. Jones still holds the equity of redemption, in exoneration of the land, the equity of redemption in which has been purchased by the plaintiff.

"The defendant, Mark P. Jones, insists that inasmuch as the land in which he holds the equity of redemption, has been laid off to him as a homestead, the same ought not to be made primarily liable for the mortgage debts, and ought not in any event to be sold for the payment thereof, unless the balance of the mortgaged premises shall have been first sold, and the proceeds of the sale shall have been insufficient for the payment of said debts, and that the decree asked for in the complaint, so far as his homestead is concerned, would be a violation of his constitutional and legal rights.

"If the Court should be of opinion for the plaintiff, then a decree is to be entered accordingly; otherwise, a decree is to be entered in favor of the defendants.

"No objection is made to a sale of any of said land, except the homestead."

His Honor adjudged, "that the debts mentioned in the mortgage ought to be paid out of the proceeds of the sale of the lands, in which the

plaintiff purchased the equity of redemption; and that the land laid off as a homestead to the defendant, Mark P. Jones, ought not to be sold, unless the proceeds of the sale of the first mentioned lands shall be insufficient to pay the said debts.

(155) It is therefore ordered, etc. From this judgment the plaintiff appealed.

Batchelor, Edwards & Batchelor and *Plummer* for appellant.
Phillips & Merrimon, contra.

PEARSON, C. J. The question presented by the case is this: Has a mortgagor in possession a right to a homestead, as against all other creditors, save the creditors secured by the mortgage?

We concur in the opinion of his Honor, that the homestead is exempt from sale under execution, and that the mortgagor, although he holds subject to the mortgage debt, holds his homestead paramount to the other creditors.

A mortgage is a mere incumbrance upon a man's land, given as a security for the debts therein set out; and if he can discharge the incumbrance by the sale of the land outside of his homestead, or in any other way, creditors who are not secured by the mortgage, have no ground upon which to deprive him of the homestead secured by the Constitution.

We are of opinion that a debtor is entitled to a homestead in an "equity of redemption," subject to the mortgage debts, just as a purchaser in possession is entitled to a homestead, subject to the payment of the purchase-money.

No Error.

PER CURIAM. Judgment affirmed.

Cited: Gaster v. Hardie, 75 N. C., 463; *Burton v. Spiers,* 87 N. C., 92; *Butler v. Stainback, Ib.,* 219; *Albright v. Albright,* 88 N. C., 241; *Hinson v. Adrian,* 92 N. C., 125; *McCanless v. Flinchum,* 98 N. C., 374; *Long v. Walker,* 105 N. C., 114.

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(156)

J. M. WELLS v. F. SLUDER, Administrator, etc.

Upon an appeal to the Superior Court by a plaintiff, in an action commenced before a Justice of the Peace, for the recovery of $60 due by former judgment, the plaintiff is entitled to have the case heard *de novo*, and for that purpose it should be entered on the Civil Issue Docket.

ACTION, commenced before a Justice of the Peace, and carried by appeal to the Superior Court of BUNCOMBE, in which it was tried by *Henry, J.,* at Fall Term, 1872.

From the judgment of his Honor, dismissing the appeal, the plaintiff appealed.

The facts are stated in the opinion of the Court.

J. H. Merrimon for appellant.

No counsel in this Court for defendant.

BOYDEN, J. This was a civil action, commenced before a Justice of the Peace, for the recovery of sixty dollars due by former judgment.

Upon the trial, a jury was empaneled and found their verdict for the defendant, and the Justice ordered judgment against the plaintiff for fourteen dollars and forty-five cents costs. From this judgment the plaintiff appealed to the Superior Court; and the case was regularly entered upon the issue docket at Fall Term, 1870, and then continued until Fall Term, 1872, when the defendant moved to dismiss the appeal, on the ground that the case had been improperly entered upon the issue docket. His Honor being of opinion with the defendant, dismissed the appeal.

This would have been error, even had it been a case where the plaintiff was not entitled to a trial *de novo* upon the facts; as in that case the Judge himself should have decided the case. But in this case the plaintiff was entitled to a trial *de novo* upon the facts, as (157) was decided in this Court in *Cowles v. Hayes,* 67 N. C., 128.

We presume his Honor had not seen that decision. This case is governed by that.

PER CURIAM. Reversed.

Cited: Commissioners v. Addington, post, 255.

STATE *ex rel.* P. C. CAMPBELL v. L. V. CAMPBELL and another.

The Supreme Court has no jurisdiction to review the decision of a Judge below, on a pure question of fact.

CIVIL ACTION (exceptions to the report of a referee), tried before *Mitchell, J.,* at the Fall Term, 1872, of IREDELL.

The suit was brought on the bond given by defendant, as guardian of the relator. At Fall Term, 1871, it was referred to R. S. McLaughlin, to state the account between the parties, which was done; and at the ensuing term defendant filed exceptions to the account, objecting to certain findings of facts by the referee. His Honor overruled the exceptions, and the defendant appealed.

Armfield for appellant.
Furches, contra.

RODMAN, J. This is an action brought on the bond given by the defendant as guardian of the relator. It was referred to a referee to state the guardian account. He reported a certain sum due. All the exceptions of the defendant are that the referee made certain errors (158) of fact, to the injury of the defendant. The Judge overruled the exceptions, and the defendant appealed. This Court has repeatedly held that it has no jurisdiction to review the decision of the Judge below on a pure question of fact. The defendant, if dissatisfied with the finding of the referee, might have requested the Judge to submit the disputed facts to a jury. We do not mean to say that the Judge would be obliged in such a case to do so; but in a case of real doubt no Judge would be likely to refuse.

PER CURIAM. Affirmed.

STATE v. WM. H. WHITE.

1. With certain exceptions, neither the acts nor the declarations of persons not on oath and subject to cross-examination, are admissible for or against a defendant. Therefore, in an indictment against A for larceny, the admissions and acts of B tending to prove that he, B, was the guilty party, are not competent evidence on the trial of A.
2. The fact that a juror is not a resident of the county in which the indictment is tried, is a good ground of challenge, but not for a new trial, after a verdict is rendered.

INDICTMENT for larceny, tried before *Moore, J.,* at the Spring Term, 1872, of GRANVILLE.

The jury returned a verdict of guilty. Motion for a new trial; motion refused. Defendant appealed.

The facts pertinent to the points raised are stated in the opinion of the Court.

(159) *Jones & Jones* for defendant.
Attorney-General and *Cox, contra.*

SETTLE, J. The record in this case is greatly cumbered by the recital of evidence not necessary to present the point intended to be raised.

The defendant, who was indicted for the larceny of four boxes of tobacco, proposed to prove by his son that when one Miles Britt, a colored man, who had resided on the defendant's premises for two or three years, saw the prosecutor and others approaching the premises on the

day after the night on which the larceny was committed, he hurried off and changed his shoes; and also that Britt stated afterwards that he had put the tobacco in the granary, and further that Britt had fled the country a few days thereafter, and had not been seen or heard from since.

All of this evidence was clearly inadmissible, for the reason that it falls under the condemnation of the maxim, *res inter alos acta,* etc.

But, aside from that, there is nothing in the acts and declarations of Britt inconsistent with the guilt of the defendant; both may have been guilty. With certain exceptions, which do not affect this case, neither the acts nor the declarations of persons not on oath and subject to cross-examination are admissible for or against a defendant, being merely hearsay evidence. *S. v. May,* 15 N. C., 428; *S. v. Duncan,* 28 N. C., 236. After verdict, the defendant moved for a new trial, and alleged as ground therefor, that one of the jurors who tried the case was not a resident of Granville County, and that the fact was not known to the defendant until after the verdict was rendered.

This was a good cause of challenge, but as it was not taken in apt time we must consider it as waived. But the defendant replies that he did not know it until after verdict. He could have known it, had he challenged the juror when tendered. The fact that an incompetent juror was permitted by the defendant to try his case does (160) not vitiate the verdict. *S. v. Ward,* 9 N. C., 443; *Briggs v. Byrd,* 34 N. C., 377; *S. v. Patrick,* 48 N. C., 443; *S. v. Douglass,* 63 N. C., 500.

PER CURIAM. No Error.

Cited: S. v. Haynes, 71 N. C., 84; *S. v. Bishop,* 73 N. C., 46; *S. v. Overton,* 77 N. C., 485; *S. v. England,* 78 N. C., 555; *S. v. Boon,* 80 N. C., 463, 465; *S. v. Baxter,* 82 N. C., 604; *S. v. Gee,* 92 N. C., 760; *S. v. Boon,* 82 N. C., 604; *S. v. Boon, Ib.,* 648; *S. v. Council,* 129 N. C., 517; *S. v. Maultsby,* 130 N. C., 665; *S. v. Lane,* 166 N. C., 338.

B. F. FRALEY v. A. H. MARCH and others, Administrators of C. F. Fisher, and others, heirs, etc.

An action by the holder of certain notes given for the purchase of land against the purchaser of the land, and others, to be subrogated to the rights of the vendor, in the contract of sale of the land, which is substantially the same as an action "for the foreclosure of a mortgage of real estate," must be tried in the county in which the land is situate. Code of Civil Procedure, sec. 66.

MOTION for a change of *venue,* heard by *Cloud, J.,* at ROWAN, Fall Term, 1872.

In his complaint, filed at Fall Term, 1872, of Rowan, the plaintiff alleges, that on 18 August, 1860, C. F. Fisher, the intestate of the administrators, who, together with the heirs of the said C. F. Fisher, are defendants in this action, sold a tract of land situate in the county of Davidson, to the defendant, A. H. March, for the sum of $3,500, and entered into a contract, covenanting to make title to said land upon the payment of the said purchase-money, as follows: $1,000 to be paid within twelve months; $2,250 to be paid within two years; and the like sum of $2,250, within three years from the date of the said contract, and for which said several sums the said March gave his notes with interest from date. That March paid the note of $1,000. That
(161) Fisher, the intestate, died in 1861, and letters of administration were granted to the said A. H. March, Burton Craige and R. A. Caldwell, defendants, in the county of Rowan, and that the remaining notes of $2,250 each above described, came into the hands of the administrators as assets.

The plaintiff further alleges, that at the time of his death, the intestate, Fisher, owed him upwards of $5,000, and that in a settlement with Craige and Caldwell, two of the administrators, he, the plaintiff, accepted from them the said two notes on March, the other administrator and defendant, as so much cash in part payment of his claim; the administrators, Craige and Caldwell, informing him that the land sold by Fisher to March was bound for the payment of the said notes, and that he, the plaintiff, would be entitled to the benefit of the land, as collateral security for the payment of the balance of the purchase-money. That upon this information and assurance, he, the plaintiff, accepted the notes, and took assignments, etc. That the defendant, March, has wholly failed to pay the notes, or any part thereof, although often requested, and has kept possession of the land, using the same and appropriating the profits thereof to his own use.

The plaintiff demands judgment, that he be subrogated to the rights of the intestate, the said Fisher, his heirs at law, and his personal representatives, in regard to the contract concerning said land; and that defendant March be required specially to perform the contract on his part, by the payment of the residue of the purchase-money for said land to plaintiff with interest, or in case he, the defendant March, refuses to pay, etc., that the land be sold, and the proceeds of sale be applied in payment of the debt due the plaintiff, and for such other relief, etc.

At the same term of the Court, the defendant, March, files a demand in writing to have the place of trial changed; alleging that the
(162) county of Davidson, and not Rowan, is the proper place in which to try the action. His Honor being of opinion with de-

fendant, ordered the case to be removed into the Superior Court of Davidson County. From this judgment, the plaintiff appealed.

Wilson for appellant.
Blackmer & McCorkle, contra.

READE, J. The law of the *venue* of actions, with reference to the residence of the parties does not govern this case, but the law of the venue with reference to the "subject of the action." It is substantially an action "for the foreclosure of a mortgage of real property"; and that must be tried in the county where the land is situate. C. C. P., 66.

PER CURIAM. Judgment affirmed.

Cited: Manufacturing Co. v. Brewer, 105 N. C., 446; *Connor v. Dillard,* 129 N. C., 51; *Eames v. Armstrong,* 136 N. C., 394; *Councill v. Bailey,* 154 N. C., 56.

STATE *ex rel.* A. W. LAWRENCE and others v. W. H. MORRISON, Administrator of J. A. Roseboro and others.

A guardian in good faith sold, on a credit of twenty days, the cotton of his wards, taking from the purchaser his note without security for the price of the cotton, the purchaser being at the time of the sale solvent and the owner of real estate, but before the note was collected became insolvent and unable to pay the note: *Held*, that his *bona fides* being established, he was not liable to his wards for failing to collect the amount for which the cotton sold.

ACTION, heard upon the report of the commissioner and the exceptions thereto before *Mitchell, J.,* at Fall Term, 1872, of IREDELL.

The "case stated," accompanying the transcript to this Court, is in substance what follows:

Alexander R. Lawrence, late of Iredell County, died intes- (163) tate in 1862, leaving ten children, his only heirs and next of kin, and of whom the four relatives in this action were minors. At November Term, 1862, of the County Court of Iredell, J. A. Roseboro, the intestate of the defendant, Morrison, was appointed guardian to said minors, and gave a bond of $40,000, with defendants, Simonton, Jameson, and one Alexander, the intestate of defendant, Stephenson, as his sureties, for the faithful discharge of his duties, etc. The relatives are now of age, having so arrived since 1865, and there having been no final settlement with their said guardian, brought this action to Fall Term, 1871, demanding an account, etc. Defendants answered at the same term; and at the term thereafter it was referred

to one E. M. Stevenson to state an account between the parties, and report the same to the ensuing Fall Term of said Court. The account was stated and duly returned, and by which it appears:

That among other property of the said A. R. Lawrence, father of the relators, was a two-thirds interest in a cotton factory in Yadkin County, known as the Buck Shoal Factory; one A. B. F. Gaither owning the other third therein. That in June, 1864, Gaither and Roseboro, as guardian of the relators, and the other next of kin of A. R. Lawrence, their said father, formed a new copartnership known as "A. B. F. Gaither and Co.," for the purpose of carrying on said factory, which they did until April, 1865, when it was destroyed by the Federal forces, under General Stoneman. That during that time the firm invested a portion of the profits in cotton, which was brought to Statesville and re-sacked under the supervision of Roseboro, who lived there at the time; there was, belonging to the firm 17,143 pounds of cotton, which was disposed of by Roseboro as follows: Dr. Lawrence for himself and sister, two of the said heirs and next of kin, received 2,264 pounds; A. B. F. Gaither, of his third, 4,093 pounds, (164) leaving still due to him 1,621 pounds; sold to Simonton & Tate (by Roseboro) 5,502 pounds at 25 cents per pound in gold, out of which he paid expenses, and also paid Gaither the remainder due to him; leaving still on hand 5,380 pounds, which he sold to one A. A. Harbin, on the 6th November, 1865, at 32 cents in gold, amounting to $1,721.60, the said Harbin giving his note, without security at thirty days, to A. B. F. Gaither & Co. That Roseboro held this note until the Fall of 1866, when he endorsed the same, "Pay to R. F. Simonton for value." Signed "A. B. F. Gaither & Co.," and placed the same in the hands of an attorney for collection. In October, the 22d, the attorney sued to November Term, 1866, of the County Court, and at February Term ensuing, obtained judgment; an execution issued, but Harbin becoming insolvent, nothing thereon could be recovered. That at the time he purchased the cotton, Harbin was solvent, owning real estate worth 2,000 or 2,500 dollars, with cash probably from 400 to 500 dollars, and was generally reputed solvent. At the time of this sale, Roseboro sold to Harbin his own individual cotton, to the amount of $696.50 upon the same terms and credit. Harbin the same day bought cotton from a Mr. Vanpelt, at 50 cents in greenbacks, amounting to $12,000, giving Vanpelt a draft on Sacket, Belcher & Co., of New York, to whom he, Harbin, shipped the cotton; that Harbin bought other lots of cotton, for which he paid part, etc.

Upon the above facts, the commissioner found that Roseboro acted in good faith, and as the agent of the company of A. B. F. Gaither & Co., and refused to charge him, Roseboro, with the value of the cotton

sold to Harbin, or with the excess of the shares of Dr. Lawrence and his sister. Plaintiffs excepted. The points raised by the exceptions are stated in the opinion of the Court.

From the order of his Honor, confirming the report, and giving judgment upon the basis of the same, the plaintiffs ap- (165) pealed.

It was admitted that the defendant, Morrison, was the regularly appointed administrator of Roseboro, and that the defendant Stephenson, is the administrator of Alexander, who is deceased.

Furches for appellant.
Caldwell, McLaughlin and Armfield, contra.

PEARSON, C. J. Upon the evidence, the commissioner finds facts, "that Roseboro acted in good faith, and as the agent of the company of A. B. F. Gaither and Co.," and upon these facts, as a conclusion of law, he held that the defendants (who stand in the shoes of Roseboro as guardian of the relators), were not chargeable with the value of the cotton sold to Harbin, or with the excess of the shares of Dr. Lawrence and Mrs. Long."

We are to take it that his Honor adopted the finding of the commissioner as to the facts, and also that he concurred in his conclusions of law, by overruling the exceptions.

In this case we see no error. Roseboro was the guardian of the relators, and also the agent of the company of A. B. F. Gaither & Co. In the latter capacity he sold the cotton, and as he acted in good faith there is no ground upon which he can be made liable for error in judgment in selling to a speculator on time at a high price, instead of retaining it or selling it at a lower figure for cash, or to some one, who would agree to give a note with good security. It will be remarked that the *bona fides* of Roseboro is proved by the fact that he sold his own cotton to this speculator upon the same terms, and lost that as well as the cotton which he sold as agent of the company.

As Roseboro, in making sale of this cotton, was acting not in his capacity of guardian of the relators, but as agent of the company, the action was misconceived. Instead of being upon (166) the guardian bond, it would seem that it ought to have been an action against the other members of the company for contribution, on the ground that as they had received from the agent their shares of the cotton in full, and by reason of the loss on the sale of the last lot of cotton, the relators had received nothing, the loss should fall ratably upon all of the members of the company, leaving the guardian bond as a *"dernier resort,"* in case the other members could not pay a ratable contribution, on which to allege a breach, that

the guardian was guilty of negligence, in letting the other members take their shares in full out of the first sales, and permitting the shares of his wards to be put off until the last, which turned out to be a losing operation.

PER CURIAM. Affirmed.

NOTE.—We are pleased to see that the intelligent counsel who made up the statement of the case set out only so much of the evidence as was necessary to show the finding upon the issues of fact, and do not encumber the record with all of the evidence, which overloads the case, increases the costs of litigation, and is very embarrassing to this Court. PEARSON, C. J.

Cited: Culp v. Stanford, 112 N. C., 669.

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(167)

S. C. WAUGH, Admr., v. GEORGE BLEVINS.

1. A paper in writing, not under seal and unregistered, which has been surrendered to the grantor by the alleged grantee, prevents any title resting in the grantee. And such paper-writing, passing no title, could do no more than raise an equity which the grantee had a right to surrender, unless it was done to defraud creditors.
2. The Act of 1846, chapter 46, section 53, gives administrators express authority to sell all the interest of a deceased debtor in land possessed by him, whether legal or equitable; and also authorizes the administrator to sell any land his intestate may have conveyed for the purpose of defrauding creditors.

Appeal from *Mitchell, J.,* at Fall Term, 1872, of ASHE.

The plaintiff, as administrator of one David Blevins, had filed a petition in the proper Court to sell the land of his intestate to pay debts. The sale was regularly ordered, and when it took place the defendant objected to it, claiming it as his own. The land concerning which this action was brought sold for $5. The case, as made up, states that "the plaintiff then brought this action to try the issue raised."

It was in evidence on the trial that Eli Blevins, the father of the plaintiff's intestate and the defendant, owned the land and had agreed to give it to the defendant and the intestate, but before he made any deed or other writing to them, the defendant sold his part of it to David, the plaintiff's intestate, and he paid him for it, the defendant and David agreeing that their father should make the deed to the latter. The father, Eli, did execute and deliver to David, the intestate of the plaintiff, a paper-writing, but it did not appear affirmatively what land it did convey; it being stated by two witnesses that they saw the

paper and thought it was for another tract; that the paper had no seal, and that they, the witnesses, told David it was no account. David, the intestate as aforesaid, entered on the land and resided on it until he left the county, and then he left his wife on it, who continued to live on it until dispossessed by defendant. This paper was left by David in the hands of one Susan Blevins, with instructions (168) to return it to his father should he, David, never call for it. He never called and she gave it to the father, Eli, who then made a deed to the same land to defendant. Eli and David are both dead, the defendant being the administrator of the former and the plaintiff of the latter.

His Honor instructed the jury that they must find the character of the paper made by Eli to David; that unless it was a deed and under seal the plaintiff could not recover.

The plaintiff insisted, that whether it was an instrument under seal or not, yet if they believed the old man Eli knew of the arrangement between David and the defendant, and that David had paid the defendant for the land, and he, Eli, intended to carry out the arrangement by conveying the title to David, the plaintiff would be entitled to recover. The plaintiff further insisted that if the jury found the facts as stated, the subsequent conduct of the defendant in obtaining a deed from his father would be such fraud as would entitle the plaintiff to a decree at law for a one-half of the land.

The jury returned a verdict for defendant. Judgment against the plaintiff for costs, from which judgment he appealed.

Todd and *Folk* for appellant.
Trivett and *Furches, contra.*

BOYDEN, J. The plaintiff has failed to state in his complaint, or to prove on the trial, a case entitling him to recover the land in controversy.

Had it been established by the evidence (as it was not) that the paper-writing alleged to have been given by Eli to David was a deed, yet as it was never registered David had a right to surrender up this deed to his father, Eli, and that surrender before (169) registration would prevent the title from vesting in David.

It was clearly established on the trial that the paper-writing had no seal to it, and the proof left it in doubt whether it even covered the land in dispute, but having no seal, it could not pass the title and could do no more than raise an equity, which David had a right to surrender, unless this was done with a view to defraud his creditors. The Act of 1846, chap. 46, sec. 53, Revised Code, makes express provision for the sale by the administrator of all the interest any deceased

may have had in land, either legal or equitable, and gives the administrator the power to sell all such lands as the deceased may have conveyed to defraud his creditors. And it appears in the complaint, that the plaintiff actually did sell this very tract of land for the sum of five dollars; and that put an end to any interest the plaintiff or administrator might have in this tract of land. But there is another fatal defect in the case of the plaintiff, to-wit: that the purchase by David of the interest of the defendant was by parol, and no memorandum thereof in writing is alleged to have been signed by the defendant or by anyone acting for him. So that, had it been clearly established that this parol contract had been made between David and the defendant, yet still it would have passed no title, nor could such parol contract have been enforced by any proceeding, either at law or in equity.

Then as to the paper alleged to have been a deed from Eli to his son David, this question was submitted to the jury and they found, under the charge of his Honor, to which no objection was taken, that said paper-writing was not a deed, and there was no allegation that there was any pecuniary or other consideration given for the same, and the complaint states it as a gift, and this paper having been redelivered to Eli by the direction of David, neither David or his
(170) creditors can have any claim to enforce a specific performance of that agreement, whatever it might have been.

PER CURIAM. Affirmed.

W. H. WINSTEAD and wife v. W. F. BOWMAN and wife, and others.

1. Where a script, alleged to be a holograph will, was found in a trunk of the decedent, in which he had valuable papers, and it appeared that the decedent had also a tin box, deposited in bank, in which he had other papers intrinsically of more value than were those in the trunk: *Held*, to be error in the Judge, on the trial of an issue, *devisavit vel non*, to charge the jury, in relation to there being two proper depositories of a holograph will under the statute, that "to constitute such, he (the Judge) was satisfied there must be a somewhat equal division of the valuable papers and effects between the two places claimed as legal depositories."
2. The phrase, "among the valuable papers and effects of," etc., used in sec. 435 (2), Code of Civil Procedure, does not necessarily and without exception mean among the *most* valuable papers, etc.
3. Valuable papers consist of such as are regarded by a decedent as worthy of preservation, and therefore in his estimation, of some value; depending much upon the condition and business and habits of the decedent in respect to keeping his valuable papers.

DEVISAVIT VEL NON, tried at Fall Term, 1872, of GUILFORD, before *Tourgee, J.*

The script propounded in the Probate Court, was, by the plaintiffs, alleged to be the last will and testament of one Andrew D. Lindsay, and to be altogether in his handwriting. The questions arising upon the trial in the Court, the issues submitted to the jury, and the evidence introduced on the trial, are fully set out in the opinion of the Court.

The jury, upon the issues made up and submitted to them, having found that the script propounded was in the handwriting of A. D. Lindsay, the decedent, but was not found amongst his most valuable papers, and was not his last will and testament, it was (171) so adjudged by his Honor. From which judgment, the propounders (plaintiffs) appealed.

W. A. Graham and *Scott & Scott* for propounders.
Dillard, Gilmer & Smith, and *Smith & Strong* for caveators.

RODMAN, J. This was an issue upon a writing propounded as the will of Andrew Lindsay. It was admitted on the trial to be entirely in his handwriting. It was not subscribed, but his name was written in the first part of the writing, which declared it to be his will.

Three issues were submitted to a jury:

1. Was the paper-writing, etc., found among the valuable papers and effects of the deceased at his death?

2. Is it in his handwriting? (This was admitted.)

3. Did the alleged testator intend the script propounded to be his last will and testament?

The jury under the instruction of the Judge, found "that the script was in the handwriting of the deceased, but was not found among his most valuable papers, and that it is not his last will." Whereupon the Court gave judgment for the caveators, and the propounders appealed.

The only issue upon which the Judge seems to have instructed the jury or to have been requested to instruct them, was the first. His instructions on this excluded any consideration of the third issue. As in the view we take of this case, it must go back for a new trial. The instructions of the Judge upon the first issue will be the only subject considered.

They were these: "Upon the hypothesis of there being but one proper place of deposit, to-wit: with the valuable papers and effects, that is, the *most valuable* (the word "in" is here in the record, but evidently by mistake), the trunk in which the script was found was not a proper depository under the statute. The propounders (172) however insisted that there might be two proper depositories for a holograph will under the statute; but to constitute such, he (the Judge) was satisfied there must be a somewhat equal division of the valuable papers and effects between the two places claimed as legal

depositories. So that, if in this case, the jury are satisfied that the papers and effects found in the trunk were insignificant in appreciable value as compared with the papers and effects found in the tin box, then the trunk was not a legal depository in any view which can be taken of it under the statute." The evidence as to the place of finding was, in substance, this: The deceased was a single man. He lived in Greensboro for several years before his death and occupied a room in the same building with the Bank of Greensboro. He died in Richmond, whither he had gone for his health, in November, 1870. After his death the room in Greensboro was found locked, and in it was found a trunk, also locked, one of the keys to which was found in the tin box hereafter spoken of. In a tray of the trunk were found the script in question, some old letters and receipts, accounts of the settlement of a partnership in which the deceased had been concerned, several memorandum books, seven notes payable to deceased, amounting in all to the nominal value of $600 or thereabouts, and a list of the bonds, etc., hereafter mentioned as found in a tin box. In the trunk, below the tray, were found articles of wearing apparel. Some of the above papers were tied up in bundles, but most of them were lying loose. One envelope was endorsed in the handwriting of the deceased: "Receipts and valuable papers," but it contained only old accounts receipted at the foot, and some notes made by the deceased which he had paid and from which he had torn his name.

In a tin box, which had been left by the deceased in the care of the Bank of Greensboro, were found a key to the above-men-
(173) tioned trunk, bonds of the State of North Carolina to the amount of $11,500, and bonds and notes of individuals to the nominal value of about $10,000.

It will be seen that while the papers found in the trunk were not insignificant, and possessed some value, both as evidences of past transactions and of existing credits, yet their value in both respects was greatly less than that of those found in the tin box.

We will now consider the instructions of the Judge founded on this state of the evidence.

The Revised Code (chap. 119, sec. 1) enacts that no last will shall be good unless signed by the testator and witnessed, nor unless such last will and testament be found among the valuable papers and effects of any deceased person," etc.

Can this script, upon a proper construction of the statute, be said to have been found among the valuable papers *and* effects of the deceased? The word "and," italicized above, stood "or" in the Revised Statutes, but was substituted in the Revised Code (1856). We do not think that this substitution was intended to make any change in the

meaning of the Act. At all events, it made none to affect the present case. We only notice it to put it out of the way.

The leading case in this State—we may say the only one touching the question before us—is *Little v. Lockman,* 49 N. C., 494 (1857). We do not mean to question the propriety of the judgment in that case. But with great respect for the learned and able Judge who delivered the opinion of the Court, it seems to us that he put too much stress on the definite article "the" in the expression "the valuable papers," etc. It may be inferred from the argument of the learned Judge, though probably it was not intended to be, that if a man has two places in which he keeps his valuable papers, etc., and what purports to be his will be found in that that one of them in which other papers are found of considerable value in themselves, but very greatly surpassed by the value of those found in some other place, the script (not being found among the *most* valuable papers) is (174) not found in such a place as the statute requires in order to give it validity as a will. This inference, however, is not a legitimate one (although the learned Judge below seems to have drawn it); for, the Judge whose opinion we are considering, clearly admits that a man may have two places in which he keeps his valuable papers, and then goes on to contrast, not two places in both of which are papers of value, but of unequal values, but two places in one of which are found papers of no appreciable value, and in the other papers of value. Thus understood, the justness of the opinion will not be questioned. In the present case, however, the deceased did have two places, in both of which he kept papers of value, although the value of those in one was greatly in excess of that of those in the other. So the question is distinctly presented: must the script be found in that place in which the *most* valuable papers were kept? We think that it is not only possible for a man to have more than one place for keeping his valuable papers and effects, but that men of any considerable estate, or engaged in any considerable business, do in general have two such places or more. A merchant in a city will probably keep his cash on deposit in a bank; the sum he carries in his pocket-book or keeps in the drawer of his counting-house desk, will be inconsiderable.

If he owns real estate, or government or other bonds, as a permanent investment, he may keep them in a tin box in the vaults of a security company or of a bank. His notes and bills becoming payable weekly or daily, he will keep in his place of business for ready access. His wife may have still another place, in which she keeps her costly articles of jewelry. So a planter may keep his bonds in a bank in town, the ready mony he needs for the current expenses of his business he may keep in a safe or other secure place, while his accounts of sales from

his factor, though representing a much larger amount than
(175) either of the others, yet as presenting fewer temptations to
theft, he may leave in the pigeon hole of his desk. A will, as not being a temptation to theft and as having very little value during a man's life and health, may as probably be found in one of these places as in another, depending somewhat upon the fixedness and intended permanence of its provisions, and somewhat, perhaps, on individual habits. As long as the provisions were still the subject of reflection, and liable to be changed by the changing circumstances of fortune and family, a testator might wish to keep his will accessible; but when these were once fixed on, without the probability of a wish to change, he might prefer putting it in a place less convenient of access, but more safe. Many other illustrations might be put, drawn from the different conditions of life arising out of differences of estate or business pursuits. So a man who made his will at home might put it among one class of valuable papers, while one who made it on a journey might be under the necessity of putting it among papers and effects of no very great value either intrinsically or as compared with his estate.

From these considerations, we are led to conclude that the phrase "among the valuable papers and effects," can not, necessarily and without exception, mean "among the *most* valuable," etc. If that were required, it might be difficult for one who had two or more places for keeping his valuable papers, to know in which he could safely place his will. The values in cash would be liable to change more or less frequently. It might well happen that a bond or a large sum might be paid off and the money deposited in bank or invested in real estate, so that the place which contained the most valuable papers today, might tomorrow contain only those of comparatively insignificant value.

The phrase can not have a fixed and unvarying meaning to be applied under all circumstances. It can only mean that the script
(176) must be found among such papers and effects as show that the deceased considered it a paper of value, one deliberately made and to be preserved, and intended to have effect as a will. This would depend greatly upon the condition, and business, and habits of the deceased in respect to keeping valuable papers, and the place and circumstances under which the script was executed, viz: whether at home or on a journey, etc.

It was not the intention of the Legislature to destroy, or unreasonably restrict, the power of making a holographic will; but simply to assure that the writing offered as a will was really and deliberately intended as such. The place in which it is found, supposing it to be found among valuable papers and effects, is but one circumstance in evidence upon that issue.

The English law as to wills of personal property at the date of our statute, and up to 1838, will be found in 1 Redfield on Wills, 201, *et seq.* The policy of our statute seems to have been to restrict the facility with which testamentary papers were allowed probate in the English Courts.

We believe that no statute similar to ours is found in any State except Tennessee, which received it as an advancement from us when she quit the parental domicile, and set up for herself as an independent member of the sisterhood of States. We have consulted the decisions of the Courts of that State, and are glad to find that they support the views here presented. In the latest case we have found, *Marr v. Marr,* 2 Head., 303 (1859), the Court says: "What is meant by valuable papers? No better definition, perhaps, can be given than that they consist of such as are regarded by the testator as worthy of preservation, and therefore, in his estimation, of some value. It is not confined to deeds for land or slaves, obligations for money, or certificates of stock. Any others which are kept and considered worthy of being taken care of by the particular person, must be regarded as embraced in that description." The whole opinion is worth (177) reading, in reference to this case. See also 11 Ham., 385—465; 2 Sneed, 156.

PER CURIAM. *Venire de novo.*

Cited: Brown v. Eaton, 91 N. C., 31. *In re Sheppard's Will,* 128 N. C., 56. *In re Jenkins,* 157 N. C., 434, 435, 436, 437.

GIDEON L. JOHNSTON v. LUCY A. NEVILLE.

The Court below has the power to amend the pleadings, by adding the name of any party, who may be necessary to a full determination of the cause.

MOTION to make one Peebles a party defendant, heard by *Cloud, J.,* at Special (January) Term, of HALIFAX.

On the trial below, his Honor allowed the motion, and the plaintiff appealed.

The facts are stated in the opinion of the Court.

Conigland and *Moore & Gatling* for appellant.
Clark & Mullen and *Batchelor, Edwards & Batchelor, contra.*

SETTLE, J. The plaintiff seeks to recover the purchase-money for

certain lands which he contracted to convey in fee simple to the defendant.

The defendant resists the payment, alleging a defect in the plaintiff's title, and in support of her allegation avers, that soon after the said contract was made, the said real estate was sold under an execution duly issued from the Circuit Court of the United States at Raleigh, against one Daniel, the grantor of the plaintiff, and was purchased by one Peebles, a citizen of Virginia, who now holds the same.

(178) On motion of defendant's counsel, his Honor declared that the said Peebles was a necessary party in order to determine the rights of all the parties interested, and ordered a summons to issue and service to be made by publication to bring him before the Court. From this order the plaintiff appealed.

His Honor clearly had the power to amend the pleadings by adding the name of the party who might be necessary to a full determination of the cause. It would certainly be a hard measure for a Court which adjusts equities while enforcing laws, to compel the payment of the purchase-money today, and turn the defendant out of possession tomorrow.

However, we express no opinion on the merits of the cause; it is sufficient for us to say that his Honor did not exceed the limits of his authority.

Although under the C. C. P., sec. 299, the right of appeal is very broad, the Court is inclined to think that much inconvenience and delay is occasioned by the practice of appealing from orders, at every stage of the case, on objections which the party aggrieved could avail himself of after a final issue, as well as at the first steps in the proceedings.

PER CURIAM. Affirmed.

Cited: Dancy v. Smith, post, 179.

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(179)

JOHN S. DANCY, Admr., etc., v. WM. H. SMITH and another.

In a suit by an administrator to recover the amount of a note given to a former administrator (*pendente lite*) of the same intestate, *it is no error* for the Judge of the Superior Court to order such administrator *pendente lite* to be made a party, if, in his discretion, it be necessary to a proper determination of the cause.

Appeal from *Cloud, J.,* at Special (January) Term, 1873, of HALIFAX.

DAVIS *v.* DAVIS.

The plaintiff sued the defendants on a note given by them to a former administrator (*pendente lite*) of his intestate, for property purchased at a sale of such first administrator.

As a defense, the defendants allege in their answer that Whitmore, the administrator *pendente lite* induced the defendant, Wm. H. Smith, to purchase the property at the sale above alluded to, upon the promise that the amount of his bid, to-wit: $354.99, should be credited on a claim which he held against the administrator's intestate. Soon after the sale, and before the note he gave became due, another administrator was appointed, who refused to carry out the said agreement. There were other allegations in the answer, not material at this time to be stated.

His Honor upon hearing the pleadings, adjudged that Henry B. Whitmore, the administrator *pendente lite,* be made a party-defendant, to the end that the promise alleged in the answer might be litigated. From this judgment the plaintiff appealed.

Battle & Son, and *Conigland* for appellant.
Moore & Gatling, contra.

SETTLE, J. The only point raised by the pleadings is decided in *Johnston v. Neville,* 177, *ante.* Here his Honor directed one Whitmore to be made a party defendant upon the suggestion that he had while administrator *pendente lite* induced the defendant (180) W. H. Smith to bid at the sale of the effects of his intestate, promising the said Smith that the amount of his bids should go as a payment on a large debt due from his intestate to the said Smith.

This alleged agreement has never been executed; on the contrary the plaintiff now seeks to recover the amount of the defndant's bid.

His Honor it appears deemed it equitable that Whitmore should be made a party; but whether the defendant Smith will be benefited thereby or otherwise it is not for us to consider.

PER CURIAM. Affirmed.

MARY DAVIS v. JUSTUS DAVIS.

1. Our statute, Rev. Code, chap. 39, sec. 3, allows one-third of the husband's estate to be assigned to the wife when she obtains a divorce.
2. After a decree dissolving the nuptial tie between a husband and wife, it is no good ground for exception by the husband, the defendant, to the report of the commissioners appointed to allot one-third in value of his estate to the wife, that the commissioners did not take into their consideration his interest claimed in certain land as tenant by the curtesy, supposing, as they stated in their report, that the same belonged to the wife absolutely.

PETITION FOR DIVORCE *a vinculo matrimonii,* heard by *Mitchell, J.,* at Fall Term, 1872, of WILKES.

The complaint alleged adultery, abandonment and cruel treatment as the grounds upon which the petition is filed, and prays a divorce from the bonds of matrimony, and a decree for alimony. The (181) material allegations of the complaint were denied by the defendant; and at Spring Term, 1872, issues, comprising those allegations, were submitted to referees, who reported, after hearing the evidence, in favor of the plaintiff; whereupon his Honor directed a decree to be entered up dissolving the marriage relation between the parties, and referred it to commissioners to ascertain and report what would be one-third in value of the estate of the defendant. The commissioners, in this order, were directed to lay off by metes and bounds one-third part (in value) of the defendant's real estate, and to designate by description and value any articles of personal property that in their estimation ought to be assigned to the plaintiff, not to exceed the one-third part in value thereof. At the ensuing Fall Term, the commissioners, in obedience to that order, returned their report, to which the defendant filed sundry exceptions, all of which, however, were abandoned upon the argument in this Court except one, which is fully stated, with the evidence pertinent thereto, in the opinion of the Court.

His Honor in the Court below overruled the exceptions, and confirmed the report, whereupon the defendant appealed.

Folk for appellant.
Armfield, contra.

READE, J. Our statute allows one-third of the husband's estate to be assigned to the wife when she obtains a divorce. Rev. Code, chap. 39, sec. 3.

To the assignment made in this case, the defendant filed several exceptions, only one of which was pressed in this Court. The facts upon which the exception is based are as follows: The husband had a tract of land valued at $1,000. He had ten undivided elevenths of another tract, which tract was valued at $600, and his interest in it $545.46, making the whole value of his real estate $1,545.46, one-third of which for the wife is $515.15.

(182) Instead of allowing the wife land of the value of $515.15, they allowed her $545.46 worth of the $600 tract, which was $30.31 more than her one-third of the whole real estate; and therefore this sum of $30.31 she was directed to pay to the husband, so as to leave the value of the assignment to her $515.15, which is precisely one-third of

the whole, that is, of the $1,000 tract and ten-elevenths of the $600 tract. It is clear that there is no error thus far. But then the defendant says that he has more real estate than was valued; that besides the $1,000 tract, and ten-elevenths ($545.46) of the $600 tract, making $1,545.46, one-third of which ($515.15) was assigned to the wife, he has other real estate, to-wit: an interest in the other eleventh of the $600 tract. Take that to be so, and what follows? Why, clearly, that the assignment to the wife is too little; whereas the exception taken is, that it is too much!

While the foregoing is the state of facts as they appear of record, it is due to the defendant to say that the exception was taken upon the supposition that not only a third in value of the $1,000 tract and of the ten-elevenths of the $600 tract was assigned to the wife, but the whole of the defendant's interest in the other eleventh share was assigned also. And the purpose was to present the question, whether a husband has any assignable interest in the lands of his wife as tenant by the curtesy initiate—the fact in this case being that the said eleventh share was inherited by the wife from her father. The defendant insisted that he was tenant by the curtesy initiate, and the whole of his interest, instead of one-third, had been assigned to the wife. But it appears that only the husband's ten shares were valued and a third of that assigned to the wife, and the other eleventh was treated as the wife's individual and separate property. If the husband has any interest in said eleventh share it has not been valued and assigned to the wife as a part of his real estate; and he can pursue his rights as he may be advised. The exception itself sets forth the fact that the commissioners who made the assignment "con- (183) sidered the one-eleventh which descended to the plaintiff as the absolute property of the plaintiff, and assigned to plaintiff one-third of the residue as alimony." So that the amount of the exception is that the commissioners considered the eleventh part as the wife's already without any assignment; whereas, the defendant insists they ought to have considered it his. The object of this proceeding is not to try the title. It may serve to illustrate, to treat this eleventh share as a separate tract: Suppose the defendant had three tracts, $1,000 tract, $600 tract, and a third tract; and the commissioners had assigned the wife only a third of the two first named and assigned no part of the third tract, because, as they supposed, it belonged to some third person or to the wife herself, could the husband complain? Of what could he complain except that too little had been assigned? Or, except that the commissioners would not pass upon a disputed title?

PER CURIAM. Affirmed.

ANN WILLIAMS v. SILAS M. GREEN.

Husband and wife in 1869, contracted to sell the land devised to the wife in 1855, and jointly covenanted to make title when the purchase-money was paid, the purchaser giving bonds payable to the husband alone for the purchase-money: *Held*, to be error in the Court below, to condemn this debt owing by the purchaser of the lands, to the payment of a debt due from the husband: *Held, further*, that the wife was entitled to be heard on motion, in the proceedings supplemental to execution, instituted to subject the debt owing for the land to the payment of a debt owing by the husband.

MOTION, to set aside a former judgment of condemnation heard by *Cannon, J.*, at Fall Term, 1871, of CHEROKEE.

(184) The original was a proceeding supplemental to execution, instituted by the defendant in this action to condemn to his use a certain debt, owing by one Blackwell, as is alleged, to S. E. Williams, against whom the defendant had a judgment. The debt owing by Blackwell was claimed by the plaintiff, the wife of Williams. His Honor condemned the debt to the use of the defendant, and at Fall Term, 1871, having refused to vacate that judgment, the plaintiff appealed.

Other facts relating to the point decided are stated in the opinion of the Court.

Pace for appellant.

Jones & Jones, Gudger and *Shipp, contra.*

(185) SETTLE, J. It appears that Ann Williams, who seeks to be heard in this proceeding, became seized and possessed of a parcel of land in Cherokee County in 1855.

In 1862 she intermarried with the defendant, S. E. Williams, and in 1869 she with her husband, contracted to sell the said lands to one Blackwell, he giving bonds for the payment of the purchase-money, and they giving bonds to make title when the purchase-money should be paid. The said Williams and wife then removed to the State of Tennessee, and one Greene, the plaintiff in the action, to which this proceeding is supplemental, having theretofore recovered a judgment against the said S. E. Williams, procured an order from the Court directing Blackwell to appear and answer what he owed the defendant, S. E. Williams. Blackwell answered that he owed the said S. E. Williams about $200, being the balance due on the purchase of the said lands; and thereupon the Court ordered Blackwell to pay the judgment in favor of Greene. The said Ann Williams makes affidavit that all of these proceedings occurred while she and her husband were absent from

the State, and that she knew nothing of the same until some time thereafter.

There was error in the order directing Blackwell to pay money, due in equity to the wife, in discharge of a debt of her husband.

The fact that she permitted the bonds from Blackwell to be given to her husband alone, does not affect the equity which she had in that fund.

No determination of any controversy in relation to that fund could be had without the presence of the wife, and when she applied to be made a party and to have the order of the Court directing Blackwell to pay her money to the plaintiff set aside, the Court again erred in refusing her motion. As she sought relief from an illegal order made in that cause, she was entitled to be heard on motion in (186) the same cause.

The injustice of the order is still more apparent, when we consider its effect upon Blackwell. He simply has a bond for title, and of course the wife will never join in a deed until she receives full payment for her land, and no Court will compel her to do so.

Let it be certified that there is error.

PER CURIAM. Judgment reversed.

Cited: *Rodman v. Harvey,* 102 N. C., 3.

STATE v. JOSEPH R. BRANCH.

A Judge of the Superior Court has no right to require a grand jury to have the witnesses on the part of the State examined publicly.

CRIMINAL ACTION certified to this Court in obedience to a writ of *Certiorari,* issued upon the petition of the defendant at the last term; an appeal having been refused by *Moore, J.,* at Spring Term, 1872, of HALIFAX.

The facts, pertinent to the only question decided in this Court, as alleged in the defendant's petition for a *Certiorari,* and contained in the "case stated," filed by his Honor, and sent up with the transcript of record, are substantially:

That at Spring Term, 1872, of Halifax Superior Court, an indictment, charging the defendant with having committed an affray, and with an assault on one Spier Whitaker, was sent by the Solicitor to the grand jury. That the said Whitaker and one Hardy were the witnesses sent to, and examined by the grand jury, who, after the examination "offered to return the bill," indorsed, "not a true bill, *which*

the Court refused to receive. His Honor ordered the grand
(187) jury to be seated in the jury box, and proceeded to examine in open Court before them (the grand jury), Hardy and Whitaker. Upon the evidence of these witnesses, his Honor charged the grand jury, that if the testimony was believed, it was their duty to find a true bill; and that after this charge from the Court, the grand jury returned the bill indorsed "A true bill."

The defendant moved to quash the bill of indictment, assigning as ground for such motion, the facts above stated. His Honor refused the motion, and required the defendant to plead. From this order the defendant prayed an appeal to the Supreme Court. The Court refused to allow the appeal.

Conigland, and *Batchelor & Son* for petitioner.
Hargrove, Attorney-General, and *Cox, contra.*

PEARSON, C. J. We will pass by the objection made to the mode of instituting this proceeding, and also the point that the announcement of their finding by the grand jury, is, in contemplation of law, recorded at the instant it is announced, on the principle, that in a civil action the plaintiff can not take a non-suit after the jury has announced its verdict, for it is in law recorded *eo instanti;* and the corollary drawn therefrom, that as the bill has been returned "not a true bill," the same bill, nor a bill charging the same offense can not be passed on by the same grand jury.

We give no opinion on this corollary, but we can see no objection to the practice, that after an indictment has been returned "not a true bill," the State's Solicitor, upon a suggestion to the Court that he has procured further evidence, may be allowed to send another bill to the same grand jury, charging the same offense.

These points are passed by for the purpose of putting our decision upon the main question, that is to say, has a Judge the right
(188) to require a grand jury to have the witnesses on the part of the State examined publicly?

There is nothing in our law books, and no tradition of the profession to show that such has ever been the practice or the course of the courts in this State; and we are of opinion that the ruling of his Honor is an innovation not warranted by the law of the land.

The power of the Judge to require a grand jury to come into open court and have the witnesses for the State examined, is not only opposed to immemorial usage, but is not sustained either by principle or by authority.

The province of a grand jury is, not to try the party, but to inquire whether he ought to be put on trial; and the purpose is, to save the

citizen the trouble, expense and *the disgrace of being arraigned and tried in public on a criminal charge, unless there be sufficient cause for it.* To this end it is provided by the Constitution: "No person shall be put on trial, except upon a bill of indictment found by a grand jury." This provision of the Constitution was aimed at a prerogative of the crown, under pretence whereof a citizen could be put on trial upon a charge of a criminal offence, upon the information of the crown officer, whereby the good citizens were oftentimes exposed to the scandal and disgrace of being tried in public, when, in truth, there was no sufficient cause to suspect their guilt.

Thus it is seen that the purpose of this provision in the Declaration of Rights, is to protect citizens from the scandal and disgrace of being arraigned and put on trial in public, unless there be sufficient ground for it.

How does this innovation upon ancient usage comport with this clause of the Declaration of Rights? It defeats it in *toto*. If the man is to be exposed without inquiry as to the sufficiency of the evidence, to the scandal and disgrace of a trial in public, it may as well be done on the information of the State's Solicitor; for the protection of a grand jury amounts to nothing if the citizen is to be first (189) exposed to scandal and disgrace by a public examination of the witnesses on the part of the State, in order to see whether he ought to be exposed to the scandal and disgrace of being tried in public on a criminal charge; and, if upon the public examination of the witnesses for the State he has no right to cross-examine and no right to offer witnesses to contradict the witnesses of the State, or to prove their bad character, and to be defended by counsel, it would be better for him to have a trial at once, upon information, where he has the right "to confront the accusers and witnesses with other testimony and to have counsel for his defence," instead of being, in the first place, put in the condition of a victim tied to a stake, while his reputation is being tortured to death. If the witnesses for the State are to be examined in public, upon the inquiry of the grand jury, in all fairness the accused should be allowed to cross-examine and to offer witnesses to contradict or explain, and to have the benefit of counsel. So the result would be two trials in public instead of an inquiry and one trial, provided the bill is returned by the grand jury "a true bill." To avoid this absurdity, his Honor took the other horn of the dilemma, and refused to allow the accused to cross-examine, and of course to offer witnesses in contradiction, etc., and "tied the victim to the stake." He was subjected to bear the disgrace of whatever the witnesses might swear against him, and could not be heard.

In either point of view, this procedure is opposed by the principles of the common law, which means "common sense."

As to authority, the only case cited to support this innovation is that of the *Earl of Shaftesbury,* State Trials, 772. A perusal of that case will satisfy anyone that it ought not to be made a precedent, for the reason, that it was in the time of Charles II, 1681, when the Duke of York, with the countenance of the King (his brother), had (190) joined the Roman Catholics, and the attempt of the Jesuits to make that "the established religion," was stoutly opposed by the people, and by no others more zealously than the citizens of London, of whom the grand jury was drawn; and who, although compelled to hear the witnesses for the crown examined in public, because "such was the pleasure of the King," were "stout enough" to cross-examine the witnesses for the crown, and after being charged, that it was not their business to pass upon the credit of the witnesses of the crown (that should be left for the jury of trial), had the manhood to refuse to find the bill, and to endorse *"ignoramus";* for which, as the report says, there was such applause and loud cheering that nothing could be heard, and the Judge retired.

This case was never drawn into a precedent in England, and the practice there has ever since been for grand juries in their sessions, which are held in their own room, under an oath, "the State's counsel, your fellows, and your own, you will keep secret," "to examine such witnesses as are endorsed on the bill," "sworn and sent," and the return is made, "not a true bill," unless at the least, twelve of the grand jury would convict upon the evidence before them.

There is not the slightest reason to believe that the practice of examining witnesses before a grand jury in public was ever "in force and in use in the colony of North Carolina"; very certainly, such has not been the practice in the State of North Carolina, and it must be rejected as inconsistent with the genius of a republican government. Why examine the witnesses for the State in public, without the right of cross-examination and of confronting the witnesses, unless it be to expose the accused to scandal and disgrace, else to browbeat the grand jury and influence "the finding," not in respect to the case, but in respect to the fact?

PER CURIAM. Reversed.

Cited: S. v. Harris, 91 N. C., 658; *S. v. Jacobs,* 107 N. C., 782; *S. v. Lewis,* 142 N. C., 638.

(191)

MARCELLUS POPE and wife, and others, v. EDWIN WHITEHEAD and others.

1. A testator after giving his land to his wife for life devised as follows: "At my wife's death it is my will that my land be equally divided between my sons, J., E., and W., and the negroes given her (the wife), as above, are to be disposed of as follows: that is, each of *them* upon their arrival at lawful age, is to have an equal part of the said negroes, except my sons T. and F., and my daughters P., B., and C.," etc.: *Held*, that the three sons named were alone entitled to the land.
2. Where a tenant in common has improved a part of the common land he is entitled, upon the partition of the land, to have the part so improved, allotted to him at the original valuation.

SPECIAL PROCEEDING, for partition, and sale for partition, of certain lands, commenced in the Probate Court of HALIFAX, and heard by *Watts, J.*, at Chambers, 23 January, 1873.

The following facts were certified as found by the Judge of Probate, and by him transmitted to his Honor, with the question of law raised thereon:

"1. That one Joseph Whitehead, domiciled in Halifax County, died in 1833, leaving a last will and testament, which was proved at August Term, 1833, of Halifax County Court, a copy of which," etc.

2. That said testator was twice married, and had issue by his first marriage, who survived him; the defendants, Patsy, wife of John A. Stamps, Eliza Howell and Thomas Whitehead, who died thereafter, leaving issue, the defendants, Lucy, Mary and Eliza Whitehead, also John Whitehead, who has since died, leaving issue the defendants, A. J. Whitehead, Mary A. Parker, wife of Mark Parker, Louisa Cherry, wife of Amos Cherry, Turner and John T. Whitehead, and also C. Whitehead, who intermarried with one Candy Howell, and died leaving issue, the defendants, Mary, Sarah, Margaret, Brinkley, Temperance and Jane Eliza Howell. By his second wife, Sally, (192) mentioned in his last will and testament, the said testator had issue, the plaintiffs, Sarah, wife of Wm. P. Threewitts, Dorothy, wife of Marcellus Pope, Mary, wife of George W. Spivy, and the defendants, Edwin Whitehead and Nancy, who intermarried with one Luke Howell, and died leaving issue, the plaintiffs, Benjamin T. Howell, and Sarah F., wife of Wm. T. Joyner, and Wiley Whitehead, who died without leaving issue.

3. That all the lands of which said testator died seized and possessed of, was the tract described in the complaint, and that his wife, Sally, died in February, 1872.

4. That the defendant, Edwin Whitehead, in the year 1845, purchased the interest of the defendant, Joseph Whitehead, in said lands and became the owner thereof.

5. That said Wiley Whitehead died in September, 1845, intestate as to his interest in said land, and without issue.

6. That the said testator during his lifetime fully provided for his sons, and partially for his daughters of his first marriage, by advancements of portions of his estate; to the sons, both real and personal estate, and to his daughters only personal property; but made no provisions by advancement or otherwise for the children of his second marriage.

7. That the defendant, Edwin Whitehead, made permanent improvements upon said land, in the year 1867, by erecting a dwelling-house and other buildings thereon, at a great expense; and that at the time of this erection the said defendant was under the impression that at the death of his mother, the said Sally, the title in fee in said lands vested in him, he having previously purchased the interest of the defendant, Joseph Whitehead, and the said Wiley Whitehead having died before his interest in the lands vested in possession, and that he therefore had no interest therein.

8. That the defendant, Edwin Whitehead, executor of Wiley
(193) Whitehead, dec'd, heretofore filed a petition in this Court (and the same is now pending and undetermined therein), to sell the interest of his said testator in said lands, to make assets for the payment of debts, etc.

9. That the plaintiffs and defendants are tenants in common of said land, and are desirous of partition of the same according to their respective interests therein.

10. That the above-named testator, Joseph Whitehead, by his said last will and testament, a copy of which, etc., provided as follows: (Those parts of the will necessary to an understanding of the points raised are set out in the opinion of the Court.)

"Upon the foregoing facts, the following issues or questions of law, arose:

(1) The plaintiffs claim that the said testator, Joseph Whitehead, never intended in his said last will and testament to exclude any of the children of the second marriage from participation in, but intended to devise his real estate to his wife, Sally, for life, and then equally to all the children of the second marriage; that his daughters of said marriage, to-wit: Dorothy, wife of the plaintiff, Marcellus Pope; Sarah, wife of the plaintiff, Wm. P. Threewitts; Nancy, now deceased, and represented by the plaintiffs, B. T. Howell and Sarah F. Joyner, wife of Wm. T. Joyner, and Mary, wife of the plaintiff, Geo. W. Spivey, were inadvertently and by mistake omitted from said last will and testament, all of which a proper construction will show. The plaintiffs further contend, that said tract of land above referred to, should be

divided into seven equal shares; to one of which, the plaintiff, Dorothy, wife of Marcellus Pope, is entitled; one to plaintiff, Mary, wife of Geo. W. Spivy; one to Sarah, wife of Wm. P. Threewitts; one to defendant, Edwin Whitehead, in his own right, and one to him as assignee of the defendant, Joseph Whitehead; one to the heirs of Wiley Whitehead, dec'd; and one jointly to the plaintiffs Benja- (194) min T. Howell and Sarah F. Joyner, wife of W. T. Joyner.

They further contend, that the share to which the heirs of Wiley Whitehead, dec'd, are entitled, should, on account of its smallness, the number of owners and the impracticability of actual partition thereof, be sold for partition, etc.

(2) The defendant, Edwin Whitehead, contends, that the devise of the real estate of the testator, Joseph Whitehead, was in express and positive terms to his sons, Joseph, Edwin (both defendants in this action), and Wiley Whitehead, now deceased, after the death of his wife Sally; that by the provisions and upon a proper construction of said will, all other persons were, and it was the intention of the testator to exclude all other persons from any participation in his real estate after the death of his wife, Sally; and that the same was devised to his said sons, Joseph, Edwin and Wiley, and to them only, subject to the said life estate therein. That said real estate should be divided into three shares, to wit: to two of which, this defendant (Edwin), in his own right and as assignee of the defendant, Joseph, is entitled; and the heirs of Wiley Whitehead to the remaining one. That in the division of the said premises, he should be allowed the value of the permanent improvements placed thereon, or that they should be embraced in the portion thereof allotted to him, and at no valuation. Further, that the share to which the heirs of Wiley Whitehead are entitled, should not be divided among them, either by actual partition, or by a sale for partition, during the pendency of the petition of said Wiley's executor, to sell the same and make assets," etc.

His Honor, upon consideration of the foregoing facts, admitted and found by the Judge of Probate, and the questions of law arising thereon, *adjudged and decreed:*

"1. That the defendant, Edwin Whitehead, is entitled to an undivided two-thirds in and to the real property set out in the pleadings, and that the other one-third descends to the heirs- (195) at-law of Wiley Whitehead.

2. That actual partition be made of said premises, and that the Clerk appoint commissioners for that purpose, and to set apart as above, two-thirds of said lands to said Edwin Whitehead, and one-third to the heirs-at-law of Wiley Whitehead.

And it appearing further, that Edwin Whitehead has placed certain

and sundry improvements upon said land, under a reasonable belief, that he was the owner in entirety of said premises, *it is adjudged,* that the said Edwin Whitehead be allowed his reasonable valuation of said improvements in the partition; and that this cause be certified to the next term of any Superior Court to be held for the county of Halifax, to the end, that a jury may be empaneled to assess the value of said improvements in the manner and according to law, as in the statute in this case made and provided.

3. It appearing further, that the executor of Wiley Whitehead opposes the sale of the one-third devolving upon the heirs-at-law of his testator, and that the personal property may prove insufficient to pay debts; *it is decreed,* by the Court, that as to partition, or sale for partition of said one-third among the heirs of Wiley Whitehead, this cause is retained for further hearing," etc.

From which judgment, the plaintiffs appealed.

Batchelor, Edwards & Batchelor for appellants.
Clark & Mullen, contra.

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

1. Upon the construction of the will of Joseph Whitehead.
2. As to the right of a tenant in common, who has made improvements on the common land, to be allowed for them on a par-

(196) tition.

1. The material parts of the will are as follows:

"I will and bequeath to my living wife, Sally, all my lands which I may die seized and possessed of, and the following negroes": (here follow the names of several slaves); "and also," (here follows a list of sundry articles of personal property). "The above legacy is given upon the following conditions: At my wife's death it is my will that my land be equally divided between my sons, Joseph, Edwin and Wiley, and the negroes given her as above, are to be disposed of as follows: that is, each of *them,* upon their arrival at lawful age, is to have an equal part of the said negroes, except my sons, Thomas and John, and daughters Patsy, Betsy and Penny—these five children are to have no part of my estate, except that already given them by deed and what is expressly given them by this will."

He then gives legacies of negroes and personal property to his daughters Patsy and Betsy, and proceeds: "The negroes given to my wife upon the conditions named in this will are, in case of the death of either of my children (to whom they are given afterwards), dying before their arival at lawful age, or without a lawful heir, to descend to the remaining living children by my said wife Sally."

It is contended on behalf of the daughters of the second marriage:

That when the testator, after having given the land to his three sons of that marriage, *nominatim,* goes on to say that the negroes given to his wife for life "shall be disposed of as follows: that is, each of *them* is to have an equal part, *except the children of the first marriage.*" The word *them* can not refer to the three sons, because in that case the exception being of those not embraced in the original description would be absurd. It is contended that to make the exception sensible and have any meaning, we must suppose the word *them* to refer to some antecedent, more extensive than the (197) three sons named, and at least as extensive as all the children of the testator; and then as the children of the first marriage are excepted, it would leave the devise in effect to read to the three sons and three daughters of the second marriage. Upon that construction the will would read "that my land be equally divided between my three sons and all the rest of my children, except those by my first wife." But it must strike us that this would be a very awkward and unusual mode of giving the land to all the children of the second marriage. The sentence may as naturally be amended by striking out the word *them* and inserting in lieu of it, the words "my children," except, etc., which, while it would leave the devise to the sons to stand as a separate sentence, would make a gift of the negroes to the children of the second marriage. Undeniably there is an obscurity in the will as it stands at present. Some phrase has probably been left out, or some word changed in transcribing it. Several conjectural emendations might be made, any of which would make the text sensible, but the meaning upon each would be different. All of them would be merely conjectural. If we were dealing with the corrupt text of a classic author, an exercise of our ingenuity would be, at worst, harmless. But we have no right to do it with a solemn will; we must take the text as it is, and put a meaning on it as far as we can. That part of it which gives the land to the three sons is clear. After that the uncertainty begins. When the girls claim to share the estate with the sons, the burden is on them to show some words in the will to authorize the claim, but this they can not do; they are obliged to resort to conjecture; but we are not at liberty to deprive the sons of any part of the estate given to them upon conjecture. A will must be in writing and signed by the testator, but what the claim of the daughters is put on, is not in the writing. The construction can not be varied by any supposition or proof of the affection of the testator to the (198) daughters. A will may be inofficious, and it may appear to us capricious and unjust, but we are obliged to enforce it, because it is the will of one who had the right to make it. We can not reform the will according to our notions. The daughters take no estate in the land by the will.

2. The defendant, Edwin Whitehead, took one-third of the land by devise (subject to his mother's life estate); in February, 1840, he bought the third devised to Joseph; and by the death of Wiley, in 1865, he inherited one-tenth of his share (subject to its liability for his debts). In 1867, during the life of the tenant for life, he took possession of some part of the land and built a dwelling-house and made other improvements thereon. The case states, that he did this under the belief that he would own the whole at the death of the life tenant, thinking that as Wiley had died during the life of the life tenant, his heirs would get nothing. If he had this belief, it was founded on a mistake of law, and can not benefit him. He contends that he is entitled to an allowance for his improvements, under chap. 147, Laws 1871-1872, p. 225. But upon an attentive examination, it will be seen that that act does not apply to tenants in common. It says, in substance, that any defendant against whom a judgment shall be rendered for land, may, upon a petition stating that while holding the premises under a title, believed by him to be good, he made improvements, etc. In this case, there has not been, nor will be, any judgment against the improving tenant for land. He will, after the judgment, remain in possession of all he is now possessed of: the difference being, that he will then hold in severalty the share which he now holds in common. The object of the act was to introduce into the law of North Carolina an equity in favor of one who has purchased lands, and in the belief that he has acquired a good title thereto, has made lasting im-
(199) improvements, popularly called *betterments*. It is an equity unknown in England, but it has long been an accepted doctrine in the New England States and probably in some others, that upon eviction by the true owner, such an occupier was entitled to an allowance for his improvements. The particular equity seems to be confined to cases of this sort; but probably, vendees who enter into possession upon a contract for title, which being in parol is void, *Albea v. Griffin,* 19 N. C., 9, or, where for any cause, the vendor can not make title, have a like equity. 2 Green. Ev., secs. 549, 551; 2 Kent, Com., 334, 338; and see the very learned and elaborate opinion in 1 Story, 478, where the doctrine is attempted to be established on the general doctrines of equity.

The defendant, Edwin Whitehead, also contends that on general principles of equity he is entitled to the allowance claimed; and we think he is. *Jones v. Carland,* 55 N. C., 502, establishes, that prior to the Act of 1871-'72, such betterments as are provided for in that Act were not then allowed in this State; and that the equity of a tenant in common, who had improved a part of the common land, to have that part laid off to him at its original value, was recognized. In

1 Story Eq. Jur., s. 656 b., it is said: "In suits in equity also for partition, various other equitable rights and claims and adjustments will be made, which are beyond the reach of Courts of law. Thus if improvements have been made by one tenant in common, a suitable compensation will (as we have seen), be made him upon the partition, or the property on which the improvements have been made, assigned to him. So Courts of equity will not (only) take care that the parties have an equal share and just compensation; but they will assign to the parties respectively such parts of the estate as would best accommodate them, and be of most value to them, with reference to their respective situations, in relation to the property before the partition. For in all cases of partition, a Court of equity does not act merely in a ministerial character, and in obedience to the call of the (200) parties who have a right to the partition; but it founds itself upon its general jurisdiction as a Court of equity, and administers its relief *ex aequo et bono* according to its own notions of general justice and equity between the parties." See also *Green v. Putnam,* Barb., 501 (N. Y.).

A decree may be drawn, declaring that under the will the three sons named were alone entitled to the land; also for a partition, and directing the commissioners to assign to Edwin Whitehead his share of the land so as to include that part on which he has made improvements, valuing it at what it would have been worth without the improvements, and otherwise in accordance with this opinion. The case may be remanded if either party desires it, so that a judgment may be given in the Superior Court in conformity with this opinion, and such further proceedings be had, etc. The defendants will recover costs in this Court.

PER CURIAM. Modified and remanded.

Cited: Daniel v. Crumpler, 75 N. C., 186; *Collett v. Henderson,* 80 N. C., 338; *Bell v. Foscue,* 81 N. C., 89; *Cox v. Ward,* 107 N. C., 514; *Vann v. Newsom,* 110 N. C., 126; *Holt v. Couch,* 125 N. C., 462; *Daniel v. Dixon,* 163 N. C., 139.

MATTHEW H. LOVE v. L. H. MOODY.

Tampering with a juror, during the progress of a trial, by anyone, is a sufficient reason for setting aside the verdict.

ACTION for the recovery of a tract of land, brought to the Superior Court of HAYWOOD, Spring Term, 1871, and removed on the affidavit of the defendant, to the Superior Court of TRANSYLVANIA, where it was tried before *Cloud, J.,* at Fall Term, 1871.

The trial in the Court below commenced on Tuesday and continued until late the ensuing Saturday night—the jury being allowed to
(201) separate at the adjournments of the Court, upon receiving the usual charge, not to talk with anyone concerning the subject of the trial, nor allow anyone to speak to them thereof, nor converse about the same with each other. These instructions were repeated more than once during the week. At 10 o'clock, Saturday night, the jury came into Court and asked for further instructions, which were given by his Honor, when they again retired and soon returned with a verdict in favor of the defendant.

On the succeeding Monday morning, the plaintiff moved for a new trial, founding his motion upon affidavit, in which he states that he is informed that one F. J. Whitmire, an attorney of the Court, had, during the trial, spoken to one of the jury in regard to the case and had advised him thereon; and also stating that he had discovered other and material evidence in the cause. The case states, "that the Court not being satisfied with the affidavit of Whitmire, the attorney, and of Brooks, the juror" (both of which were presented by defendant in reply to the motion for a new trial), caused them to be sworn, and proceeded to examine them orally touching the matter.

His Honor after the examination, set the verdict aside and granted a new trial, referring to what took place between Whitmire and the juror. In making up the case, his Honor could not say that he was influenced in any manner by the affidavit suggesting newly discovered testimony.

From the judgment of the Court, setting aside the verdict and granting a new trial, the defendant appealed.

D. Coleman for appellant.
Bailey and *Battle & Sons, contra.*

READE, J. The record proper sets forth that there was a verdict for the defendant. And then, "Rule for new trial. Rule made absolute. New trial granted." So that, from the record, it does not appear
(202) for what cause, a new trial was granted.

The "case" for this Court sets forth, that "the plaintiff moved for a new trial on two affidavits, copies of which are hereunto appended marked A and B." And the defendant also offered affidavits which are appended. But it is not found by his Honor what facts are established by the affidavits. There was no use in sending up the affidavits. If any facts were to be found from them, his Honor below ought to have found them. This Court does not try facts nor review them, as a general rule, but only "matters of law or legal inference." And so the defendant's counsel insisted that as the record set forth no facts, and the Judge found no facts, and this Court cannot find the facts from the

affidavits, no facts appear at all. And therefore, the only question for consideration is, whether the Judge below can arbitrarily, that is to say, without giving any reason at all, set aside a verdict and grant a new trial; or, whether he must not find the facts and state the reasons upon which he acts, so that this Court may review, not his facts, but his reasons—his law or legal inference. It is an interesting question, and important in practice; and, therefore, we would declare our opinion if we were unanimous, although we do not think it necessary in this case. But the members of the Court are not all of the same opinion, and, therefore, we pretermit the decision of the question, and throw it out for the consideration of the profession. We are not obliged to decide it in this case, because we collect from the whole case, that his Honor set aside the verdict and granted a new trial because he found that the jury had been tampered with during the trial. And this is, very clearly, a sufficient reason for setting aside a verdict. The case states, that "the Court not being satisfied with the affidavits of Whitmire, the attorney, and Brooks, the juror, caused them to be sworn before him, and proceeded to examine them orally touching the said matter. Whitmire, in answer to the questions asked him, said he did not re- (203) member whether or not he read from "Battle's Digest" to Brooks. And Brooks replied to questions asked him, "that he did not remember whether Whitmire read him any law from the book." And then the case sets forth that his Honor set aside the verdict because of "what took place between Whitmire and Brooks." And although we cannot refer to the affidavits for the purpose of finding disputed facts, yet we may refer to them to see what was their subject-matter, and that we find to be the alleged tampering with the juror Brooks, by the attorney, Whitmire. And therefore, we take it, that his Honor found the fact that the juror had been tampered with; and then he concluded that as a matter of law, he had the right to set aside the verdict. And in that we agree with his Honor.

PER CURIAM. Affirmed.

Cited: Moore v. Edmiston, 70 N. C., 482; *S. v. Smallwood,* 78 N. C., 562; *S. v. Best,* 111 N. C., 643; *Pharr v. R. R.,* 132 N. C., 423; *Lumber Co. v. Buhmann,* 160 N. C., 387.

STATE v. JAMES G. WISEMAN and WILLIAM E. WISEMAN.

1. An appeal can not be taken in State cases from an interlocutory judgment, and it is only by statute that such appeals can be taken in civil cases.
2. In cases of necessity, a mistrial may be ordered in capital cases.
3. The necessity justifying such mistrial, may be regarded as a technical term, including distinct classes of necessity; for instance, the one physical and absolute, as where a juror from sudden illness is disqualified to sit, or the prisoner becomes insane, and so on; another may be termed a case of legal necessity or the necessity of doing justice, as in case of tampering with jurors, and such like—such cases of necessity being the subject of review in this Court after a final decision in the Court below.
4. Whenever the Court below finds that the jury has been tampered with, a mistrial should be ordered, it being one of the highest duties of a Court to guard the administration of justice against such fraudulent practices.

(204)

MOTION to discharge the prisoner from custody, on account of the withdrawal of a juror and a mistrial at the instance of the State.

The indictment (for arson) was found at Fall Term, 1871, of MITCHELL, and thence removed on affidavit of defendant to MCDOWELL, and from thence to YANCEY, where the defendants were put on trial at Fall Term, 1872, before *Henry, J.*

The case made out by his Honor and sent here as a part of the transcript, on the only point material to an understanding of the opinion of the Court, states, that one Wheeler had been appointed the officer to attend the jury, and was sitting in the same box with them; that on the evening of the second day of the trial, after the evidence for the prosecution had closed, and while the defendants' witnesses were being examined, the counsel for the defendants, after asking permission to speak to Wheeler, the officer, called him as a witness and examined him as to a matter tending to discredit or contradict the prosecutor, a witness for the State. Upon Wheeler's cross-examination, he was asked as to whom he had spoken of the matter—the subject of the testimony. He replied, that while a former witness was giving in his evidence, that he, Wheeler, had remarked to one of the jurors in the box: "That is so, Childs (the prosecutor) said the same thing to the prisoner in the jail at the last Court." Wheeler further stated, that he had remarked the same thing in substance to another of the jury and to others. The jurors to whom Wheeler had addressed himself, being called at the instance of the defendants, stated that Wheeler had spoken to them about the matter, but that their minds were not influenced by what he said. One of them stated, that Wheeler had also said to him,

(205) that "Childs (the prosecutor) is a mean man and a rascal," when he was told to go away and not to speak to him, the juror about it.

STATE *v.* WISEMAN.

The Solicitor for the State, moved that a juror be withdrawn and a mistrial entered.

His Honor allowed the motion, and a juror was withdrawn, whereupon it was moved that the prisoners be discharged from custody which being refused, they appealed.

Busbee & Busbee for the prisoners
Attorney-General Hargrove for the State.

BOYDEN, J. No appeal can be taken in a State case until after a trial and judgment against the defendant in the Court below. An appeal cannot be taken in State cases from an interlocutory judgment, and it is only by statute that such appeals can be taken in civil actions. *S. v. Bailey,* 64 N. C., 426, and *S. v. Jefferson,* 66 N. C., 309. The appeal in this case must therefore be dismissed.

This case being now before the Court, as upon a writ of *certiorari,* that raises the question as to the power of the Court below to withdraw a juror and make a mistrial.

It must now be considered, as settled law, in our State, that in cases of necessity a mistrial may be ordered even in capital cases. The term, necessity, as used in this connection, must be regarded rather as a technical term, and includes quite distinct classes of necessity. One class may not improperly be termed physical and absolute; as where a juror by a sudden attack of illness is wholly disqualified from proceeding with the trial; or where the prisoner becomes insane during the trial, or where a female defendant is taken in labor during the trial, as in the case of Elizabeth Meadows, cited by Chief Justice TILGHMAN, in *Commonwealth v. Cook* and others, 6 Sergeant & Rawles, 771 (Foster 76, A. D., 1750). There is another class of cases of necessity which may be termed cases of legal necessity, and which the (206) same authority denominates the necessity of doing justice; arising from the duty of the Court to guard the administration of justice from fraudulent practices; as in the case of tampering with the jury, or keeping back the witnesses on the part of the prosecution, by the prisoner.

In misdemeanors of the lower grade, mistrials are within the sound discretion of the Courts, and their decisions in such cases cannot be reviewed in this Court. But in capital cases, and other felonies, and in offenses under the grade of felony, where infamous punishments are awarded, such as perjury, conspiracy and the like, mistrials are not matters of discretion, and can only be made in cases of necessity as above defined; and all such cases are the subject of review in this Court after a final decision in the Court below; and in such cases, the defendant when called for a second trial, may avail himself of any error com-

mitted in the former trial by ordering a mistrial when the necessity for a mistrial did not exist. In such cases the Judge should find the facts and place them on the record, and these findings of the Court below are conclusive, and not the subject of review here; but his Honor's decision upon the law, arising upon the facts, may be reviewed and reversed.

In this case we understand his Honor as finding that the jury had been tampered with, and that his Honor ordered the mistrial on that ground. But it is argued by the defendants' counsel in this Court that this power to make a mistrial in such a case can only be exercised against the consent of the defendant, when it is shown that the prisoner has himself been engaged, directly or indirectly, in tampering with the jury.

We do not so regard the rule, and we hold the law to be that whenever the Court finds that the jury have been tampered with, a mistrial may be ordered. It cannot be necessary for the Court to proceed further, and also find that the defendant has himself been engaged in this (207) tampering; as such an inquiry would necessarily delay the trial, often for days, and owing to the secret manner in which such practices are conducted, the fact of the defendant's actual participation therein, could rarely be ascertained, and would result in destroying the practical application of the rule.

We regard it as one of the highest duties of a Court to guard the administration of justice against such fraudulent practices, and whenever the Court is satisfied that the jury have been tampered with, a mistrial should be ordered.

In this case we hold that his Honor was right in withdrawing a juror and ordering a mistrial.

The discharge of the prisoner is refused, as we hold he is liable to be put upon his trial again.

PER CURIAM. Judgment affirmed.

Cited: *S. v. McGimsey,* 80 N. C., 382; *S. v. Davis, Id.,* 387; *S. v. Keeter, Id.,* 473; *S. v. Bell,* 81 N. C., 594; *S. v. Hinson,* 82 N. C., 541; *S. v. Bass, Id.,* 574; *S. v. Barber,* 89 N. C., 526; *S. v. Washington, Id.,* 538; *S. v. Lee,* 90 N. C., 652; *S. v. Twiggs, Ib.,* 686; *S. v. Hazell,* 95 N. C., 624; *S. v. Dry,* 152 N. C., 814, 815.

STATE v. SIMPSON MORDECAI and THOMAS GRIFFICE.

1. A building within the curtilage, and regularly used as a sleeping room, is in contemplation of law a dwelling-house in which burglary can be committed.
2. The defendants went to the store-house of the prosecutor, in which he was sleeping, between the hours of 10 and 11 o'clock at night, and knocking at the door called his name twice; he answered the call, and told them to wait until he put on his breeches, which he did, and opened the door, when the defendants entered the house and called for meat, and as the prosecutor was in the act of getting the meat he was knocked down by one of the defendants, and the store robbed: *Held*, to be a sufficient breaking to constitute the crime of burglary.
3. The house in which the burglary was committed, and that occupied by the family of the prosecutor were distant 30 yards from each other: *Held*, to be no error in the Judge's refusing to charge, that one could not have two dwelling-houses in that distance from each other.
4. The counsel for the State has a right to exhibit and comment upon a stick which had been identified as one had by one of the defendants, and with which it was alleged the prosecutor had been struck.

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BURGLARY, tried before *Watts, J.*, at January Term, 1873, of WAKE.

The defendants were charged in the bill of indictment with breaking into the dwelling-house of the prosecutor, and in another count with the larceny of a pair of shoes and other articles, alleged to have been taken from the house.

The evidence as to the different counts, and the objections taken to its admission by defendants, with the exceptions to the ruling of the Judge who tried the case in the Superior Court, are fully stated in the opinion of the Court.

The jury returned a verdict of guilty. Rule for a new trial; rule discharged. Judgment of death and appeal by defendants.

Batchelor, Edwards & Batchelor for defendants.
Attorney-General Hargrove, with whom was *Cox,* for the State.

BOYDEN, J. In this case his Honor was requested to instruct the jury, "first: That the storehouse in which the alleged burglary was committed was not, under the circumstances testified to, a dwelling-house in contemplation of the law." His Honor refused the prayer and charged the jury, "that if they believed the witnesses the house in which the alleged burglary was committed was a dwelling-house in contemplation of the law." The testimony upon the point was as follows: That the owner, the prosecutor Hicks, was sleeping in his store in the night of the alleged burglary; that he had slept there for five months, with the exception of a single night; that the dwelling-house where his wife

slept was distant thirty steps, and in the same enclosure; that he slept there to protect his store and for the convenience of trade.

The son of the prosecutor testified that his father had been (209) usually sleeping in the said store for the last five years.

The authorities in the brief filed in the cause on the part of the State are full and conclusive, and the point has been heretofore so thoroughly considered in our State that we had supposed the question not now debatable, that a building within the curtilage and regularly used as a sleeping room, was in contemplation of law a dwelling-house in which burglary might be committed. There was no error in the charge of his Honor upon this point.

Secondly: His Honor was also requested to instruct the jury, "that the entrance of the defendants into the storehouse in the manner testified to, was not such a felonious breaking into a dwelling-house as to constitute the crime of burglary, even if the storehouse was in contemplation of law a dwelling-house." This prayer his Honor refused, and charged the jury, "that if they believed the evidence, the entrance of the defendants into the warehouse, in the manner testified to by the witnesses, was a sufficient breaking into a dwelling-house to constitute the crime of burglary, if it was done with a felonious purpose." The evidence upon this point was as follows: William Hicks, the prosecutor and the owner of the storehouse, testified, that on the night of 11 August, 1872, between the hours of ten and eleven o'clock, he was in bed in a back room of his storehouse, and was aroused from his sleep by some person or persons knocking at the door, and calling, "Mr. Hicks, Mr. Hicks!" He answered the call, and said: "Hold on till I put on my breeches." That he got up, slipped on his breeches, lit his candle, and went to the door, set his candle on a small table beside the wall and unfastened the door without inquiring who they were, and what they wanted. Immediately three colored men entered and asked if he had any meat. He replied: "Yes; how much do you want?" One answered, "Four pounds." As he stepped to get his candle, they (210) passed before him and went into the next room, where his meat was. That he took up his axe to chop it off, and just as he stooped to make the lick, he was struck over the head, and that he was insensible from that time, Saturday night, until the following Monday morning.

Alfred Bryant, testified, that by an agreement between himself and the defendants and one Mason Boylan, they left the city of Raleigh on the night of 11 August, 1872, Saturday, for the storehouse of the prosecutor, distant about three miles, for the purpose and intent of getting a jug of whiskey. That as he had a burnt face, and could be easily identified, he was to stand out in the road and watch, and give the alarm if any person should approach. That the said defendants and Mason

Boylan went into the store, Hicks inviting them in, Boylan having and carrying in a large stick, which being exhibited on the trial, witness identified. That after the entrance he heard some scuffling in the store; soon thereafter the defendants and Mason Boylan came running out, with various articles. That they all ran off down the railroad, and after getting off some distance they sat down and divided out the things. Witness further testified, that while they were dividing out the things one of them said, "this was a long walk, a sharp trick, and a free drink." The authorities cited on the part of the State fully sustain his Honor's charge as to the burglarious entrance.

The third prayer for instructions was that his Honor should charge the jury, that the prosecutor could not have two dwelling-houses within thirty yards of each other. This prayer was properly refused.

We are also of opinion that there was no error in his Honor's permitting the counsel for the State to exhibit the stick, and make the remarks objected to by defendants' counsel.

PER CURIAM. No Error.

(211)

STATE v. ANDREW RUCKER.

The word "feloniously" is absolutely necessary in every indictment charging a felony, and it can not be dispensed with or its use supplied by any circumlocution.

INDICTMENT for murder, tried before *Henry, J.*, at the Fall Term, 1871, of MADISON. (The continuance of the case in this Court was owing to a diminution of the record, which was supplied by a *certiorari*).

The prisoner was charged in the bill of indictment, containing one count, with the murder of one Miza Wilson. The charge as made was, that the prisoner, with a certain rock, a deadly weapon, *"willfully, deliberately and of his malice aforethought, in and upon the head of her, the said,"* etc., with a repetition of the same words in a subsequent part of the indictment, charging the murder.

The objection to the validity of the indictment is set out in the opinion of the Court; and as that was the material point made here, a statement of the evidence and of the exceptions taken by the prisoner's counsel upon the trial below, becomes unnecessary.

The jury returned a verdict of guilty. Motion for a *venire de novo;* motion refused. Judgment and sentence of death. Prisoner appealed.

Jones & Jones for the prisoner. (212)
Attorney-General Hargrove for the State.

SETTLE, J. The record discloses a murder shocking in its details, and the confessions of the prisoner, together with the corroborating evidence, fully warranted the jury in finding him guilty. But the bill of indictment is not only informal in many respects, but fatally defective.

Neither the word feloniously nor the word felony is to be found in the bill of indictment from the beginning to the end, and it is common learning, too plain to need citation of authority for its support, that the word feloniously is absolutely necessary in every indictment charging a felony, and it can not be dispensed with or its use supplied by any circumlocution.

It is as necessary in an indictment charging a felony as the word heirs is in a deed conveying a fee simple. *S. v. Purdie,* 67 N. C., 25; *S. v. Jessee,* 19 N. C., 297.

It follows that the judgment must be arrested, and that the prisoner upon this indictment is entitled to go without day. But as his life, in consequence of this fatally defective bill, has never been in jeopardy, there is nothing to prevent another bill being sent and a further prosecution for the murder.

PER CURIAM. Judgment arrested.

DOE *ex dem.* JOS. W. SIMMONS v. T. L. HASSELL and others.

1. **A deed from a Clerk and Master in Equity conveys the legal title, and its validity can not be attacked in a collateral way, as for instance, in an action of ejectment. To avoid such a deed it is necessary that proceedings in the nature of a bill in equity should be instituted, and a decree obtained declaring its validity or invalidity.**
2. **A guardian who is a party to a petition to sell real estate in which his ward is interested, has a right to bid for and purchase the same at the sale made by a commissioner under a decree of the Court.**

(213)

EJECTMENT, commenced at Spring Term, 1863, of TYRRELL, and continued regularly until it was removed to the docket of the present Superior Court, at Spring Term, 1872, of which it was tried by *Watts, J.*

The question determining the case, and upon which its decision turned in the Superior and in this Court, was as to the validity of a certain deed, a necessary link in the defendants' title, made by a former Clerk and Master in Equity of Tyrrell County, to T. L. Hassell the defendant, who had been by a decree of the Court subrogated to the rights of the purchaser of the land (the same in controversy in this action) at the sale of the Clerk and Master. Some of the records in the Equity office of Tyrrell County having been destroyed during the war, evidence of the proceedings relating to a sale of the land was offered by the defend-

ant, and his Honor rejected the testimony, giving notice to defendants' counsel that he should hold the sale void, and instruct the jury that the plaintiffs were entitled to recover:

1. Because the evidence shows that the purchase-money was never paid.

2. The Court of Equity acted erroneously in ordering title to be made until the purchase-money was paid.

3. That the sale was voidable, as the guardian, S. S. Simmons, could not purchase at the sale, and the order directing the investment of the proceeds of said sale in negroes was voidable, the pur- (214) chase-money not having been paid.

4. That plaintiff, Jos. W. Simmons, had, on arriving at full age, the right to elect whether or not he would ratify the said sale and order of investment; and his sale of said land to Caroline Walker amounted to a rejection of the same.

The defendants excepted, and upon the foregoing intimation of his Honor, submitted to a verdict for the plaintiffs. Judgment accordingly and appeal by defendants.

Busbee & Busbee for appellants.
Smith & Strong and *A. M. Moore, contra.*

BOYDEN, J. His Honor was mistaken in holding that the sale of the Clerk and Master could be attacked in this collateral way. This is an action of ejectment under our old system, brought to try the legal title and not any equitable claims to the premises.

The deed of the Clerk and Master passed the legal title to the purchaser, and this title can only be attacked by some proceeding in the nature of a bill in equity, and not by an action of ejectment. This puts the plaintiff out of Court. This question is so fully discussed, in *Beard v. Hall,* 63 N. C., 39, by his Honor, the present Chief Justice, that we deem it unnecessary to do more than to refer to that case.

His Honor was also mistaken in holding that the husband of the widow and the guardian of the children could not purchase at the sale of the Clerk and Master. His wife had dower in the land, which interest was included in the sale, and being also guardian of the children, the heirs and owners in fee of the land, it was his right and duty to see that the land brought a fair price. What objection can there be to a guardian's bidding at a sale made by a commissioner under a decree of the Court? Such bid is nothing more than an (215) offer to purchase, and binds no one until it has the sanction of the Court, upon its being made to appear that the sale was fairly conducted, and that the land brought a fair price.

This is quite different from the case of a guardian purchasing at his own sale, where he is both the seller and purchaser, as in the case cited by plaintiff's counsel.

PER CURIAM. *Venire de novo.*

Cited: Lee v. Howell, 69 N. C., 203; *Sumner v. Sessoms,* 94 N. C., 375; *Dickens v. Long,* 109 N. C., 170.

Explained: Froneberger v. Lewis, 79 N. C., 434.

WILLIAM F. DEAL v. WEIGHSTILL PALMER.

1. The Code of Civil Procedure, secs. 132 and 133, wisely clothes the Superior Court Judges with large discretion as to amendments in furtherance of justice and relief in cases of mistake: *Therefore, held,* that it was right for the Judge below to set aside a judgment entered up after the defendant and his counsel had left the Court, and in so doing he exercised a sound discretion.
2. Neither the Code of Civil Procedure, sec. 72, nor the *proviso* in the Act of 1870, ch....., requires notice to be given to the adverse party, on an application for permission to defend a suit without giving the required security.

MOTION to set aside a judgment rendered in a civil action, for the recovery of the possession of a tract of land, heard before *Mitchell, J.,* at Fall Term, 1872; of CALDWELL.

At Spring Term, 1872, the plaintiff filed his complaint and the defendant his answer, the latter, as the case states, giving no bond for costs or damages. During the term, but after the defendant and his attorney had left the Court, the plaintiff, finding no bond filed by defendant, caused the Clerk of the Court to enter up judgment in his favor (216) for want of an answer, upon which judgment a writ of possession was regularly issued, and the defendant turned out of possession.

At the Fall Term, the defendant having given proper notice, and upon the affidavits of himself and counsel, moved to set aside the judgment, upon the ground of excusable negligence (C. C. P., sec. 133), his Honor allowed the motion, set aside the judgment, and ordered that a writ of restitution be issued, restoring the possession of the land to the defendant; and that he be allowed to answer upon filing the bond with good security required by law. From this judgment the plaintiff appealed.

After the adjournment of the Court (at Fall Term), the defendant, without notice to the plaintiff, applied to his Honor, at Chambers, for leave to defend the suit without giving the required bond, first filing

the necessary affidavit of his inability to give the security and a certificate from counsel that he had good grounds of defense. His Honor allowed the motion, and permitted the defendant to answer without giving security, and the writ of restitution to issue, etc To this the plaintiff also excepted.

Folk for appellant.
Armfield, contra.

SETTLE, J. We are of opinion that his Honor had the power to relieve the defendant from the judgment taken against him at Spring Term, 1872, and that in so doing he exercised a sound discretion.

C. C. P., secs. 132 and 133, clothes the Superior Court Judges, as we think, wisely, with large discretion as to amendments in furtherance of justice, and relief in cases of mistake.

But the plaintiff complains further, that after the adjournment of Court at Fall Term, 1872, without notice, his Honor made an order, at Chambers granting permission to the defendant to answer without giving the security provided for by an act ratified 28 (217) March, 1870, requiring a defendant in an action for the recovery of real estate to file a bond for costs.

C. C. P., sec. 72, points out the mode in which a person may obtain permission to sue as a pauper. And we find a proviso to the act of 1870, above referred to, which enacts, "that no defendant shall be required to give said bond if any attorney practicing in the Court where the action is pending will certify to the Court in writing that he has examined the case of the defendant, and that in his opinion the plaintiff is not entitled to recover, and said defendant shall further file an affidavit that he is unable to give said bond." These requisites have been complied with. But the plaintiff's counsel objected that his Honor granted this permission without notice to the plaintiff.

Neither C. C. P., sec. 72, nor the proviso to the act of 1870, requires notice to be given to the adverse party. The certificate of counsel, together with the affidavit of a party, it would seem, are sufficient, without notice to authorize a Judge to grant the permission under either act.

PER CURIAM. Affirmed.

Cited: Jones v. Fortune, 69 N. C., 324; *English v. English,* 87 N. C., 498; *Kivett v. Wynne,* 89 N. C., 42; *Pickens v. Fox,* 90 N. C., 372; *Dempsey v. Rhodes,* 93 N. C., 125.

(218)

THOMAS A. JAMES, Adm'r, etc., v. J. F. LONG and another.

In a suit upon the following guaranty, to wit: "We, the undersigned, have this day sold to T. A. J., administrator, etc., the notes listed above; and we bind ourselves for any and all of the above-named notes should the said T. A. J. fail to collect the same: *Held*, that the guarantors were bound for the face value of the notes, principal and interest, though the same might, between the maker and payee, be subject to the legislative scale.

ACTION, tried at Fall Term, 1872, of IREDELL, before *Mitchell, J.*

The suit was brought on a guaranty given by defendants for the payment of certain notes, principal and interest, described in a list, underneath which the guaranty, in the following words, was written and signed by defendants:

"We, the undersigned, have this day sold to Thomas James, administrator of Martha Potts, deceased, the notes listed above, and we bind ourselves for any or all of the above-named notes should the said James fail to collect the same." (Signed and sealed by the defendants.)

The main question arising on the trial, and the one upon which the judgment of the Court is founded, is the proper construction of the above guaranty. The other questions, with the evidence thereto relating, not being pertinent to this one point decided, may be omitted.

There was a verdict for the plaintiff. Motion for a new trial. Motion refused. Judgment and appeal by defendants.

W. P. Caldwell for appellants.
Bailey, contra.

READE, J. A list of notes is made out with the amount of each note run out, and interest calculated upon each, and run out also, and
(219) then the whole amount, principal and interest, added up and set down at $4,496.69. And then at the foot is the following:

"We, the undersigned, have this day sold to Thomas A. James, administrator, etc., the notes listed above; and we bind ourselves for any and all of the above-named notes should the said James fail to collect the same."

Some of the notes were dated before the war and some after the war, and of course were not subject to be scaled; others were dated during the war, and were subject to the legislative scale; and the question is, whether the guaranty is for the face value or only for the real value of such of the notes as are subject to the scale?

We are of the opinion that the guaranty is for the face value of the notes, the amount run out and the interest calculated, and the addition

made. Ordinarily an endorser, or a guarantor, is liable for the face value of a note endorsed or guaranteed; and that principle governs our case, nothing more appearing. If there is anything to take this case out of the general rule, it is for the defendant to show it. What he relies upon is, that the makers of the note were entitled to the scale, and that the guaranty is, that the defendants will pay what the makers were bound to pay and failed to pay. That was the defense set up in *Carter v. McGehee,* 61 N. C., 431. In that case the defendant had guaranteed a $3,000 bond, which was entitled to be scaled down to $750. And yet the defendant was held liable for the face value, $3,000. It is true, that in that case the guarantor had received $3,000 in value for his guaranty, and if any importance is to be attached to that, so in our case the guarantors received the full amount and more of the face value of the notes guaranteed. But we put our case upon the plain meaning of the guaranty itself—the list of the notes, the amounts stated, interest calculated, and addition made, all being a part of the same instrument, makes it plain that the guaranty was intended to embrace the full amount so stated. (220)

PER CURIAM. No Error.

JAMES DUVALL v. H. H. ROLLINS.

A, to whom certain articles of personal property has been allotted as his personal property exemption, sold and transferred the same to B for a valuable consideration; afterwards, the articles having been seized by a constable under an attachment against A's property, B rescinds his contract with A, and the property was sold by the officer: *Held,* that in a suit against the officer, A, the plaintiff had a right to recover the value of the property at the time of its seizure.

ACTION for the recovery of certain personal property, claimed as a part of plaintiff's homestead exemption, tried before *Mitchell, J.,* at Spring Term, 1872, of ASHE.

Under the instructions of his Honor, on the trial in the Superior Court, the jury returned a verdict for the defendant. Motion for a new trial. Motion refused. Judgment and appeal by plaintiff.

The facts in the case are fully set out in the opinion of the Court.

Todd and *Caldwell* for appellant.
Folk, contra.

BOYDEN, J. This case involves a new question touching the plaintiff's personal property exemption. It is agreed that the property in

dispute had been the property of plaintiff, and that on 5 October,
(221) 1870, the plaintiff sold and transferred the property in controversy to one Aker, his son-in-law, upon the consideration that his said son-in-law should support the plaintiff, who is an old man, and plaintiff's wife, during their declining years, and also pay off the plaintiff's debts, as soon as he could. That about 25 October, 1870, the sheriff of said county, having executions against the plaintiff, at plaintiff's instance summoned three freeholders, and the property now in dispute was laid off to the plaintiff and due return thereof made. On 24 December, 1870, the defendant, who was a constable, levied several attachments upon the property thus laid off, as plaintiff's personal exemption, which attachments were regularly issued against the property of the plaintiff, and judgments obtained against the plaintiff on said attachments on 24 December, 1870, and that plaintiff appeared before the justice at the time the judgments were rendered; and that at the time the judgments were rendered, Aker, the son-in-law, appeared before the justice, and in the presence of the plaintiff claimed the property in dispute, and made an affidavit that he was the owner of the property, the plaintiff making no objections to such claim. The justice, notwithstanding this claim of Aker, condemned the property so taken to be sold and applied to pay off the judgments rendered on said attachments. After said judgments were rendered on the attachments and before the day of sale, Aker, being unwilling to engage in litigation, rescinded the contract for the property with the plaintiff as before recited, and thereafter the defendant sold the said property at public auction under the *venditioni exponas*, issued upon the judgments rendered on said attachments, the plaintiff being present at the said sale, and objecting to the sale, and claiming the property as his personal exemption; the plaintiff, as the case states, being a resident of the State. And it is further stated, as agreed, that the debts upon which
the attachments issued were neither laborers' liens, nor me-
(222) chanics' liens, nor purchase-money for lands. So the question is, had the defendant a right to seize this property under these attachments, and sell the same under the executions issuing on the judgments rendered on those attachments? There is no ground set up by the defendant, as we understand his defence, that has any tendency to justify the original seizure of this property, under the attachments, so that at all events the plaintiff would be entitled to recover nominal damages at least, and, as we think, damages for the detention until the alleged transfer of the property to Aker.

The defence set up by the defendant is, that while the constable had this property in his custody under the attachments as the property of the plaintiff, the plaintiff could not acquire the interest of Aker therein by rescinding and recanting the trade as above-mentioned, "that Aker

had nothing but a right of action and a right of reception left." This he might grant or release to defendant, but could not assign to a stranger by the common or statute law. "What is called a rescission of the contract, between the plaintiff and his son-in-law, could not transfer the property in the chattels to the plaintiff, because they were in the adverse possession of the defendant, and the right of action he could not assign." In the first place it may be remarked that the defendant's counsel is mistaken in supposing that the possession of the constable was adverse; so far from being adverse, the constable had seized this very property as the property of the plaintiff, and was holding as his property for the purpose of satisfying the executions in his hands against the plaintiff. So that the reason urged against the right of the plaintiff and his son-in-law, to rescind the contract and re-invest the property in the plaintiff, failing, his supposed law, as applying to this case, also fails. Hence, we think it clear that the plaintiff is entitled to recover the value of the property against the defendant. But as the case agreed does not state the value of the property con- (223) verted, no judgment can be given in this Court. There must be an inquiry by a jury below to ascertain the damages to which the plaintiff is entitled.

There is error.

PER CURIAM. Judgment accordingly.

Cited: *S. c.*, 71 N. C., 218; *Pate v. Harper,* 94 N. C., 27; *Rankin v. Shaw, Id.,* 407; *Etheridge v. Davis,* 111 N. C., 294.

J. S. HENDERSON, Assignee of O. G. FOARD, v. C. W. BESSENT and others.

1. A bailee, where the bailment is for the benefit of both parties, is only liable for ordinary neglect; and this does not embrace a case of accidental destruction by fire, without default on the part of the bailee.
2. A contracted to manufacture 50,000 pounds of leaf tobacco for B, *between the 1st day of May and the 15th day of October, 1866,* for which B was to pay 10 cents per pound, and to pay the taxes and for the ingredients used in its manufacture, such payment to be made whenever B was notified that 100 boxes were ready for market: *Held,* that the defendants were bound to have all the tobacco manufactured on or before the day agreed upon, and that the promise of B to pay 10 cents per pound, and to pay taxes, etc., was not a condition precedent, or an act on which A's undertaking was made to depend.

ASSUMPSIT, brought to Fall Term, 1867, of ROWAN, by Foard, and thence removed into the Superior Court organized under the Constitution, where it was tried before *Cannon, J.,* at Fall Term, 1871.

Since the institution of the suit, Foard has been declared a bankrupt, and the plaintiff, his assignee, declared on the trial, for the breach of a parol contract, substantially as follows:

That on 3 February, 1866, the defendants and Foard entered into an agreement in which it was stipulated that the defendants would manufacture for Foard 50,000 pounds of leaf tobacco, Foard agreeing to deliver it at the defendants' factory before the 1st day of Sep-
(224) tember, 1866, and to pay for its manufacture 10 cents per pound and all taxes and for ingredients at factory prices, and to make this payment as soon as he was notified that 100 boxes thereof was ready for market. The defendants agreed to manufacture the tobacco, furnishing all ingredients, between 1 May and 15 October, 1866.

On the trial the following facts were disclosed: That 100 boxes of the tobacco were ready about 17 July, 1866, of which Foard was notified, who paid for its manufacture, and was allowed to remove it—no claim being made for taxes; that the remainder of the leaf tobacco was not manufactured prior to 15 October, as agreed upon; that on or about 15 November ensuing, Foard applied for his tobacco, but was put off by defendants and told that they needed money. The week after he paid defendants $800.

It also appeared that Foard had obtained a verbal promise from the Collector of Internal Revenue, Mr. Wiley, empowering him to remove the tobacco; and that early in December, 1866, he sent his son to defendants with this message from Wiley, and they allowed him to remove 116 boxes, some of the defendants furnishing teams to assist in the removal. Soon after this he sent for more, but the defendants refused to deliver it, unless he furnished a written permit from the Collector. Some evidence was here offered tending to show that arrangements had been made with the Treasury Department to allow tobacco of this character to be removed from the factory, and assessed specially for taxation.

The factory of the defendants was burned in December, 1866, and the tobacco of Foard therein consumed.

His Honor was requested by the plaintiff to instruct the jury:

1. That if they should find that the tobacco was to be manufactured before 15 October, and that the defendants failed to do it, the
(225) plaintiff would be entitled to recover such damages as may have resulted from such failure, and that he would be entitled to recover, although the jury might be satisfied that the factory was accidentally burned without any fault of defendants.

2. That if they should find, that the payment of the tax was waived by defendants, and this was done under a misapprehension and with no intention of defrauding the government, the plaintiff could recover, although the tax was not paid; and further, that the payment of 10 cents per pound, the price for manufacturing, and also the payment

for the ingredients might be waived, in any of which cases, the plaintiff would be entitled to recover.

3. That if the tobacco was not manufactured by 15 October, the plaintiff is entitled to recover, it not being necessary to perform any condition precedent except to furnish the leaf tobacco.

Other instructions were asked, which, not being material to the point decided, are omitted.

His Honor refused to give the instructions asked, and charged the jury that it was incumbent on the plaintiff to prove to their satisfaction that he delivered the leaf tobacco as agreed; that when notified that 100 boxes were ready, he came forward and paid taxes and charges; that this payment, or his being ready and willing to pay, was a condition precedent to his right to recover. If the plaintiff had satisfied them of this, he would be entitled to recover, although the factory was accidentally burned. If the plaintiff had failed in this, or if the defendants had satisfied them that the time for manufacturing the tobacco had been extended by the plaintiff to a time beyond the date of the burning, the defendants would be entitled to their verdict.

There was a verdict for the defendants. Rule for a new trial; rule discharged. Judgment and appeal by plaintiff.

Bailey for plaintiff. (226)
Blackmer & McCorkle, contra.

PEARSON, C. J. The bailment is for the benefit of both parties; so upon the settled distinction, the bailee is only liable for ordinary neglect, which does not embrace a case of accidental destruction by fire, without default on the part of the bailee. Let it be granted that the defendant was in default in this, the tobacco was not all manufactured at the time agreed on. The delay was not the *proximate cause* of the loss by fire, and according to all of the authorities, is too remote in its bearing as a ground to subject the defendant for the value of the tobacco that was burnt. This position could not be seriously contested, and the case dwindles down into a question for nominal damages to carry costs.

His Honor was of opinion that the payment of taxes, and for the ingredients, was a dependent condition, according to the terms of the agreement, and that on failure by Foard, the defendant was excused for not completing his part of the contract, and having all of the tobacco manufactured by the time stipulated.

In this there was error. The defendant was bound to have all of the tobacco manufactured on or before the day agreed upon, and the promise of Foard to pay 10 cents per pound, taxes and costs of ingredients, was accepted as an independent agreement, upon which the defendant was willing to rely without making its performance a condition prece-

dent, or an act on which the defendant's undertaking was made to depend, so that a failure on the part of Foard would have the effect of relieving the defendant from his undertaking to manufacture the tobacco by the day fixed. Upon the evidence, his Honor ought to have charged that the defendant was not liable for the value of the tobacco which was lost by accident, but that the plaintiff was entitled to nominal damages for the breach of the agreement as to time, which
(227) will carry the costs. This really seems to be the only purpose for protracting the litigation.

PER CURIAM. *Venire de novo.*

Cited: *Hughes v. Knott,* 138 N. C., 109; *Sawyer v. Wilkinson,* 166 N. C., 500.

A. B. STITH v. JACOB LOCKABILL.

Whether or not there was a spoliation of a deposition offered in evidence, is a question for the Court, to be decided upon inspection, and it is error to submit the same to the decision of the jury.

EJECTMENT, tried before *Cloud, J.,* at the Fall Term, 1872, of DAVIDSON.

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

The case in this Court was disposed of by the decision of one of the points made in the Court below, the facts relating to which are fully set forth in the opinion of the Court.

Dillard, Gilmer & Smith and *Blackmer & McCorkle* for appellant.
Bailey and *Gorrell, contra.*

SETTLE, J. It appears from the statement of the case, which his Honor sends to this Court, that the plaintiff's counsel, in addressing the jury, asked them, in consequence of alleged spoliation in a cer-
(228) tain deposition which had been admitted and read to them, not to believe the statements contained therein.

The counsel for the defendant objected to the comments of the plaintiff's counsel at the time, and asked the Court to charge the jury that there was no evidence of any spoliation; which the Court declined to do, but remarked that the Court did not know whether there was any spoliation or not; that the jury had been shown the alleged spoliation and could examine it again, and it was for them to say whether they were satisfied that there had been any spoliation or not. In this there was error.

The question of spoliation was one of fact to be tried by the Court upon inspection, and should not have been left to the jury. The defendant is entitled to a

PER CURIAM. *Venire de novo.*

Cited: *Wilson v. Derr,* 69 N. C., 139; *Leak v. Covington,* 99 N. C., 564.

JOHN R. WHITAKER v. PETER FORBES and others.

In an action of the nature of trespass *quare clausum fregit*, it is not necessary to describe the land entered upon by metes and bounds.

ACTION, for a trespass on a certain lot, tried at January (Special) Term of HALIFAX, before *Cloud, J.*

There was a general demurrer to the complaint, in that, the description of the *locus in quo* was not sufficient. His Honor sustained the demurrer, and gave judgment dismissing the complaint. Plaintiff appealed.

Conigland and *Moore & Gatling* for appellant.
Batchelor, Edwards & Batchelor, contra.

BOYDEN, J. This was a civil action alleging a trespass on (229) land, and the allegation in the complaint is in these words: "That about the ... day of December, 1870, the defendant at the town of Enfield, in the County of Halifax aforesaid, unlawfully and forcibly entered upon a certain lot of land, the property of the plaintiff, situate in the said town of Enfield, on which lot was a framed house of great value, and did then and there deface, pull down and destroy said house."

To the foregoing complaint the defendants demur and for cause of demurrer, say: "that the said complaint does not sufficiently describe the lot and premises on to which the said trespass and damage was done."

So the sole question in the cause is as to description of the land and premises in an action of trespass. It is not necessary to decide how this would be in an action for the recovery of the land, but we think the authorities are abundant, that the description is all that is required in an action for trespass *quare clausum fregit.*

It is true, that by the rules of pleading in England adopted at Hil. Term, 4 W. iv, in trespass *quare clausum fregit,* the name of the close or abuttals must be stated, or a special demurrer will be sustainable; but

those rules have never been in force in our State, having been adopted since our separation from the mother country.

We presume that it was an omission to notice the fact, that these rules were not in force here which misled the defendant in filing a demurrer in this case, as it is clear that previous to the adoption of this rule, it was entirely unnecessary to describe the *locus* by name or abuttals. See I Lan., 347, note 1, where it is expressly said, "that it is sufficient for the plaintiff to allege the trespass to have been done in a ville or parish only, without mentioning any place, for it is not material; and if the plaintiff does mention a place, the defendant may justify in another place without a traverse, and the plaintiff must ascer-
(230) tain a place in a new assignment." In Buller's *Nisi Prius,* 92, it is said, that, "if in trespass *quare clausum fregit,* a man declare generally in such a ville, the defendant may plead *liberum tenementum,* and if the plaintiff traverse it, it is at his peril, for the defendant, if he have any part of the land in the whole town he shall justify it there, and therefore the better way for the plaintiff is to make a new assignment."

It may here be remarked, that more particularity is necessary in an action of ejectment than in an action *quare clausum fregit;* yet in that action a deed may be taken with no further description than that contained in the levy of a constable on land, as directed by our statute, which requires the constable only to state where the lands are situate, on what watercourse and whose lands it adjoins.

If in an action *quare clausum* the plaintiff set out the abuttals of his close, he must on the trial prove every part thereof. Buller's *Nisi Prius,* 98. This makes it hazardous to attempt such description.

It has been the unvarying practice in our State for the last fifty years to declare as in the case before us; and in such action it has never been deemed necessary to describe the close by name or by the abuttals.

PER CURIAM. Reversed.

Cited: Womack v. Carter, 160 N. C., 289.

(231)

R. V. HIX v. D. D. DAVIS.

1. If A and B execute a joint and several note, a judgment against A is no bar to an action against B. The creditor may take several judgments and make his money out of either of them, or make a part out of one and a part out of the other.
2. (Debts, the amount of which are certain and made so by the act of the parties, and claims for damages for torts, the amount of which are uncertain, and depend upon the finding of a jury, commented on, explained and distinguished from each other by Chief Justice PEARSON.)

ACTION, instituted by plaintiff, Hix, in JACKSON, whence it was moved to HAYWOOD, where it was tried before *Cannon, J.*, at Fall Term, 1872.

The plaintiff, Hix, sued on a note given by the defendant and one Shanklin, as surety, for $640 and interest. In his complaint he admitted a payment of $400 by Shanklin, and $120 by Davis, the defendant, demanding in this suit payment for the balance. The note was given for land upon which the defendant is now living.

The defendant resists the payment, and avers that the plaintiff brought suit upon the note in one of the courts of South Carolina against the surety, Shanklin, who is a resident of that State, obtained judgment in that suit, which judgment had been satisfied.

To this the plaintiff replies that the judgment that was obtained against Shanklin in South Carolina was only for a part of the claim, and not for the whole of it; that the amount paid by Shanklin had been credited on the claim, and that to enable him to sue for the balance, the Court in South Carolina had permitted him to withdraw the note; that since the judgment he had presented the note to the defendant, who promised to pay the amount left due, etc.

On the trial there was evidence of what was the usual custom of the courts of South Carolina in respect to ante war debts, and that the judgment against Shanklin was not considered to be a full (232) satisfaction of the claim, but rather as an equitable compromise. The defendant also offered in evidence a receipt for $120, "to be credited on a judgment and execution in favor of R. V. Hix, and against J. S. Shanklin, of Oconee County, S. C., said judgment and execution is in full of a note given by said Davis and Shanklin to Hix. Judgment rendered 29 January, 1869, at Anderson C. H., this 12 June, 1869. R. V. Hix." He, the defendant, insisted that this receipt was in full satisfaction of the judgment. The plaintiff stated that he signed this receipt at the house of defendant in North Carolina; that he was by him informed a judgment had been given, and taking it for granted that it was for the whole debt, the receipt was so given.

His Honor reserved the question as one of law, as to the effect of the judgment in the court in South Carolina in extinguishing the claim of the plaintiff; and charged the jury if the receipt was given in ignorance of the true circumstances of the case, it would not be an acquittance, nor any evidence of the plaintiff's sanction of the judgment in South Carolina, and that if they believed that afterwards when it was presented to him, the defendant promised to settle it, the plaintiff was entitled to recover. To this defendant excepted, and asked his Honor to charge, that even if the jury should find there was a subsequent promise, there was no consideration to support it, and the plaintiff could not recover. This instruction was declined.

The jury returned a verdict in favor of the plaintiff.

His Honor upon consideration of the point reserved, being of opinion that the judgment given in the court of South Carolina was a bar to the recovery of the plaintiff in this suit, set aside the verdict of the jury, and entered a judgment of nonsuit against the plaintiff, from which he appealed.

(233) *Dupree* and *Ashe* for appellant.
No counsel, *contra.*

PEARSON, C. J. On the trial his Honor reserved the question, "as to the legal effect," of the judgment taken in South Carolina, and after verdict for the plaintiff set the verdict aside on the question reserved, and directed a *nonsuit.*

If A and B execute a joint and several note, a judgment against A is no bar to an action against B on the same note. The creditor may take several judgments and make his money out of either of them, or make a part out of one and a part out of the other.

This is so well settled that we cannot suppose his Honor intended to rule that the mere fact of the judgment in South Carolina against Shanklin had the legal effect of being a bar to this action against Davis, although from the manner in which the case is made up, such would seem to be the point presented by the appeal; for, on a perusal of the record, we find that the plaintiff in his replication, admits "the judgment against Shanklin has been satisfied, and relies on the fact that owing to the condition of things in South Carolina, the jury cut his debt down to one-half and raises the question that he has a right to recover the other half of the note and interest out of Davis, who is still in possession of the land for which the note was given." So the point decided by his Honor was not the mere legal effect of the judgment against Shanklin, but the legal effect of the judgment and its being satisfied in full, which he held was a bar to the action against Davis.

This is a new question and an interesting one, growing out of the complications of the war, and the fact that courts and juries in South Carolina did not allow the plaintiff to take judgment for more than one-half of his debt, although it was contracted before the war, 1859.

It is clear that if the creditor takes judgment against A for the (234) full amount of the note, and the judgment is satisfied that is a bar to an action against B; or if judgment be taken against B, and afterwards the judgment against A is satisfied, B may upon *andita querela* within the year, or on *sci. fa.* after the year, have benefit of the fact, of the satisfaction of the judgment against A.

This doctrine rests upon the idea that the debt is extinguished by the satisfaction of the judgment, and that rests upon the idea that the judgment covers the whole debt. Here we see from the record that the judgment does not cover the whole debt, but only such a part of it as the jury chose to allow, to wit: one-half of an ante war debt for land.

We think his Honor erred in not taking the distinction between the satisfaction of the judgment and the satisfaction of the debt. Here the judgment was satisfied; but the one-half of the debt excluded by the judgment was not satisfied, and as to that there was no bar to the plaintiff's right of action; for it is settled that payment of a less sum is not a satisfaction of a greater although accepted as such; except by anticipating the day of payment, or other circumstance.

Davis was no party to the action in South Carolina, and of course there is no estoppel as between him and the plaintiff, in regard to the amount of the debt. So we have the plain case of a debt paid in part by one obligor and unpaid as to the residue. The fact that as against Shanklin, the plaintiff is estopped by the verdict and judgment in regard to the true amount of the debt, cannot be taken advantage of by the defendant Davis; he was no party to that action, and estoppels are mutual.

The amount of the debt is fixed by the note—only a part of it has been paid by Shanklin, who has screened himself by satisfying the judgment in South Carolina, but how does that exempt (235) Davis from the duty of paying the balance?

His Honor fell into error by failing to distinguish between the effect of the judgment on the note and the satisfaction of that judgment, and the effect of the satisfaction of the note; if the note or debt be satisfied of course that is an end of it, but so long as any part of the debt remains unpaid, we can see "no hook or crook" by which the principal debtor can avoid payment.

This case is not at all like the cases of damage for torts. See Buller *Nisi Prius,* 20, where a judgment and satisfaction against one of several tort persons is held to bar an action against the others.

The cases referred to turned entirely upon the measure of damages, which being uncertain are considered as fixed by the verdict, if the plaintiff after judgment in an action against one, elects to accept the damages found in satisfaction of the injury; but here there was no question as to the amount of the debt, that was fixed by the note, and the only question is, can the payment of a less sum be a satisfaction of a larger sum due as a debt agreed on, there being no change as to time, place or other circumstance. This is settled.

His Honor erred by not noting the distinction between debts, which are certain and made so by the agreement of the parties, and a claim of damages for torts, the amount of which is uncertain and depends on the verdict; in the latter case, if the plaintiff accepts satisfaction of a judgment, that extinguishes his cause of action; in the former as the amount of the debt is fixed by the note, payment of a part cannot extinguish the entire debt.

Judgment reversed, and judgment for plaintiff on the verdict.

PER CURIAM. Reversed.

Cited: *Bank v. Lumber Co.*, 123 N. C., 27.

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(236)

JULIUS S. JOYNER v. THOMAS H. SPEED.

The assignee of a widow, entitled to 103 acres of land as dower, has a right to clear 10 acres of such dower land, where the clearing and the timber thereon is necessary for the proper cultivation of the remainder, and also necessary for the support of the widow and her children. The order restraining such clearing was properly vacated.

ACTION, for damages on account of alleged waste, and to restrain the defendant from clearing certain lands, heard by *Watts, J.*, at Chambers, in FRANKLIN, on 17 February, 1872.

Upon the hearing his Honor found the following facts: J. S. Joyner, the plaintiff, purchased at an administrator's sale in the year 1863 or '64, 103 acres of land, subject to the dower interest of Mrs. M. E. Allen; that about 50 acres of the land are cleared and have been in cultivation for a number of years, the other 53 acres have grown up mostly in old-field pines, and that a small portion of the 53 acres is in original growth, say from 10 to 20 acres. On 1 January, 1872, the tenant for life, Mrs. Allen, or her agent, rented the premises for the year 1872 to the defendant, Speed, with the express understanding and agreement in writing, that the defendant should have the privilege of clearing 10 acres of the old-field land and put the same in cultivation, and to carry away and

convert to his own use the wood from said 10 acres, the same being old-field pine, the growth of not more than 25 or 30 years on the said land; that the defendant bound himself in a bond or obligation to clear and cultivate the land in question; that he commenced to clear the land, cutting off the pine trees as per agreement, and designed to sell the wood for his own benefit. That he, the defendant, gave a much larger price for the rent of the land in consideration of the wood that would result from the clearing of the land, than the ordinary rent the land had hitherto brought or was likely to bring. That Mrs. Allen had some five or six children to support, and that the only visible, (237) available property with which to support herself and family, is the products realized from said dower interest in said land or the rents arising therefrom.

Upon the foregoing facts, as conclusions of law, his Honor, held, the defendant, Speed, occupies the same position during his lease as the tenant in dower, and is subject to the same liabilities and invested with the same rights. That the tenant for life is not liable for waste in cutting and clearing and selling the wood from 10 acres of land, as in this case, and under the circumstances disclosed by the facts before found to exist. Therefore it was adjudged by the Court, that the injunction restraining the defendant from clearing the said 10 acres, etc., heretofore granted, be dissolved and vacated, and that the cost of this proceeding be paid by the plaintiff.

From this judgment the plaintiff appealed.

Jones & Jones for appellant.
Davis and *Cooke, contra.*

BOYDEN, J. In this case it does not appear in the complaint what portion of the dower land is cleared, but for aught that is shown by the complaint the whole dower land may be grown up in old-field pines like the ten acres about to be cleared. But suppose the defects in the complaint are supplied by the answer, still we think his Honor was right in dissolving the injunction. By the answer it appears, that there were 103 acres of the dower lands, of which about 50 acres are cleared, and that of these 50 acres a portion thereof is worn out and has become unfit for cultivation and is now left to grow up in pine, like the 10 acres about to be cleared for cultivation. So that, using the answer to supply the manifest defects in the complaint, the case made by the pleadings, is this, to wit: The intestate, Conyers, at his death, owned in fee a tract of land of 303 acres, and out of which tract there was (238) assigned to his widow, as dower, 103 acres; that at a public sale for the payment of debts, the plaintiff purchased and now owns the whole tract, subject to the widow's right of dower in the 103 acres, part

of the said tract. That of the 103 assigned as dower, about one-half thereof was cleared, and of the balance some 20 acres are now in timber of the original growth and some 30 acres in old-field pine, and of the cleared land a portion thereof is worn out and is left to grow up in pine like the 10 acres about to be cleared. It also appearing that most of the timber about to be cut on the 10 acres will be required for repairing the fences around the cultivated land, and that the means of support of the widow and children require these 10 acres to be cleared and cultivated; that such clearing will enhance instead of diminishing the value of the estate. There is no statement in the complaint or answer as to the condition in regard to the timber of the 200 acres of the plaintiff not encumbered with the dower, and for aught that appears the larger portion thereof may be in timber.

Upon the above statement of the case, we are of opinion that the injunction heretofore granted was properly dissolved. The cases cited for defendant fully sustain the ruling of his Honor.

We are further of opinion that the complaint does not state a case that entitled the plaintiff to the original restraining order.

PER CURIAM. Affirmed.

(239)

KADER BIGGS & CO. v. W. W. BRICKELL.

A sale under execution, made at the courthouse, where by the general law, sales are required to be made, with the assent of the debtor in the execution, is valid, notwithstanding the requirements of a private local law directing such sales to be made on the premises; and the purchaser of land at a sale so made at the court-house acquires a good title.

ACTION for the recovery of certain land, and for damages, etc., tried before *Cloud, J.*, at January (Special) Term, 1873, of HALIFAX, upon the facts following and agreed to:

One William H. Ponton was seized of a freehold estate in the lands in controversy, and the defendant, W. W. Brickell, at public sale made by the sheriff by virtue of a certain execution, at the court house in Halifax, on 27 January, 1868, purchased the right, title and interest of said Ponton, with his assent, in and to said land and premises, and received the sheriff's deed therefor. The judgments upon which the said executions were issued were obtained by the defendant, Brickell, and one Parsons, against the said Ponton, at the Spring and Fall Terms, 1867, of Halifax; *fi. fas.* were regularly issued, and on 20 December, 1867, levied on the lands in dispute, then the property of said Ponton.

On the 30 March, 1868, the plaintiffs, at public sale under executions issued from the United States Circuit Court against said Ponton

and one Day, and in favor of themselves, made by the United States Marshal at the court house in Halifax, purchased the "right, title and interest, claims and demands" of said William H. Ponton in and to said premises, at the sum of $124, and obtained a deed from the Marshal, 5 June, 1868. This judgment in the United States Circuit Court was rendered at Fall (November) Term, 1867, and execution (240) regularly issued thereon and was levied upon the land in dispute.

On 29 January, 1829, a private act was passed by the General Assembly, to go into effect 1st March following, entitled "An Act directing the time and place of selling land under execution in the counties of Halifax, Northampton, Hertford and Martin," which provided, "that all sales of land hereafter made in the counties of Halifax," etc., "by any Sheriff, Coroner, Constable, or by any Clerk and Master in Equity, under any execution or decree, shall be made *on the premises,*" etc. This act remained in force until repealed by an act entitled, "An Act directing the time and place for selling land in the counties of Halifax," etc., passed by the General Assembly, at special session in 1868, to wit: on 29 July, 1868, to go into effect on 1 September following, which act repealed the act of 1829, and provided, "that all sales *bona fide* made in any of the counties aforesaid according to the Rev. Code, chap. 45, sec. 14, are hereby confirmed and declared to be valid."

The deeds alluded to have both been recorded.

The yearly rental of the premises is $75, and the defendant has been in possession since 30 March, 1868.

His Honor, after argument, holding with the plaintiffs, adjudged that they recover the said land of the defendant, and also the sum of $100 damages for its detention, and for costs.

From this judgment the defendant appealed.

Conigland and *Moore & Gatling* for appellant.
Clark & Mullen, contra.

BOYDEN, J. We have carefully examined all the authorities cited by the learned counsel for the plaintiff, and we think that the points actually decided in those cases fail to establish the position attempted to be maintained for the plaintiff. (241)

It is true that the learned Judges who delivered opinions in these cases, in some of them express the opinion that a sale made in a wrong place would vitiate the sale; but in every case cited, the sale was held valid, notwithstanding the irregularities, and of course the opinions relied on were *obiter dicta,* and not upon the points actually decided in these cases; and even in their *obiter dicta* there is not a single expression of opinion, that a sale made under the circum-

stances of this case would be invalid; while the decisions actually made would seem to establish the validity of the sale in the principal case. For whose benefit was a sale permitted or directed to be made upon the premises? Evidently for the benefit of defendant in execution. Who, then, could have objected to the place of sale save the defendants in the executions? And in our case the debtor not only received this benefit, but actually assented to the sale before and at the time it was made.

Let it be granted, for the sake of the argument, that without the assent of the debtor, previously obtained, the sale would have been void, and no title would have been acquired by the purchaser at such a sale; still we hold it clear, that a sale made at the court-house by the Sheriff, where the general law required sales to be made, the debtor might waive the benefit of the private local law directing such sales to be made upon the premises, and assent to the sale, as was done in this case, which would not only bind the debtor, but the purchaser would acquire the title of the defendant in the execution. In our case, the plaintiffs had their executions in the hands of the Marshal at the time of the sale by the Sheriff, and had he been vigilant he might have made the first sale, and his sale would then have been valid, and would have passed the title of the debtor to the purchaser, notwithstanding the judgments and executions under which the defendant pur-
(242) chased were anterior in point of time, and had been first levied upon the land in dispute. This has been repeatedly decided in this Court. How is it supposed that any creditor would be injured by a sale at the court-house door? Can anyone maintain that the debtor who assented to this sale could have successfully defended an action of ejectment brought against him by the defendant? We think *Lentz v. Chambers,* 27 N. C., 587, and *Mason v. Williams,* 66 N. C., 564, and the cases therein cited, are decisive of the question.

It has been repeatedly decided that a Sheriff, or Marshal, can only sell such interest in land under execution as the debtor could sell; and here there was nothing in the debtor to sell, as all his interest in the land had passed to the defendant by the Sheriff's sale. This makes it unnecessary to notice the other questions in the cause, and particularly the interesting question as to the effect of the act passed to cure such irregularities.

The Court is of opinion, that his Honor was in error in rendering judgment upon the case agreed for the plaintiff.

The judgment below is reversed, and judgment here for the defendant.

PER CURIAM. Reversed.

Dist.: Mayers v. Carter, 87 N. C., 148.

(243)

HENRY J. HERVEY & CO. v. B. C. and J. S. EDMUNDS, Adm'rs, etc.

1. Judgments, void or irregular by reason of some informality, will be set aside, only at the instance of a party to the action who is prejudiced by it.
2. Judgments, void for want of jurisdiction in the Court, if such appears on the record, may be collaterally impeached in any Court in which the question arises. Such judgments may be avoided and stricken from the record by the Court, *ex mero motu*, or at the instance of any person interested in having it done.
3. A judge of the Superior Court has a right, with consent of parties, to sign a judgment in vacation out of Court, and to order the same to be entered of record at the ensuing term.
4. Sections 315 and 325 of the Code of Civil Procedure, are still in force, notwithstanding the Act of 1868-'69, chap. 76, suspending the Code in certain cases.

MOTION to vacate and set aside a judgment obtained in the cause at May Term, 1869, heard and determined by *Cloud, J.*, at the January (Special) Term, 1873, of HALIFAX.

The facts are stated in the opinion of the Court.

His Honor allowed the motion and set aside the judgment. From this judgment, the plaintiffs appealed.

Conigland and *Moore & Gatling* for appellants.
Clark & Mullen, and *Batchelor, Edwards & Batchelor, contra.*

RODMAN, J. The plaintiffs issued a summons against the two defendants, as administrators of A. T. Edmunds, returnable to May Term, 1869, of Halifax, which was executed on one of the administrators only. At that term the plaintiffs filed a complaint demanding payment of a certain debt alleged to be owing to them from the intestate.

On the records of that Court appears an entry, that defendants appeared and answered, admitted the bonds declared on, and said they had fully administered, with the exception of $350. The plaintiffs admitted this plea, took a judgment ascertaining the amount (244) of the debt which considerably exceeded the assets confessed, and a judgment of execution upon the assets confessed, and a judgment *quando* for the residue of the debt.

It was found that this judgment was not in fact given during May Term, 1869, or during any other term of the Court, but that the entry thereof was drawn up in writing by consent of the parties to the action, and signed by the Judge of the District, during vacation, viz: about July 1, 1869.

At a Special term of Halifax, held before *Cloud, J.*, in January, 1873, Marble and wife claiming to be creditors of the intestate, Ed-

munds, moved to vacate or strike out from the record said judgment, because of its having been rendered in vacation. The presiding Judge granted the motion and plaintiffs appealed.

The parties, Marble, contend that the judgment was void, because the Judge had no jurisdiction to render such a judgment, except in term time. They further contend that the record ought to be amended by striking out the entry of judgment, which is false, as it professes to have been rendered in Court, when it was really rendered afterwards.

As to the second point of contention, it may be conceded that the record should be amended so as to state, according to the fact, that the judgment was rendered out of term. But this would still leave open the question as to the validity and effect of the judgment, and would not benefit the movers. We will consider this amendment made, and proceed to consider the validity of the judgment as amended, that is, the jurisdiction of the Judge in vacation.

1. In the first place:

The plaintiffs object to the allowance of the motion, because the parties making it, not being parties to the original action, have no (245) right to interpose.

Irregular and void judgments may be classed under the following heads:

(1) Irregular, by reason of some informality.
(2) Void, for want of jurisdiction in the Court.
(3) Void, as having been obtained by fraud.

Judgments in the first class, it is conceded, will be set aside only at the instance of a party to the action who is prejudiced by it. The third class of judgments obtained by fraud need not be considered, for no fraud is alleged in this case. The debt upon which the plaintiff's judgment is founded is admitted to be *bona fide*.

The second class alone remains to be considered. A judgment is void if given by one who has no colorable right to act; it may, nevertheless, get in some way on the records of the Court. So a judgment may be void because the subject-matter is not within the jurisdiction of the Court; as for example, if a Superior Court Judge should grant original probate of a will.

In these cases if the want of a jurisdiction appears on the record, its validity may be collaterally impeached in any court in which the question arises. And so we conceive (if it be conceded that the Judge had no power to give the judgment in question in vacation), this judgment might be likewise collaterally impeached and avoided, the want of jurisdiction appearing on its face, as by the amended record it would.

This being so, there can be no reason why such a judgment may not be *directly* impeached and avoided and stricken from the records, either by the Court *ex mero motu,* or at the instance of any person not interested in having it done. This was decided in *Winslow v. Anderson,* 20 N. C., 9, and we take it to be reasonable.

So we think the motion of Marble and wife must be heard and decided on its merits.

2. The second question is much more important.

Had the Judge jurisdiction out of term time? Before the (246) C. C. P. he certainly did not. But it is contended for the plaintiffs that he now has under either of sections 315 and 325, C. C. P. It may be admitted that under whichever of these sections the proceeding was taken, it was irregular. If under 315, for want of an affidavit that the controversy was real. If under 325, for want of the oath of the defendant. But this admission (which is only for the argument), would not help the plaintiffs in the motion. If the proceeding be within the jurisdiction of the Judge, it must stand as to him. We think that it may be supported under section 315, provided that section be still in force. The plaintiff in the motion contends that it was suspended by the Laws 1868-'69, ch. 76, p. 179, to suspend the C. C. P. in certain cases. *McAdoo v. Benbow,* 63 N. C., 461, decides this act to be constitutional, and no member of the Court has any disposition to throw a doubt on that decision. Then, does that act reach the case? Its only material enactments so far as this case is concerned, are, that all summons shall be returnable to a regular term of a Superior Court; that the pleadings shall be made up during term time; and that the issues shall stand for trial at the next succeeding term.

All these provisions refer only to adversary suits.

There is not one of them that may not be, and is not habitually waived by the parties. A defendant may, if he chooses, waive the summons altogether, and effectually make himself a party by appearing and pleading. The pleadings may, by consent, be made up out of term and entered of record in term. The issues may be tried by consent, or judgment confessed, at the first time.

The proceedings under section 315 are altogether by consent, and we see nothing in the act of 1868-'69, that applies to them. The policy of the act extended only to adversary actions. It can not affect the validity or even the regularity of the proceedings before the (247) Judge, that a summons had been served and a complaint filed. There can be no reason why even after issues joined, the parties may not agree upon a state of facts, and submit it to the Judge for his decision.

We think the two sections of The Code referred to are still in force,

and that the Judge had jurisdiction in this case under section 315. We think, however, that the record ought to be amended so as to set forth truly the date of the judgment. To any greater extent the motion is refused.

PER CURIAM. Judgment accordingly.

Cited: Sharpe v. Williams, 76 N. C., 90; *Harrell v. Peebles,* 79 N. C., 32; *Grant v. Newsom,* 81 N. C., 38; *S. v. Alphin, Id.,* 567; *Molyneux v. Huey, Ib.,* 112; *Badger v. Daniel,* 82 N. C., 469; *Stradley v. King,* 84 N. C., 639; *Dobson v. Simonton,* 86 N. C., 497; *Wilmington v. Atkinson,* 88 N. C., 55; *Spillman v. Williams,* 91 N. C., 487; *Shackelford v. Miller, Ib.,* 186; *Hinton v. Roach,* 95 N. C., 111; *Bynum v. Powe,* 97 N. C., 378, 382; *Knott v. Taylor,* 99 N. C., 515; *Brooks v. Stephens,* 100 N. C., 299; *Walton v. McKesson,* 101 N. C., 442; *Fertilizer Co. v. Taylor,* 112 N. C., 145; *Bank v. Gilmer,* 118 N. C., 670.

STATE v. GEORGE GRAHAM.

The refusal of a Judge on a trial for murder, to instruct the jury that they ought not to convict on a simple confession, for the reason that if they believed the confession to be true it was their duty to convict is not error; especially so when there is much corroborating testimony, and the proposition was a mere abstraction.

INDICTMENT FOR MURDER, tried before *Mitchell, J.,* at Fall Term, 1872, of WILKES.

The defendant, with one Baldy Gaither, was indicted at the Fall Term, 1872, of IREDELL, for the murder of one Margaret Seamon. They severed in their trials, and on proper affidavits the cases of both were removed to Wilkes County.

Upon the trial of the defendant, who was first tried, the following facts appeared in the evidence offered by the State:

The deceased and her mother lived on or near to a public road leading from Statesville, by one Dr. Angel's, their house being about three-
quarters of a mile south of the doctor's. The homicide was
(248) committed on the margin of this road, one-quarter of a mile
south of the house of the mother, on the night of 2 April, 1872, by two or more cuts on the neck of the deceased with a knife—her head being nearly severed from the body. Her clothes, when the body was found, were raised to her abdomen. The deceased had a bad general character for lewdness, and at the time of her death was pregnant of a white child, and in the seventh month of her gestation. There was evidence, that in passing, the prisoner associated with the deceased and her mother on terms of social equality, but no evidence of any

criminal cohabitation. The prisoner lived with Dr. Angel, as a common servant, and is a colored boy of some 22 or 23 years of age.

On the afternoon of 2 April (the night of the homicide), the prisoner was ploughing near the house of his employer, and at the same time one Caswell Dalton, another colored boy, was at work on an adjoining farm, within call of the prisoner. The prisoner called Dalton and told him, that he would come to his, Dalton's, house that night. Dalton lived with his brother Anderson. About half-past 8 o'clock on the same evening, the prisoner, dressed in his best clothes, started from Dr. Angel's to go to Anderson Dalton's, and reached there about half-past 10 o'clock. He called Caswell, who met him a short distance from the house, where some casual conversation occurred; they then went near the steps of the house and sat down. In the conversation then had, the prisoner, in a whispered communication, informed Caswell, that he had that night killed Margaret Seamon. The witness, Caswell, expressed his surprise and protested that he, the prisoner, could not have the heart to do such a thing. The conversation was heard in part by a colored female visitor, but to her the import was unintelligible as an entire communication. The prisoner remained at Dalton's until the next mornng. The distance from the house (249) of Dr. Angel to the house of Anderson Dalton, and from the latter to the place of the murder, is about the same, each being about three-quarters of a mile. The distance from Dr. Angel's to the place of the murder is one mile. The places named form a triangle, with a distance of one mile on the road from the house.

It was also in evidence that the body of the deceased was first discovered about 9 o'clock the next day, 3 April. An inquest was held by the coroner, and witnesses were examined, but no material revelations were made in their testimony. However, several persons were on the alert, and in consequence of their vigilance, some three or four weeks after the inquest, the prisoner was arrested on suspicion and had an examination before a Justice's Court. The Justices after examining all the evidence, committed the prisoner for trial. After his commitment, the prisoner being in custody, with his arms so confined that he could not conveniently use them to feed himself, a colored girl who also lived at Dr. Angel's brought him his breakfast, and waited on him while he was eating. During that time she remarked: "If he had listened to her advice and not gone to that house that night, you would not be in this fix. This will kill your mother. You will be carried off and I shall never see you again." His reply was: "It is too late now, it can't be helped." Another witness heard the conversation, but the words: "Why did the damned bitch tell that lie," were added, in his testimony. The defendant excepted to this evidence, for the

reason that the prisoner was in custody, and his arms tied. It was received by the Court.

There was further evidence tending to prove, that on the Saturday night before the murder the prisoner had theatened to kill the deceased, to prevent her from swearing her child. Similar threats had been made by him against those who charged him with the
(250) murder.

The Court refused to instruct the jury, asked by the prisoner's counsel, that they ought not to convict on a simple confession; for the reason, that if they believed in the truth of the confession, it was their duty to convict; and because in this case, there was much corroborating testimony, and the proposition was a mere abstraction.

The jury found the prisoner guilty. Motion for a new trial; motion overruled. Judgment, and sentence, from which the prisoner appealed.

Furches for the prisoner.
Attorney-General for the State.

SETTLE, J. We have examined the record with the care which the importance of the case demands, and find no error which entitles the prisoner to a *venire de novo*.

The chief ground assigned for error in this Court is found in the response of his Honor to a prayer for instructions; in which he states, that he refused to instruct the jury that they ought not to convict on a simple confession, for the reason that if they believed in the truth of the confession, it was their duty to convict; and secondly, because in this case there was much corroborating testimony, and the proposition was a mere abstraction.

(251) We think his Honor was correct in refusing to charge a proposition, which, to use his own language, was a mere abstraction. It was his duty not only to refuse the prayer of the prisoner, but also to call the attention of the jury to the fact that there were circumstances which the State relied upon, as corroborating the theory of the prisoner's guilt.

We do not think that the charge, fairly construed, intimates any opinion as to the weight which the jury should give to the corroborating testimony.

PER CURIAM. No Error.

Cited: *S. v. Hardee,* 83 N. C., 622.

ANGELO GARIBALDI v. C. W. HOLLOWELL and EDWARD WOOD, Ex'rs of Jas. C. Johnston, dec'd.

A died in 1866, in the county of Chowan, leaving estates in other counties which he gave to different persons, and which he charged with the payment of his debt in the counties respectively, wherein such estates were situate and the creditors resided. B living at the time of A's death in Halifax County, claimed a debt against A's estate arising under a special contract made in the county of Chowan in 1862, for services rendered at various times and places, including services rendered in Halifax: *Held*, that B's debt when established, would be a charge against the estate of A left in Halifax County.

ACTION, tried at the January (Special) Term, 1873, of HALIFAX, before *Cloud, J.*

The case stated for and sent to this Court, is:

"The plaintiff claimed for services rendered by him upon the testator Johnston's "Caledonia" plantation in Halifax County, during 1862-'63-'64-'65, upon a special contract made with him in Chowan in 1861. Then, and before that time, the plaintiff had resided in Washington County, but from January, 1862, and up to the trial of (252) the cause, resided in Halifax County.

The plaintiff put in evidence the last will and testament of the testator, Jas. C. Johnston, who resided in Chowan County, which is reported in 61 N. C., 251, to which reference is made.

It was in evidence that Futrell, one of the devisees and executors, died intestate in Halifax, in the year 1867, and that administration upon his estate was granted to the plaintiff, and that he has in his hands, of the estate of the testator, Johnston, devised to Futrell, in money a large amount, to-wit: much more than the sum demanded by plaintiff in this action. That all of the debts of testator, Johnston, have been paid off, except the demand of the plaintiff, and a settlement of the estate made between the other executors, Hollowell and Wood, and this plaintiff, as administrator of Futrell. That Edward Wood died in Chowan in November, 1872, leaving a last will and testament, of which he appointed the defendants, W. C. Wood and Caroline M. Wood, the executors.

After closing the evidence and before submitting the case to the jury, a preliminary question was submitted to the Court, to-wit: Whether under the will of James C. Johnston, and in carrying into effect its provisions, the claim of the plaintiff, if established, would fall upon that portion of the testator's estate given to the devisee and legatee, Henry J. Futrell, in the adjustment between the plaintiff and the other executors, devisees and legatees, or upon other parts of the estate, the plaintiff agreeing that he had in his hands ample funds to

satisfy his demand, if it constituted a charge upon the testator's estate lying in the counties of Halifax and Northampton?

His Honor held that the plaintiff's claim would, as between him as administrator, and the other executors, devisees and legatees,
(253) be a charge upon the estate given to and bequeathed to Futrell, whereupon he, the plaintiff, submitted to a *nonsuit* and appealed.

Conigland and *Moore & Gatling* for appellant.
W. N. H. Smith, contra.

READE, J. The testator, Johnston, had an estate in Chowan County, where he lived and died, which he gave to one Edward Wood, charged with his "debts in the county of Chowan, and his funeral expenses." And he also had an estate in Pasquotank County, which he gave to C. W. Hollowell, charging it with his debts owing in that county. And he also owned estates in Halifax and Northampton counties, which he gave to H. J. Futrell, charged with "any debts I may owe in said counties." And each of the persons named, was made executor of the particular estate bequeathed and devised to him, charged as aforesaid.

The plaintiff lived in Halifax County at the time of testator's death, and has lived there ever since. If the testator, Johnston, owed him anything, it was a "debt which he owed in the county of Halifax," and was a charge upon the estate in Halifax, to be administered by Futrell, of whose estate plaintiff is now administrator. There will be judgment in this Court for the defendant for costs.

PER CURIAM. Affirmed.

(254)

THE BOARD OF COMMISSIONERS OF JACKSON COUNTY v. WM. ADDINGTON and others.

An appeal by a plaintiff, from a judgment rendered against him in a Justice's Court, for $6.60, costs in a suit against the defendant on an account for over $80.00, should be entered by the Clerk on the trial, or civil issue docket, of the Superior Court, to be tried *de novo*. Such appeal can not be heard by the Judge at Chambers.

APPEAL from *Cannon, J.*, at Chambers, in Macon County, 10 July, 1872.

The plaintiffs sued the defendants, who were mail contractors, on an account for tolls due Jackson County, in a Justice's Court of Macon County. The account was for $82.30. The Justice gave a judgment in favor of defendants and against the plaintiffs, for $6.60 costs, and the plaintiffs appealed.

The transcript of the Justice's record being sent to his Honor, he adjudged that the judgment being for a less sum than twenty-five dollars, the case was properly before him at Chambers. And a motion by the plaintiffs that the case be remanded to the Clerk of the Superior Court of Macon County, with directions that it be placed on the Civil Issue Docket, on the ground that the Court had no jurisdiction of the matter, unless in term time, the amount in controversy being over twenty-five dollars, was overruled. From which judgment, the plaintiffs appealed.

Other points, unnecessary to state, were made before his Honor, the case being decided in this Court upon the question of jurisdiction.

Dupre and *Jones & Jones* for appellants.
A. S. Merrimon, contra.

BOYDEN, J. His Honor was mistaken in supposing that this (255) was a case for his decision at Chambers. The case should have been placed on the trial, or issue docket, to be tried *de novo,* as has been repeatedly decided in this Court.

It is when the sum recovered against the defendant is less than $25.00, or when the plaintiff's demand does not exceed that sum, that his Honor is to decide the case at Chambers; but when the plaintiff's claim is for more than twenty-five dollars, as in this case it is for more than eighty dollars, and he recovered nothing, or less than twenty-five dollars, but a judgment is rendered against the plaintiff, the appeal is to be placed upon the trial, or issue docket, to be tried anew in the Superior Court upon the facts, as was decided in *Cowles v. Hayes,* 67 N. C., 128, and *Wells v. Sluder,* 156, *ante.*

This disposes of the case in this Court, and renders it unnecessary to notice the other points made in the case.

PER CURIAM. Reversed.

ABRAM MARTIN v. WM. Z. RICHARDSON and WALKER SMITH.

1. When a negotiable instrument has been transferred, it becomes affected in the hands of the holder, by any equity the obligor may have against such holder and no subsequent transfer will defeat that equity.
2. Therefore, where A is indebted by bond to B, who transfers it without endorsement to C, and at the time of such transfer, C owes A a bond; after holding it sometime, C returns A's bond to B. In an action by B against A upon the bond. due B: *Held,* that it was subject to the set off of C's bond to A, though B may have had no notice of the indebtedness of C to A.

APPEAL from *Tourgee, J.,* at Fall Term, 1872, of ROCKING- (256) HAM.

The following facts are agreed: On 30 July, 1855, the defendants executed their bond to the plaintiff for the sum of $950, which bond the plaintiff held until 1862. Sometime in that year one James L. Cardwell, with the view of purchasing a lot of tobacco from the defendant, Richardson, and which he would only sell for specie, went to the plaintiff and purchased the bond, the subject of this action, and gave therefor his own bond for the same amount, and thereupon the bond now in suit was passed to the said Cardwell without endorsement. The defendant, Richardson, declined to sell his tobacco for the bond, but insisted that as he held a bond on said Cardwell for the sum of $954, given 3 Jan., 1861, and due one day after date, that one note should be applied to the payment of the other, and the balance upon a settlement, if any, he would pay over to Cardwell; and Richardson alleged that Cardwell had several times promised to make the application. Cardwell never came to a settlement. He kept the bond of the defendants until sometime in the year 1866, when he returned it to the plaintiff, still as now unendorsed, and took up his own bond.

The following facts were found by the jury, on issues submitted to them: 1st. That Cardwell while in possession of defendants' bond, agreed with the defendant, Richardson, that one bond should be applied to the payment of the other, as far as it would go. 2d. That at the time Cardwell returned the bond to the plaintiff, to-wit: in 1866, he, Cardwell, was solvent, had been so from 1861, and continued so until the latter part of 1868. He is now a bankrupt and insolvent.

Upon the facts agreed, and as found by the jury, his Honor decided that the bond in the hands of Richardson was an offset to the bond sued on by the plaintiff. A judgment in favor of the plaintiff
(257) for the sum of $.., the remainder due after allowing said offset. From which judgment the plaintiff appealed.

Scales & Scales for appellant.
Dillard, Gilmer & Smith, contra.

SETTLE, J. The principle governing this case is decided in *Harris v. Parham*, 65 N. C., 584. But it was said upon the argument, that as the plaintiff had assigned the bond on the defendant to Cardwell, without endorsement, in 1862, and received it again from Cardwell in 1866, still without endorsement, he had never parted with the legal title, and that therefore the bond from Cardwell to the defendant constituted no set-off to the bond sued on, notwithstanding the agreement to that effect between Cardwell and the defendant.

This position is answered by the decision above cited. It declares that the Code of Civil Procedure, sec. 55, abrogates the principle of the common law, that a chose in action can not be assigned, confers

an unlimited right to assign "anything in action" arising out of contract, and subjects the assignee to any set-off *or other defense* existing at the time of, or before, notice of the assignment. The only saving being in regard to negotiable promissory notes and bills of exchange transferred in good faith and upon good consideration before due.

The Chief Justice, in delivering the opinion of the Court, predicts that this will put an effectual check to the trading of notes after maturity. Let that be as it may, we must apply the principle here enunciated to the facts in our case.

It appears that for several years Cardwell and the defendant each held a bond on the other for about equal amounts. Cardwell, it is true, purchased the bond he held on the defendant from the plaintiff, but that does not affect the question. The jury find "that Cardwell, while in the possession of the defendant's bond, agreed with (258) him that one bond should be applied to the payment of the other as far as it would go."

The defendant then was lulled to sleep by the promise of Cardwell, and he continued to sleep for a long time, and only awoke to find that Cardwell had become a bankrupt, after re-assigning his bond to the plaintiff. But, it was said, that this would work a great hardship on the plaintiff. That may be true, but he had put it in the power of Cardwell to work a hardship on the defendant; and the singular fact that Cardwell proposed to re-assign the bond after such a lapse of time and such changes in the condition of the country, should have aroused the plaintiff and caused him to inquire into the true state of the facts.

Whether he did so or not, is immaterial so far as the defendant is concerned; for while the bond was the property of Cardwell, it became affected by an equity which cannot be defeated by want of notice to the plaintiff.

McConnaughey v. Chambers, 64 N. C., 284, and *Riddick v. Moore,* 65 N. C., 382, both admit the principle, that where there has been an agreement between the parties, that one debt should be set off against the other, it is not in the power of one party to assign the evidence of indebtedness, and thereby defeat the agreement.

PER CURIAM. Affirmed.

Cited: Burroughs v. Bank, 70 N. C., 285; *Adrian v. McCaskill,* 103 N. C., 186; *Horne v. Bank,* 108 N. C., 120.

(259)

STATE v. LEONARD PEPPER.

1. To make profane swearing a nuisance, the profanity charged must be uttered in the hearing of divers persons; and it must be charged in the bill of indictment, and proved to have been so uttered. The general allegation *ad commune nocumentum* is insufficient.
2. Hence, where the indictment is alleged that the defendant "in the public streets of the town of L., with force and arms, and to the great displeasure of Almighty God, and the common nuisance of all good citizens of the State then and there assembled did, for a long time, to-wit: for the space of twelve seconds, profanely curse and swear, and take the name of Almighty God in vain, to the common nuisance, etc.; *Held*, that no criminal offense was therein charged.

APPEAL from *Russell, J.*, at Fall Term, 1872, of ROBESON.

The defendant was indicted for a common nuisance. The allegation in the bill of indictment charging the offense is set out in the opinion of this Court.

On the trial below his Honor charged the jury, that if the defendant went into the streets in the night, and by loud talking and by profane and objectionable language, disturbed and annoyed the citizens generally, that he was guilty; that the question was not whether he disturbed particular persons, but whether his conduct annoyed and disturbed the neighborhood. That the offence was sufficiently set forth, inasmuch as the bill of indictment charged it to have been in the streets of a town, and in the presence or hearing of the inhabitants, and to their nuisance.

The defendant was found guilty. Judgment and appeal.

No counsel for defendant in this Court.

Attorney-General Hargrove, for the State.

RODMAN, J. The Attorney-General moved to dismiss the defendants' appeal, because he had neither given an appeal bond or made the affidavit of inability and filed an opinion of counsel in lieu of (260) it, as provided by Law 1869-'70, chap. 196. He afterwards, however, argued the case on its merits, thereby waiving his motion to dismiss the appeal. He had a right to do this, and we have no disposition, perhaps no right, to revise his discretion. But we may say generally, that inasmuch as it never can be to the interest of the State for one of its citizens to suffer punishment, unless he has been legally charged with and found guilty of some crime, a public prosecutor acts within the spirit of the law, if he forbears to insist on a strict compliance with its terms, when he has reason to believe that a question of reasonable doubt is presented by the record; that the failure to comply was the result of ignorance or accident, and that his forbearance is not likely to prejudice the just claims of the State.

The only question which it is necessary to consider, arises on the face of the indictment. Does it charge any criminal offense?

It charges that the defendant "in the public streets of the town of Lumberton, with force and arms, and to the great displeasure of Almighty God, and the common nuisance of all the good citizens of the State, then and there being assembled, did, for a long time, to-wit: for the space of twelve seconds, profanely curse and swear and take the name of Almighty God in vain, to the common nuisance as aforesaid," etc.

We think no indictable offence is charged, and that the indictment is defective in several respects.

1. In the learned and instructive opinion of the Court in *S. v. Jones,* 31 N. C., 38, delivered by NASH, J., it is said that a single act of profane swearing is not indictable. The acts must be so repeated in public as to have become an annoyance and inconvenience to the public. The fact must be so, and it must be so charged. That is not charged in the bill before us. The question is too clear, both (261) upon reason and authority, to require more to be said.

To make profane swearing a nuisance, the profanity must be uttered in the hearing of divers persons, and it must be charged in the bill to have been so uttered. This principle is fully established by *S. v. Jones, supra,* and the cases there cited, especially *S. v. Waller,* 7 N. C., 229, which was an indictment for drunkenness.

In this case the averment that the profanity was "to the common nuisance of all the good citizens of the State then and there being assembled," is equivocal. Taken literally it would mean that all the citizens of the State were assembled in Lumberton on this occasion; which would be absurd. If it be understood as alleging that the profanity was to the nuisance of all *such* citizens of the State, *as* were then and there assembled, it is not a direct and positive averment that any citizens were so assembled. The averment might be true, although there were no persons assembled. It is not the same as saying "in the presence of divers persons being then and there assembled"; for that contains a direct averment of the presence of divers persons.

We were referred to *S. v. Roper,* 18 N. C., 208, as an authority that it was not necessary to charge the act to have been done in the presence of any person; it being charged to have been done in a public place.

In that case the indictment charged the defendant with an indecent exposure of his person on a public highway, but omitted to allege that it was in the presence of divers persons or of any person.

GASTON, J., delivering the opinion of the Court, says, that such allegation was unnecessary, it was sufficient if it was probable from the

circumstances, that the exposure could have been seen by the public, and the indictment was sustained. The authority upon which (262) that decision professes to be founded, is *The King v. Cruden,* 2 Camp., 89. But we conceive that case does not sustain *the form of indictment* adopted in *S. v. Roper.*

The form of the indictment in *King v. Cruden,* is given in 2 Chit. Cr. Law 41, from which it appears that it was charged in both Courts that the defendant exposed himself naked in a public place, and "in the presence of divers of the King's subjects." The evidence was that the defendant bathed in the sea at Brighton, near to and in front of a row of inhabited houses. Although there was no direct evidence that any occupant of the houses or others had seen him, yet clearly there was evidence from which the jury might have inferred that they did. The most that can be gathered from that case is, that if one person (the witness), saw the indecent exposure, and others were actually present and might have seen it, though there is no proof that they did, "yet the law recognizes the probable risk of their seeing it, as sufficiently proximate to be dealt with as a reality." Note 7 to *Regina v. Webb,* 1 Dew. Cr. C., 338.

In the case last cited, the indictment charged that the defendant exposed his person "in a public place in a certain victualling ale house in the presence of one M. A., the wife of E. C., *and of divers others,*" etc. The evidence was that the defendant exposed his person to the view of M. A., she alone being present. The Court doubted about the sufficiency of the indictment, upon grounds not pertinent to the present point, and held, that if the words "of divers others," had been omitted, it would have been bad, and as this allegation was not proved, there was no evidence to support this conviction. See also *Rex v. Watson,* 2 Cox Cr. Cas., 376.

These cases establish, that when the nuisance charged is an offense to the sense of sight, it must be charged and proved that it was exposed to the view of divers persons.

3. And it follows that when the nuisance charged is an offence to the sense of hearing, it must be charged and proved that the (263) profane swearing, which constitutes the offense, was *heard* by divers persons. The general allegation *"ad commune nocumentum,"* is not sufficient.

In *Rex v. Loyd,* 4 Esp., 200, it was held that the noise made by a tinner in the course of his work, was not an indictable nuisance, because it annoyed only the occupants of three chambers in Lincoln's Inn.

In *Regina v. Webb,* PATTERSON, J., said that the usual and proper form of an indictment for an indecent exposure, was, to charge not

only that it was committed in the presence of divers persons, but also that it was "to their view."

In 2 Bish. Cr. Prac., 97, is given the form of an indictment for blasphemy and profanity, in which the words are charged to have been uttered "in the presence and *hearing* of divers," etc.

In this case it is not charged that the profane words were uttered in the *hearing* of anyone. Mere presence in the town of Lumberton, or in the public street would not (fortunately perhaps for the citizens), imply a hearing of all that was spoken there.

4. In *S. v. Jones,* 31 N. C., 38, it seems to be held necessary to set out the profane words in order that the Court may decide as to their quality; and in the precedent in Bishop, the words are set out. This would seem to be in accordance with principle.

The judgment is arrested, and this opinion will be certified to the Superior Court of Robeson, in order that the defendant may be acquitted and discharged.

PER CURIAM. Judgment arrested.

Cited: S. v .Powell, 70 N. C., 69; *S. v. Barham,* 79 N. C., 648; *S. v. Brewington,* 84 N. C., 785; *S. v. Chrisp,* 85 N. C., 531; *S. v. Faulk,* 154 N. C., 640.

(264)

STATE *ex rel.* ELIZABETH CLAPP v. W. D. REYNOLDS, Admr. *cum test. annexo* of J. A. Mebane and another.

1. In an action, assigning certain breaches of the official bond of a Clerk and Master, it is competent for the defendant, under a general denial of the complaint, to offer in evidence any circumstance tending to prove that the acts complained of were not a breach of the bond as alleged.
2. Where the allegation was, that the Clerk and Master did not invest a certain fund, and pay the relator the annual interest, evidence that the fund was deposited in a savings bank in the presence, and to the credit of the relator, who afterwards received the annual interest from the bank, is admissible, under a general denial of the complaint, to prove that the condition of the bond was not broken.

APPEAL from *Tourgee, J.,* at Fall Term, 1871, of GUILFORD.

The action is brought on the official bond of J. A. Mebane, former Clerk and Master of Guilford County, against his administrator with the will annexed, and against the administrator, etc., of one of his sureties.

It is alleged in the complaint, that, in a suit brought by the present relator, as plaintiff, against Henry Clapp and others, in the Court of Equity of Guilford County, certain sums of money, amounting to

$460.50, by a decree of said Court in the cause, was ordered to be paid into the office of the Clerk and Master, to be by him lent out on bond and good security, and the interest annually collected and paid over to the plaintiff, the present relator. The money was paid into the office as decreed. In the decree, it was further ordered, that so soon as the estate of the father of the plaintiff, the relator here, who was a married woman, then suing for alimony, was settled up, by the deceased father's administrators, they should pay into the office of the said Clerk and Master the distributive share of the estate coming to the plaintiff and her husband, which was also to be loaned, and the interest annually paid as above provided. Two receipts of the Clerk and Master, the testator of the defendant, were read, showing
(265) that he had received the money as provided in the decree.

The relator alleged the following breaches of the bond of the Clerk and Master:

1st. That the Clerk and Master did not loan out the money upon bond and good security, as directed in the decree.

2d. That he did not pay over the interest arising from the fund to the relator, as he was bound to do under the decree.

3d. That he did not safely keep said fund and preserve it for the use of the relator and her children, but converted the same to his own use, and spent and squandered it in his own business. (This allegation, the case states, was stricken out on the trial), and

4th. That he has failed to pay over the same to the relator on demand.

The defendants, in their answer, denied the allegations contained in the complaint, in general terms, and upon this issue thus presented the trial was had.

On the trial, the receipt of the money by the Clerk and Master was not denied, nor the terms of the decree. It was claimed for the defendant, that his testator, the Clerk and Master, had deposited the money in the Savings Bank at Greensboro, in the presence of the relator, and with her consent, and also in her name. The Clerk and Master held the certificates of deposit, the relator receiving the interest annually on the $460, up to the time of his, the Clerk and Master's, death. The certificates of deposit, with the receipts of the relator for annual interest endorsed, was offered in evidence by the defendants, but was ruled out by the Court, for the reason, that under the answer, containing a general denial of the allegations in the complaint, such proof was inadmissible.

Verdict and judgment for the plaintiff. Appeal by defendants.

(266) *Dillard, Gilmer & Smith* for appellants.
Gorrell, contra.

READE, J. The complaint alleges that money belonging to the plaintiff, came to the hands of the testator of the defendant as Clerk and Master, which he was ordered to lend out on bond and security, and pay her the interest annually; and the alleged breaches of his official bond are:

1. That he did not lend out the money on bond and security; and 2, that he did not annually pay her the interest. The defendant put in a general denial.

Upon the trial the defendant offered to prove that while he did not lend out the money on bond and security, yet he did, with the plaintiff's consent, deposit the money in a savings bank, which paid interest. And that although he did not himself pay the plaintiff the interest, yet she did annually receive the interest of the said bank; and therefore there was no breach of his bond.

His Honor refused to hear the proof, under the general denial in the answer; upon the idea, as we suppose, that the defense ought to have been by confession and avoidance.

The gist of the matter was the alleged breach of the Clerk and Master's bond. And the answer was a denial of the breaches alleged. And when the plaintiff charged the defendant with breaking his bond, it was proper for him to deny that he had broken his bond; and under that denial to prove that the acts complained of were not a breach of the bond, because they had the sanction of the plaintiff. And it was not necessary that the defendant should say, true, I did break my bond, but you can not take advantage of it, because you sanctioned it. The sanction of the plaintiff was not simply an excuse for the breach, but it prevented the acts complained of from being a breach at all.

PER CURIAM. *Venire de novo.*

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(267)

JOHN McCULLOCK v. JAS. W. DOAK and wife, MARTHA M. DOAK.

1. Evidence that the grantee in a certain deed, which is impeached for fraud, and who afterwards conveyed the land to his step-daughter, the wife of the grantor, in consideration "of love and affection," attempted before that time, to purchase for his step-daughter another house and lot, is not admissible for the purpose of establishing that the deed to himself was *bona fide* and for a fair consideration.
2. The refusal of a Judge of the Superior Court to grant a new trial on the ground of newly discovered evidence is such a matter of discretion that this Court will not review it.
3. The judgment authorized to be set aside by the Superior Court on account of mistake, inadvertence, surprise, or excusable neglect, refers to judg-

ments rendered at a previous term, and does not relate to what takes place at the trial term.

4. A charge by the Judge below, "that the deed," from the grantor to the grantee, "would have been a sufficient defense, had not the insolvency or at least the very great indebtedness of the grantor, at the time, been established, which presumptively tainted the deed with fraud, whereby it devolved on the defendants," (claiming under the deed), "to show affirmatively that the sale 'from the grantor to the grantee,' was a fair, honest and bona fide transaction," when warranted by the facts, is no ground for a new trial.

ACTION, to recover possession of land, tried before *Tourgee, J.*, at Spring Term, 1872, of GUILFORD.

The plaintiff claimed the land in controversy under a sale made by the sheriff of Guilford, by virtue of certain executions, regularly issued on judgments rendered in the Superior Court of said county; at which sale the plaintiff became the purchaser, and to whom the sheriff executed his deed according to law. The plaintiff alleged that the title to the land sold by the sheriff, and sought now to be recovered, had been in the defendant in the executions, James W. Doak, as also one of the defendants in this action, and that he, Doak, had conveyed the same to Jacob Balsey, the step-father of Martha M. Doak, the *feme* defendant, and wife of the other defendant, who conveyed the same for the consideration of "love and affection," to the said Martha.

(268) The plaintiff alleged, that this transaction and the conveyances were fraudulent and void, as against the creditors of James W. Doak; and as bearing on this point, the plaintiff introduced the following evidence:

1st. That James W. Doak, on 27 January, 1863, sold a tract of land to one Weatherly for $5,000 cash, telling Weatherly at the time that he wanted the money to pay debts, and that he had bought a piece of land from Jacob Balsey.

2d. A deed from Balsey to the defendant, Jas. W. Doak, dated the day after the transaction with Weatherly for five acres of the land in controversy, in which deed a consideration of $1,250 was recited and acknowledged to be paid; and also another deed from C. P. Mendenhall to Doak, dated 23 March, 1863, wherein, for the consideration of $200, acknowledged to be paid, seven acres more were conveyed, which two tracts were the lands sold by the sheriff and purchased by the plaintiff, as before stated, and is that sought to be recovered in this action.

3d. Two deeds, executed by the defendant, Jas. W. Doak, on 13 October, 1865, and registered on the 18th day of the same month, to said Jacob Balsey; the one for seven acres of land, in consideration of $200, and the other for five acres of land for $1,000, the same as above alluded to. And also a deed from Balsey to the *feme* defendant,

Martha M. Doak, purporting to be dated 4 December, 1866, but which was not registered until 24 January, 1870, for the same land, for and in consideration of "love and affection." This deed was witnessed by one Eckle, who testified that he attested it in the office of Attorney McLean, on the day of its date, and could not say that he had ever seen the deed since that day.

4th. That the defendant, Jas. W. Doak, at the end of the war, and continuously since, was indebted to various persons in large amounts and was insolvent. (269)

The plaintiff further showed by one Clark, that he, Clark, drew and witnessed the two deeds from Doak to Balsey, that they together applied to him to write the same one evening, requesting that the deeds should be ready by the next morning; that at the delivery of the deeds, he saw no money paid, nor bonds, nor notes given or surrendered, and there was no settlement between the parties in his presence. This witness afterwards stated, upon being introduced for the defendants, that at the time the deeds were executed, he heard Balsey say that Doak owed him for borrowed money and for outstanding security more than the land was worth.

In reply to the plaintiff's evidence, the defendants introduced testimony showing that they removed from the land (the same in controversy), in the Spring of 1865, and did not again reside thereon until 1867. In the meantime the premises were occupied by one Julian, who paid the rent of 1865 to one Jas. W. Cook, and the rent for 1866 to Balsey. The defendants, as also Jacob Balsey and his wife, testified to the following facts, to-wit: That the defendant, Jas. W. Doak, still owed Balsey a part of the purchase-money for the said land, and was besides truly indebted to him in other sums amounting to more than the value of the land, giving of such indebtedness a detailed statement, and how the same was contracted; that the re-sale to Balsey was in consideration of the discharge of such indebtedness. On cross-examination, the witnesses were asked for the notes or bonds surrendered. All testified that there were notes surrendered; and the *feme* defendant, Martha M. Doak, stated that she took them and put them away; that the mice destroyed one, and that she gave two of them to one Wm. Balsey, who asked for them, to show to her attorney, Mr. Scott. Wm. Balsey stated that he received two notes from the defendant, Martha, for the purpose of showing them to Mr. Scott; that he put them in the cash drawer in his father's store, and had never seen them since. No notes were produced on the trial.

The defendant, Jas. W. Doak, testified that of the money (270) received from Weatherly, he paid 550 to Jacob Balsey, and gave his note for $700, being for balance of the purchase-money, which he said was one of the notes surrendered at the resale; that the balance

he applied to other debts, naming them. On his cross-examination, this defendant stated that he owed with the plaintiff, as his surety, the debt to Bilbro, which had then been assigned to Iddings, under which the land had been sold by the sheriff; concerning this, he further stated, that hearing that Iddings would compromise the debt, he borrowed of Balsey, on the 10th October, 1865, $125, in Greensboro, and in a day or two went to see Iddings on the subject of compromising the debt against himself; that Iddings refused to compromise, and demanded gold. That on the refusal of Iddings, he went the same day to Balsey and told him of Iddings' refusal and his demanding gold; and that he and Balsey went that same evening to the room of Mr. Clark, in Greensboro, to get him to write the deeds to Balsey, which Clark was to have ready by morning, and they were ready as promised. Both Balsey and Doak, however, stated that the former refused to lend the money, alleging that he, Doak, now owed him too much, unless Doak would sell him back the land, and that then and there the land sale was agreed upon and the money loaned. That Balsey knew nothing of Doak's intended visit to Iddings, nor the purpose for which the $125 was borrowed; that the deed was made in pursuance of the agreement between the parties at the time when the money was loaned, and that it was a *bona fide* transaction for a valuable consideration; there was no time agreed on for a re-conveyance and no price fixed, but he had promised to let him have the land.

Defendant further offered to show by Jacob Balsey, that he, Balsey, had attempted, in the Fall of 1866, to buy for his step-daughter, the *feme* defendant, a certain house and lot in Greensboro, she (271) then being without a house, and living in one in his, Balsey's, yard, and to prevent her and her husband, the other defendant, removing to Florida. The Court excluded this evidence, and the defendant excepted. Subsequently, in the course of the trial, Mrs. Balsey was allowed, without objection, to state the fact, which was not disputed.

On the part of the plaintiff, among other things, it was contended that the deed was executed with the intent to hinder and defeat the debt of Iddings, and that this intent was known to and participated in by Balsey, and thereby the same was void as against the creditors of Doak, whatever the jury might infer as to the consideration being valuable. On this point his Honor charged the jury that if they believed that Doak made the deed to Balsey with the intent thereby to hinder and defeat the debt due Iddings, and that such intent was known to and participated in by Balsey, the deed was, in law, fraudulent and void as against the creditors of Doak.

The jury returned a verdict for the plaintiff. The defendants moved a new trial, and to sustain the motion filed affidavits, the substance of

which is set out in the conclusions of his Honor refusing the motion, and which are also sufficiently stated in the opinion of this Court.

The defendants then moved to vacate the judgment, for the reasons, 1st, That his Honor instructed the jury that the defendant, Doak, testified that upon his return from the house of Iddings, on the day that Clark wrote the deeds from him to Balsey, and just before their going to Clark's, he, Doak, communicated to Balsey the fact that Iddings had refused to accept a compromise of his debt. Whereas, the fact was, that Doak did not so inform Balsey, and if he was so understood to testify, it was a mistake on the part of the Court and counsel for the plaintiff, or an inadvertence on the part of the witness, Doak, in so expressing himself as to be thus misunderstood. (272)

2. That since the trial new testimony has come to the knowledge of the defendants, to the effect that Balsey, prior to the execution of the deed by Doak to him in 1865, told one Kersey of Doak's indebtedness to him, that he, Doak, had not paid for the lot in question, and that he should be compelled to take the same back to secure himself.

This motion his Honor refused, and the defendants appealed.

Scales & Scales and *Scott* for the appellants
Dillard, Gilmer & Smith and *Ball & Keogh, contra.*

BOYDEN, J. The first question raised in this case is as to the competency of the testimony of the witness Balsey, "that he tried to buy a house and lot for his step-daughter before he made a deed to her." This testimony was excluded by his Honor, and we think correctly, as it could have no tendency whatever to prove that the conveyances from Doak to Balsey were *bona fide,* or for a fair consideration. But had his Honor been in error in excluding this evidence of the witness, Balsey, the error was cured, by admitting the same proof by Mrs. Balsey, which evidence was admitted to be *true,* as the case states.

The question for a new trial on the ground of newly discovered testimony, was one of discretion for his Honor, and can not be reviewed in this Court. This is too well settled to require the citation of authority. As to the question of excusable neglect, as provided for in sec. 133 of C. C. P., that section has no application. That provides for setting aside a judgment rendered at a previous term, and has no reference as to what the judge may do at the trial term; as there is no judgment rendered until all the questions raised at the term have been decided. We are at a loss to understand how it could be supposed, that sec. 133 of C. C. P. could be con- (273) strued to warrant the course of the defendant's counsel in this case.

The remaining question is as to the charge of his Honor, to which defendants excepted. The instruction excepted to was as follows: "That the deed from Doak to Balsey would have been a sufficient defense had not the insolvency, or at least very great indebtedness of Doak at the time of the conveyance, been established, which presumptively tainted the deed with fraud, whereby it devolved upon the defendants to show affirmatively that the resale from Doak to Balsey was a fair, honest, *bona fide* transaction." In this instruction we understand his Honor as informing the jury substantially, that the case as made by the plaintiff's evidence would raise a presumption of fraud and devolve upon the defendants the burden of showing that in fact the transaction was fair, honest and *bona fide,* and that the question of the *bona fides* was a question for the jury upon the consideration of all the testimony in the cause.

Viewed in this light, and we can regard it in no other, the instruction was well warranted by *Satterwhite v. Hicks,* 44 N. C., 105, and *Reiger v. Davis,* 67 N. C., 185.

PER CURIAM. Affirmed.

Cited: Johnson v. Duckworth, 72 N. C., 246; *Estis v. Jackson,* 111 N. C., 150; *S. v. Jimmerson,* 118 N. C., 1176.

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(274)

JOHN G. CHAMBERS, Admr. of John Brigman, deceased, v. MADISON GREENWOOD.

1. On the trial of an action upon a note due an intestate, his administrator was introduced and asked what his intestate said about the note before his death—question ruled out. Defendant's counsel argued to the jury, that if the intestate were alive, he would be willing to leave the decision of the case with him, etc. In reply the plaintiff's counsel had a right to comment before the jury upon the objection of the defendant to the introduction of the declarations of the intestate.
2. The non-introduction of a settlement, in which it is relied that a note, the subject of the action was brought into account and satisfied, is a proper circumstance for comment before the jury, on the trial for the recovery of the amount of the note.

DEBT, under our former practice, tried before *Henry, J.,* at Fall Term, 1872, of BUNCOMBE.

The plaintiff, at Spring Term, 1867, of the Superior Court of Law for Buncombe County, sued the defendant on a note alleged to be due his intestate, at which term the defendant plead payment and satisfaction. In support of his plea, he introduced one Whitmore, who testified, that he went with the defendant to the house of Brigman,

the plaintiff's intestate, in the Spring of 1860, when both parties consented to go into a settlement. Witness went off to a neighbor's to get some whiskey and when he returned, Brigman and defendant were in the porch, surrounded by papers, and he heard the former remark that he could not find the note, that it was for about $90; and at the same time he, Brigman, asked him, the witness, to take notice that it was settled, and that the defendant and his wife would come over to his house next Thursday night, and in the meantime he would hunt up the note and give it up. It was further in evidence on the part of the defendant, that Brigman, the plaintiff's intestate, had borrowed money from defendant in the Fall of 1860, after the alleged settlement, and gave his note for $150, saying at the time noth- (275) ing about the $90 note. That plaintiff's intestate, in a conversation with witness, a short time before his death, remarked that he wanted the $150 paid defendant out of the first moneys raised from his estate, saying nothing at this time about the $90 note.

The plaintiff himself was introduced, and was asked what he heard his intestate say about the note. Question objected to, and the Court did not permit the witness to answer. The plaintiff testified that for a month before the death of his intestate, he was constantly with him, that his physician would allow no one to speak to him on business, and that he died in 1861. That he, the plaintiff, before he had taken out letters of administration, had had with the defendant a conversation, it being at the time understood, however, that he would administer, in which the defendant said he thought that his debt of $150 ought to be promptly paid out of the first moneys; that there were other matters between them, but that he could arrange them in some other way. That this time plaintiff knew nothing of the $90 note.

Other evidence was introduced, irrelevant to the points decided, and need not be stated. The objections to the remarks of opposing counsel, and the ruling of his Honor on the trial below thereon, are stated at length in the opinion of the Court.

The jury returned a verdict for the plaintiff for the amount of the note and interest. Motion for a new trial; motion overruled. Judgment for amount of verdict and for costs. Appeal by the defendant.

J. H. Merrimon for appellant.
Jones & Jones, contra.

READE, J. 1. The action is upon a note payable to the intestate of plaintiff, which note the defendant alleged was embraced in a settlement of accounts between him and the plaintiff's intestate, (276) in his lifetime, and that in that way the note had been settled, and was not delivered up because it was mislaid, and it was to be de-

livered up when found. The plaintiff had offered to prove what his intestate had said about the note, and defendant's counsel objected, and the evidence was ruled out. In the argument, the defendant's counsel said to the jury that if the intestate were alive there would be no difficulty about it; and that he would be willing to leave it to him. In reply, the plaintiff's counsel said, well, if that is so, why did you object to my proving what he said? And thereupon, the defendant's counsel asked his Honor to stop the plaintiff's counsel, because he was commenting on evidence which had been ruled out. No, said his Honor, he is not commenting on the testimony which was ruled out, but he is commenting on your argument. The defendant's counsel had gone outside of the case, to say what he would be willing to do, and the plaintiff's counsel went outside of the case, to test his sincerity. It may have been a hard hit, but in the opinion of his Honor it was fair. And as it spent its force upon the *counsel,* and not upon the case, it is not ground for a new trial. It was but the repartee common in debate, which the Judge could hardly prevent, and which in his discretion he might indulge.

2. In commenting on the alleged settlement, the plaintiff's counsel asked in argument, why the settlement, the papers, claims and evidences of debt were not produced to speak for themselves, instead of relying upon the memory of the witnesses; and why the defendant did not explain, either by himself or his wife, both of whom were competent witnesses. The defendant's counsel objected to this course of argument, and asked the Court to stop the plaintiff's counsel, which his Honor declined to do. And the defendant excepted upon the ground

(277) that the counsel had no right to comment upon the non-introduction of the defendant or his wife as a witness.

It will be observed that the non-introduction of the defendant and his wife was not the point which the counsel was making before the jury, but it was the non-introduction of the settlement and the papers and evidences of claims, and that the fact of the non-introduction of the papers, unexplained, tended to show that no such papers ever existed. And that if there was any explanation why the papers were not produced, it was for the defendant to make it, and this he had failed to do, although both himself and his wife were competent witnesses.

The authority upon which the defendant relies to support this exception, is *Devries v. Phillips and Haywood,* 63 N. C., 53. In that case it was alleged that the conveyance under which the defendant, Haywood, claimed the property was fraudulent. And the defendant, Haywood, did not offer himself as a witness to prove that it was not fraudulent, choosing to rely upon other testimony. And thereupon the plaintiff

insisted that his Honor should charge the jury "that as the facts of the case were peculiarly within his own knowledge, the circumstance that he did not tender himself as a witness, in his own behalf, required them to presume the facts as to which he might have testified most strongly against him." His Honor refused the charge, and this Court sustained him. In the opinion, it is said "that the fact that a party does or does not offer himself as a witness, *standing alone,* allows the jury to presume nothing for or against him, and can only be the subject of comment as to its propriety or necessity, in any given case according to the circumstances, as the introduction or non-introduction of any other witness might be commented on." And it is further said, "that it is a rule of evidence that where facts are proved against a party which, it is apparent, he might explain, and he withholds the explanation the facts are to be taken most strongly against him; so (278) the misconduct of a party in suppressing or destroying evidence, which he ought to produce, or to which the other party is entitled; such as the spoliation of papers and the like, warrants unfavorable presumptions against him." Apply these principles to the case before us, and the case cited would seem to be against the defendant; for the point made here is, that the papers of the settlement and the evidences of indebtedness, which the defendant set up, ought to be produced by him, or their non-production accounted for; and that it did not lay in him to say that he could not account for them, because he was himself a competent witness. It is further laid down in the case cited that the naked fact that a party does not offer himself as a witness is not a fair subject of comment by counsel, and that the court ought to restrain it. We thought then, and still think, the rule wise and necessary. The proper administration of justice and the rights of suitors require it. The evil would arise in every case, as in every case there must be parties. And if every party is to be assailed because of the naked fact that he offers himself as a witness, or because of the naked fact that he does not offer himself as a witness, every trial will be a nuisance. It would be the same as to allow every party to be assailed just because he is a party. And instead of citizens regarding the Courts as the palladiums of their rights and liberties, they would come to regard them as the slaughter houses of their reputations. But still, it must be understood that if a party chooses to put himself under suspicious circumstances, as in the particulars named in *Devries v. Haywood, supra,* or, as in *Peebles v. Horton,* 64 N. C., 374, where the defendant claimed under a deed alleged to be fraudulent against creditors, and introduced himself as a witness to prove the deed fair, instead of introducing the maker of the deed, who in that

case was disinterested and necessarily knew all about the mat-
(279) ter, and was present in Court; this was held to be a "suspicious circumstance," and a fair subject of comment by counsel.

It is proper that we should say that the mere manner of conducting the trial below is, and ought to be, so much within the discretion of the presiding Judge, that an alleged irregularity must be palpable, and the consequences important, to induce us to interfere.

PER CURIAM. No Error.

Cited: Goodman v. Sapp, 102 N. C., 483; *Hudson v. Jordan,* 108 N. C., 15.

MURDOCK McKINNON v. MALCOM FAULK, Adm'r of Bryant Sellers.

When a Judge of the Superior Court, makes or refuses to make amendments, under a mistake as to his power, the Supreme Court will review his action, on an appeal; but when such amendments lie within his discretion, the exercise of that discretion can not be reviewed by the Supreme Court.

APPEAL from *Buxton, J.,* at Fall Term, 1872, of CUMBERLAND.

The action was brought to recover a judgment obtained by the plaintiff against the defendant's intestate, in the County of Cumberland, at June Term, 1856. The amount of the judgment was $142.16, with interest on $136.43 from the said June Term, 1856, till the bringing this suit, amounting at that time to about $270.

The pleadings in this action, by agreement of counsel at the appearance Term, were to be conducted under the old rules, and the usual memoranda were made on the trial docket accordingly.

At Fall Term, 1872, the plaintiff moved to amend his summons by inserting the amount of his claim as above stated. This was
(280) allowed by the Court, whereupon the defendant moved to dismiss the summons and complaint for want of jurisdiction. The plaintiff then moved to further amend his summons, by inserting as the sum demanded $500, which was the penalty of the bond of the defendant, given as administrator, and also to amend his complaint, so as to assign the non-payment of the judgment of the County Court as a breach of the condition of the defendant's bond. The motion of the defendant was overruled by his Honor, and the further amendment of the plaintiff allowed, from which order the defendant appealed.

Hinsdale and *Broadfoot,* for appellant.
B. & T. C. Fuller. contra.

SETTLE, J. The Courts of this State had grown very liberal under the old system of pleading in allowing amendments. And then the Constitution of 1868, at one blow, struck down the technicalities and refinements of the old system, and this has been followed up by the Code of Civil Procedure, which greatly enlarges the power of the Courts in respect to amendments.

Judges now have a very large discretion to make amendments in furtherance of justice. When they make or refuse to make amendments, under a mistake as to their power, this Court will review their action, but when the matter lies within their discretion, this Court cannot review the exercise of that discretion.

Here the Court had the power to make the amendments of which the defendant complains; and by so doing removed his first objection to the jurisdiction.

PER CURIAM. Affirmed.

Cited: *Henderson v. Graham,* 84 N. C., 497.

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(281)

STATE v. JOHN ELLEN and others.

Where A, under a contract of purchase, claimed a tract of land, in the possession of, and also claimed by B, and entered upon and took temporary possession of a cabin on the land, though forbidden by B to do so: *Held,* that A was not indictable under the Act of 1865-'66 for a wilful trespass.

INDICTMENT for Wilful Trespass, tried before *Mitchell, J.,* at the Fall Term, 1872, of ASHE.

The defendants were indicted, under the Statute of 1866, chap. 60, for a wilful trespass on the lands of one Mary Miller, after having been notified and forbidden to do so. The prosecutrix claimed the right of possession of the land whereon the trespass was committed, in consideration of her husband having claimed it, and held it adversely and cultivated it continuously from 1860 to the time of his death; since which time, she and one Jonathan Miller, co-guardians of her children, have held the land and cultivated it for the children's benefit. Such was the only evidence of her title and that of the children.

The defendants claiming title under a contract of purchase from one Waugh, in January, 1872, entered upon the land against the consent of Mrs. Miller, and after being forbidden, and took temporary possession of a cabin, which was being erected on the land. From this they were ousted, and departed, taking with them some articles they had placed in the cabin.

His Honor being of opinion with the defendants, so instructed the

jury, who returned a verdict of not guilty. Motion for a new trial; motion overruled. Judgment, and appeal by the State.

Attorney-General Hargrove for the State.
Todd for defendant.

(282) BOYDEN, J. As we understand the case, his Honor was right in giving judgment for the defendants upon the case agreed; and his Honor could not have given judgment against the defendants, without substantially disregarding the decision in *S. v. Hanks,* 66 N. C., 612. Indeed, that was a much stronger case against the defendants, as in that case the son of the prosecutor, who had cultivated the field invaded for two years, was actually present forbidding the entry which might have resulted in a breach of the peace; and in that case, as intimated in the opinion of the Court, had the title to the land been in the prosecutor, the defendants would have been liable to a civil action of trespass, however honest their belief of their right to pass through the field, to complete their survey under the warrant. In the case before us, we take for granted that his Honor held, that, as the defendants set up a *bona fide* claim of title to the land, the case was not within the Act of 1865-'66, and in this his Honor was right.

It cannot be denied that *S. v. Hanks* was in the words of the statute, but the Court held it not within the meaning.

In *S. v. Dodson,* 6 Cald., decided in 1869, under a statute similar to the act of 1865-'66, the judge, in delivering the opinion of the Court, says: "If we commit a trespass upon the land of another, his good faith in the matter, or ignorance of the true right or title, will not exonerate him from civil responsibility for the act. But when the statute affixed to such a trespass the consequence of a criminal offence, we will not presume that the Legislature intended to punish criminally acts committed in ignorance, by accident or under claim of right and in the *bona fide* belief that the land is the property of the trespasser unless the terms of the statute forbid any other construction.

(283) It was upon this very ground stated by Judge ANDREWS, in *S. v. Dodson,* that *S. v. Hanks* was decided. That case was manifestly within the words, but as the Court held, not within the mischief.

We held the decision in that case was right, and that was full authority for his Honor's ruling in our case.

PER CURIAM. No Error.

Cited: S. v. Yarborough, 70 N. C., 253; *S. v. House,* 71 N. C., 521; *S. v. Crosset,* 81 N. C., 584; *S. v. Bryson, Id.,* 597; *S. v. Whitener,* 93 N. C., 592; *S. v. Winslow,* 95 N. C., 652; *S. v. Jacobs,* 103 N. C., 403.

S. MARSH & CO. v. R. M. COHEN.

1. A *recordari* is a substitute for an appeal, where the party has lost his right to appeal, otherwise than by his own default.
2. Where in an application for a *recordari*, it appeared that A was informed by a Justice of the Peace, that B had obtained before him (the J. P.), a judgment against him, and A at the time notified the J. P. of his intention to appeal, and an order to stay proceedings pending the appeal, filed in the office of the Clerk of the Superior Court an undertaking, before one whom he supposed to be a deputy of the Clerk, who approved the same and issued a *supersedeas*, and where it further appeared that the judgment was not given against A at the time he was informed by the J. J. it was so given, but not until after he had filed the undertaking: *Held*, that although the Clerk when informed of the act of his deputy, notified the Justice and the defendant that he did not approve the undertaking, and revoked the *supersedeas*, and though it further appeared, that ten days' notice of the appeal had not been given, as required by section 536, of the Code of Civil Procedure, A was not in default, and that his Honor below committed no error in granting the *recordari*.
3. An omission to give the notice of appeal required by sec. 535 of the Code of Civil Procedure, strictly within the ten days therein provided for, is not so serious a default, as will preclude a party from the right to have his case reheard.
4. The power to revise and control the action of a Clerk of the Superior Court in passing upon the sufficiency or insufficiency of bonds to be taken by him, necessarily exists with the Judge, whose minister and agent he is; and the proper mode of bringing the question before the Judge, is by an appeal from the ruling of the Clerk.

APPEAL from an order granting a *recordari* and *supersedeas,* (284) made by *Clarke, J.,* at Fall Term, 1872, of WAYNE.

On 3 December, 1872 (the transcript, in several places, says 3 November—but that is clearly a mistake), the defendant applied to the Judge of the Third Judicial District for a *recordari* and *supersedeas,* upon an affidavit in which he stated the following facts, to wit:

About 20 November, one Robinson, a Justice of the Peace of Wayne County, informed him that he, the Justice, had given a judgment against him, the defendant, in favor of the plaintiffs for about $96. The defendant then informed the Justice that he would appeal; and in order to stay execution pending his appeal, he filed with the deputy clerk of the Superior Court of Wayne, an undertaking according to law, which the deputy approved, and upon which he issued a *supersedeas* of execution. That afterwards, on the 3d of December, at Beaufort, in Carteret County, he learned that the judgment had not in fact been given until the 23d of November, which was after the day on which he had given his undertaking to the clerk. (The undertaking is dated 16th November.) The Judge thereupon ordered the Clerk of Wayne Superior Court to issue a *recordari* and *supersedeas,* upon the defend-

ants giving a bond with sufficient surety in $126, with the usual conditions.

It breaks in on the narrative of events, but it will be as well to state here as elsewhere, that there are affidavits sent up with the record, which must have been presented to the Judge at some stage of the proceedings, but it does not appear at what. In these it is stated that the undertaking to stay execution had not been accepted and approved by a deputy clerk, but by a clerk only of the clerk, who, however, did sometimes act as deputy; that the clerk, as soon as he was informed of the act of his clerk, notified the Justice and the defendant that he
(285) had not approved the undertaking, and revoked the *supersedeas*.

It also appeared that the judgment in favor of the plaintiff was not in fact given until 23 November, and that the defendant had not notified the plaintiff of his appeal.

After the order of the Judge, to wit: on the 5th of December, the defendant tendered to the Clerk of the Superior Court, an undertaking proper in form, with a surety who swore that he owned a stock of goods worth about $5,000, and that he owed $2,100 or thereabouts. The clerk disapproved the surety, and assigns the reason, that his property was transferable, and that he had reason to believe that it would be transferred, should the plaintiff recover.

On 7 December the defendant presented his affidavit to the Judge, in which he stated the disapproval of the surety by the clerk, and that it was through malice and prejudice. He also notified the plaintiff that he had appealed from the ruling of the Clerk. On 9 December, the Judge found as a fact, that the undertaking was good and sufficient, and that the refusal of the clerk to approve it was wanton, and ordered the clerk to file the undertaking and issue the writs prayed for. From this order the plaintiff appealed to this Court.

Smith & Strong for the appellant.
R. M. Cohen for himself.

RODMAN, J. After stating the foregoing facts of the case, proceeds.

The exceptions of the plaintiff raise in substance these two questions only:

1. Was the Judge justified by the circumstances presented to him, in ordering a *recordari* and *supersedeas* on the 3d of December?

2. Did he have the power to approve the undertaking of 6 December, after it had been disapproved by the Clerk, and to make an
(286) absolute order upon that officer to issue writs of *recordari* and *supersedeas*.

1. A *recordari* is a familiar substitute for an appeal, when a party has lost his right to an appeal otherwise than through his own fault.

There can be no doubt of the power of the Judge to grant it in a proper case. So that the only question is, was this a proper case? We think it was. The defendant was informed by a Justice of the Peace that a judgment had been given against him, and he thereupon notified the Justice that he appealed, and filed with one whom he had reason to think a deputy of the Clerk, a sufficient undertaking, which the supposed deputy approved.

C. C. P., sec. 534, says an appeal must be taken within ten days after the judgment. On the tenth day after the judgment was in fact rendered, the defendant, being at a distance from the county of Wayne, learned that the judgment had not in fact been given at the time when he gave his undertaking, so that the undertaking was premature and insufficient. He had been deceived by the Justice. We cannot see that he was in any default. The plaintiff, however, says that the defendant had not given him any notice of appeal as required by the Code of Civil Procedure, sec. 536, and therein was in default. That is true; but we do not think that an admission to give his notice strictly within the time, is so serious a default that thereby the party should absolutely forfeit his right to a rehearing of the case. If an appeal, of which notice had been given to the opposite party should be docketed in the Superior Court, while the Judge would certainly refuse to try the case until reasonable notice was given, and might dismiss the appeal, he might also in his "discretion" retain the case, and allow a reasonable time in which to give notice.

2. In *Stedman v. Jones*, 65 N. C., 388, the action was brought under the Landlord and Tenant Act (1868-'9, chap. 156), which (287) requires the bond to stay executions to be given to and approved by the Justice. In that case the Court say, that if the Justice wantonly and fraudulently refused to approve a security manifestly sufficient, the Judge could compel him to order a stay of execution, or could order it himself. As the applicant in that case was held not entitled to a stay of execution upon the merits; that is to say, as it did not appear that the Justice had acted wantonly, it was not necessary to inquire or suggest, in what way the Judge would use his power of supervision. The mode in which it was desired in that case, was by an order for a *recordari* and *supersedeas*, upon which the Judge, according to the usual practice, makes his order for the writs conditional upon the applicant's giving a bond with surety to be approved by the Clerk. As to what might be done if the Clerk should follow the ill example of the Justice, nothing was then said, and of that we will speak hereafter. In that case there was no difficulty about the appeal. The Justice had not refused to send up a record of his proceedings; he only refused the bond tendered to obtain a stay of execution. There being no necessity

for a *recordari,* we see no reason why the Judge could not have ordered the only writ which was needed for the party's relief, viz.: the *supersedeas* as upon an *audita querela.* The use of a *supersedeas* issued by the Clerk upon an *audita querela,* or writ of error, is old and familiar. It issued as of course from the revisory Court, to stay execution pending the appeal. So the mode in which the Judge would correct a wanton refusal by a Justice to approve a security plainly sufficient, would be by an order for a *recordari* and *supersedeas,* or for a *supersedeas* alone, according to the situation of the case and the relief needed. In the case before us, inasmuch as the defendant had lost his right to an appeal, and an execution had been, or might be issued against him, both a *recordari* and *supersedeas* were necessary,
(288) in order to give him his rightful relief. The Judge pursued the usual, most convenient, and generally the best practice, of making his order for these writs conditional, and referring it to the Clerk to pass on the sufficiency of the security. The Judge might probably have taken the security in the first instance; but however this may be, he did not, by referring it to the Clerk, waive any right to supervise the action of the Clerk, and to correct any abuse of his discretion.

There is a close analogy between bonds given for the prosecution of an action, and bonds given on issuing a *recordari* or *supersedeas.* As to the former class, the action of the Clerk in taking them, was always held to be ministerial. By Rev. Code, chap. 31, sec. 40, they might be taken by a deputy clerk, and we know that they were and still are habitually taken by attorneys, who have authority from the clerks for that purpose, but are not their deputies. *Shepperd v. Lane,* 13 N. C., 148; *Croom v. Morrisey,* 65 N. C., 591. It is well known, also, that the sufficiency of the surety to these was habitually considered within the supervisory power of the Court. Rules for additional security were common, and the power was undisputed. But whether the passing on the sufficiency of a surety be a ministerial or a judicial act, it is alike subject to the control of the Court, to the Judge of which an appeal lies from every official act of the Clerk.

It cannot be maintained that an abuse of discretion, by any officer authorized to pass on the sufficiency of a surety, is without remedy anywhere. If such were the law, such an officer, through ignorance or caprice, might effectually obstruct the rightful access of suitors to the Superior Courts. The power to revise and control the action of the Clerk in such a case must necessarily exist with the Judge, whose minister and agent he is; and the proper mode for bringing the question before the Judge, is that adopted in this case, viz.: by an appeal
(289) from the ruling of the Clerk to the Judge.

We have neither the right nor the disposition to revise the

finding of the Judge upon the sufficiency of the surety to the undertaking; but we may say that the reason rendered by the Clerk for his disapproval of him was clearly an insufficient one, and his refusal, however honest, was therefore, in a legal sense, wanton. A stock of goods may be more readily transferable than real estate; but all property may be transferred, and the law does not require that the surety to an undertaking shall be a landholder. It only requires that he be worth a certain sum above his debts and exemptions. The Legislature may hereafter require that he shall be a bondholder or housekeeper; but in the meanwhile no officer can anticipate such action, and practically insert in the law a provision which it does not contain.

PER CURIAM. Affirmed.

Cited: Marsh v. Cohen, post, 289; *Green v. Hobgood,* 74 N. C., 236; *R. R. v. Richardson,* 82 N. C., 344; *Guano Co. v. Bridgers,* 93 N. C., 442; *Bynum v. Comrs.,* 101 N. C., 419; *Cushing v. Styron,* 104 N. C., 341; *Patterson v. Gooch,* 108 N. C., 507; *S. v. Johnson,* 109 N. C., 854; *McClintock v. Ins. Co.,* 149 N. C., 36; *Arundell v. Mill Co.,* 164 N. C., 240.

L. SAULSBURY v. R. M. COHEN.

To stay proceedings, pending the review of a decision of the Clerk in regard to the sufficiency or insufficiency of an undertaking for an appeal, a *supersedeas* is the proper mode, and not an injunction.

APPEAL from an order of the Clerk of the Superior Court of WAYNE heard by *Clarke, J.,* at the Fall Term, 1872, of said Court.

The facts in this case are identically the same as those in the foregoing case of *Marsh v. Cohen,* with the exceptions stated in the opinion of the Court.

From the order of his Honor in the Court below, overruling his exceptions, the plaintiff appealed. (290)

Smith & Strong for appellant.
R. M. Cohen for himself.

RODMAN, J. Two cases are embraced in the record, as if they were but one. They are like that of *Marsh v. Cohen,* 68 N. C., 283, except in the dates, and in this; in these cases, the Justice of the Peace returned to the Clerk the transcript of the proceedings before him, but the clerk refused to approve an undertaking to stay execution under the same circumstances, and for the same reasons stated in *Marsh v. Cohen, supra.* It was a case then in which there was no occasion for a *re-*

cordari to bring up the proceedings, but only for a *supersedeas.* The Judge after giving the plaintiffs an opportunity to be heard, ordered the Clerk to issue what is called, and what in form is an injunction. It was not a case for an injunction, it does not come within any of those provided for in C. C. P., or within any other in which that order is recognized as proper. Considering the Judge's order as for an injunction technically, it is open to some of the plaintiff's exceptions. But its whole operation and effect is that of a *supersedeas,* and we think we may properly consider it as such. We have said in *Marsh v. Cohen,* that, that was a proper order. In his order, however, the issuing of it is made conditional upon defendant's giving an undertaking to secure damages not to exceed $50. Clearly this was an oversight on the part of the Judge.

The undertaking was the only security which the plaintiff had in substitution for the lien, which he had or might have had by his judgment and execution, and it ought to have been at least equal in amount to the judgment and probable interest and costs. The order of
(291) the Judge will be modified so as to conform to this opinion. And the case is remanded for further proceedings.

Neither party will recover costs in this Court.

PER CURIAM. Modified and affirmed.

JOHN I. SHAVER v. THE COMMISSIONERS OF THE TOWN OF SALISBURY.

Section 26 of the charter of the town of Salisbury, enacting that the Board of Commissioners "shall have power to acquire by purchase any piece or pieces of land as public squares for said town; and also to acquire any pieces by purchase or lease as sites for markets or other buildings for the use of said town," confers upon the Commissioners full power to acquire, regulate and dispose of a Town Hall, public squares, etc., in such manner as to them may seem best for the interest of the town.

MOTION to dissolve an Injunction, heard by *Cloud, J.,* at Chambers, 8 November, 1872, in an action instituted in the Superior Court of ROWAN.

The plaintiff, a citizen and taxpayer of the town of Salisbury, applied for and obtained, on 15 April, 1872, an order from his Honor, Judge CLOUD, enjoining and restraining the defendants from selling the Town Hall, which it is alleged the defendants proposed to do.

Upon the coming in of the answer of the defendants, and the argument of counsel, his Honor dissolved the injunction. From this order, the plaintiff appealed.

Bailey for appellant.
Blackmer & McCorkle, contra.

SETTLE, J. The plaintiff asks to restrain the Commissioners of Salisbury from selling their Town Hall, upon the ground, (292) that by so doing they would inflict irreparable injury on the town.

The defendants allege, that the town is in debt, and that a much smaller and less expensive Hall will answer all necessary purposes.

Whatever may be the merits of the controversy, it is evident that the charter of the Town, ratified on 27 Jan., 1859, confers upon the Commissioners full power to acquire, regulate and dispose of a Town Hall, public squares, etc., in such manner as to them may seem best for the interest of the Town. In other words, they have a large discretion in such matters, which is not subject to be controlled by the Courts.

His Honor was correct in dissolving the injunction.

PER CURIAM. Affirmed.

STATE v. JOE PATTERSON.

1. A defendant in custody and charged with larceny, upon his examination before a Justice of the Peace, being cautioned that "he was not obliged to answer any question for or against himself," confesses his participation in the larceny; such confession is admissible evidence on his trial before the Court.
2. A makes a crop of cotton on the plantation of B, under a verbal agreement that B is to have half of it, and while the cotton is in the house waiting to be ginned, and before any division, it is stolen: *Held*, that in the indictment the cotton was properly charged to be the property of A and another.

APPEAL from *Buxton, J.*, at Fall Term, 1872, of RICHMOND.

The defendant, with others, was indicted for stealing 800 pounds of seed cotton, the property of Wm. M. Ballard, *and another*. The defendant, Patterson, was arrested and taken before a Justice of (293) the Peace for examination. Before proceeding to examine the defendant, the attention of the Justice was called by the prosecutor to the importance of cautioning him, the defendant, as to his rights. He was accordingly told by the Justice, before any questions were asked him, that he was not obliged to answer any question for or against himself, and gave him his choice to answer or not. The defendant was without counsel, and nothing was said about his having counsel one way or the other. After receiving the caution, and without being sworn, the defendant admitted his participation in the larceny of the cotton. This admission was taken down in writing at the time by the Justice and

returned to the Court. The Solicitor having made the preliminary proof, offered to read the admissions in evidence. The defendant objected to the evidence for two reasons, 1st, Because the admission was made by defendant while under arrest; and 2d, Because defendant at the time was without counsel. Objections overruled by the Court, and the defendant excepted.

It was in evidence, that the cotton was raised by Wm. M. Ballard on the plantation of one J. D. Pemberton, under a verbal agreement that Ballard was to pay Pemberton one-half the cotton so raised. The cotton was stored in the gin house on the plantation and had not been divided, when stolen. Pemberton testified that he considered the cotton as belonging to himself and Ballard. Upon this proof the defendant insisted that the cotton, until divided, was the property of Ballard, and that the ownership was improperly charged in the indictment, as being "Wm. M. Ballard and another," and asked his Honor so to charge the jury, and that the defendant could not be convicted under this indictment. His Honor declined to instruct the jury as requested,
being of opinion that the ownership of the property was properly
(294) laid in accordance with sec. 19, chap. 35, Rev. Code. Defendant excepted.

There was a verdict of guilty. Rule for a new trial. Rule discharged. Judgment and appeal by defendant.

Walker and *Busbee & Busbee* for defendant.
Attorney-General for the State.

BOYDEN, J. In this case there are two questions raised by the record:

First, as to the competency of the confessions made by the defendant to the magistrate before his commitment. The objections urged
are that the caution given by the Justice of the Peace were not
(295) as full as required by Laws 1868-'69, chap. 178. In this case before any confessions were made, the Justice of the Peace told the defendant "that he was not obliged to answer any question for or against himself, and gave him the choice to answer or not." The case states that the defendant was without counsel and that nothing was said about his having counsel"; but that after receiving the above caution, the defendant, without being sworn, made admissions of his participation in the larceny of the cotton. The admissions were taken down in writing at the time by the magistrate, and returned to the Court. The case then states that the Solicitor having made the preliminary proof, offered to read the admissions in evidence. Defendant's counsel objected, as the case states for two reasons. First, that the admissions

were made while the defendant was under arrest. Second, because the defendant at the time was without counsel. These objections were overruled and the admissions received.

It is very clear that these admissions ought not to have been rejected for either of the reasons urged by the counsel.

The other question was, as to the ownership of the property stolen. The testimony as to the ownership of the property charged to have been stolen, was as follows: "The cotton was raised by William M. Ballard on the plantation of John D. Pemberton, in Richmond County, under a verbal agreement between Ballard and Pemberton. Ballard was to pay Pemberton one-half of the cotton raised on the plantation. This lot of cotton was stored in the gin-house on the plantation and had not been divided at the time it was stolen; it was seed cotton taken to the gin-house to be ginned. John D. Pemberton testified that he considered the cotton as belonging to himself and Ballard.

Upon this proof the counsel for the defendant insisted that the cotton, until divided, was in law the sole property of Ballard, and that the ownership was improperly charged in the indictment as being the property of William M. Ballard and another, and (296) asked his Honor to charge the jury, that under this indictment the defendant could not be convicted.

His Honor refused to charge as requested, being of opinion that the ownership of the cotton was properly laid in accordance with the Revised Code, chap. 35, sec. 19. His Honor was right in declining to give the instruction requested, as there was no evidence that Ballard had rented the land, and this cannot be inferred from the word pay as mentioned in the evidence. Had it appeared that Ballard had rented the plantation, and that Ballard was to be at the whole expense in making the cotton, and to pay one-half of this cotton by way of rent to Pemberton, then it would have been the duty of his Honor to have submitted to the jury the question whether Ballard was not still the sole owner of the cotton until actually divided, although it had been hauled to the gin-house to be ginned. But we understand his Honor as substantially charging the jury that if they believed the evidence, then the charge in the indictment laying the property stolen as the property of Ballard and another was right, and it would be their duty to convict so far as the charge of ownership was concerned; as chap. 35, sec. 19, of the Revised Code authorized the charge to be laid as in this indictment. In this there was

PER CURIAM. No Error.

Cited: *S. v. Edwards,* 86 N. C., 667; *S. v. George,* 93 N. C., 570.

(297)

STATE v. RICHARD DAVIS and another.

1. It is a settled principle, that when a thing is done by a tribunal, having jurisdiction of the subject-matter, its action can not be impeached collaterally, for any irregularity or error in the proceeding, and must be taken as valid *de facto*, if not *de jure*, until it be set aside or reversed by some direct proceeding for that purpose.
2. A road, laid off by commissioners, under an order of a Township Board of Trustees, who appoints an overseer of the same, is a public highway, and its wilful obstruction is a misdemeanor.

APPEAL from *Cloud, J.*, at Fall Term, 1872, of ROWAN.

The indictment was for obstructing a public highway, and on the trial the jury found the following special verdict:

"That an application was made by sundry persons, more than six, to the Board of Township Trustees of Atwell's Township, in Rowan County, praying for the establishment of a public highway, between the points indicated in their petition. That said Board granted the prayer of said petition on 3 June, 1871. By another order, the Commissioners therein specified laid off said road, and made a report of their action in that behalf, which was confirmed, and one McLean appointed overseer, on 3 Aug., 1871.

That in April, 1872, the defendants placed obstructions across the said road, and thereby prevented it being used and enjoyed by the public. They, the defendants, were the owners of the land thus obstructed. The names of the defendants were signed to the petition, and one of them, Richard Davis, was appointed one of the Commissioners, and his name is signed to the report. There was no evidence either way as to the handwriting of the defendants."

The jury further found: "That the road crosses the land of a family of several persons, named Frontis, and that none of them were served with copies of the petition, and only one of them, K. C.
(298) Frontis, signed it as a petitioner; that they were tenants in common, and the said K. C. Frontis was in the habit of attending to their affairs; and that all but one of them assented verbally to the prayer of the petition, there being no positive dissent by any of them. That one of said tenants in common (the Frontises) is a minor. But whether upon the whole matter, the defendants are guilty of the misdemeanor, in the said indictment specified and charged upon them, the jurors are altogether ignorant, and pray the advice of the Court thereupon. And if, upon the whole matter aforesaid, it shall appear to the Court that they are guilty of the misdemeanor charged, then the jury finds them guilty. If upon the whole matter aforesaid, it should appear to the Court, that the defendants are not guilty as charged in said bill of indictment, then the jury finds them not guilty."

The original petition, order and report of the Commissioners, after objection, was read in evidence. On the part of the defendants, it was proved by parol evidence, the State objecting, that the road passed over the lands of certain tenants in common, but one of whom had received notice of the petition; and further, that Spring Grove, one of the *termini* of the road, was in Iredell County, a half mile from the Rowan line.

His Honor being of opinion, upon the facts found in the special verdict of the jury, that the defendants were not guilty, gave judgment, discharging them from custody, from which judgment the Solicitor of the State appealed.

Attorney-General for the State.
Blackmer & McCorkle for the defendants.

PEARSON, C. J. It is a settled principle of law necessary to prevent disorganization and a general state of confusion, that when a thing is done by a tribunal having jurisdiction on the subject- (299) matter, its action cannot be impeached collaterally for any irregularity or error in the proceeding, and must be taken as valid *de facto* if not *de jure* until it be set aside or reversed by some direct proceeding for that purpose.

A grant of vacant land issued by the proper authority, cannot be impeached in an action of ejectment; there must be a direct proceeding to vacate the grant.

The election or appointment of one who is acting as constable, under a colorable appointment, cannot be impeached for irregularity, as that he had not been duly elected or appointed, or had not executed the bond required by law upon indictment for assault and battery, on the ground that as he was not a constable, the party was justified in resisting by force, his attempt to levy an execution.

In our case the road had been laid off and established as a public highway by a tribunal having jurisdiction over the subject-matter, the report confirmed, and an overseer appointed to take charge of the road and to keep it in repair as a public highway.

His Honor erred in holding that "said road was not a highway." From the argument, we infer his Honor was misled by *S. v. Spainhour,* 19 N. C., 547, in which case Judge GASTON, after laying down the general principles of law which we have announced, is not fortunate in drawing the distinction between a highway established by the competent authority, and "a road which had not been definitely accepted and established, in the place and stead of the old road."

Here the road was definitely established as a public highway, and an overseer was appointed. That is a fair test. Suppose the overseer, in the exercise of his duty had been resisted by the defendant and death ensued; could the homicide be justified on the ground of some error or irregularity in the proceeding?

PER CURIAM. Reversed.

Cited: *Ashcraft v. Lee,* 75 N. C., 158; *S. v. Smith,* 100 N. C., 554.

Dist.: *Henderson v. Davis,* 106 N. C., 94.

(300)

THE STATE *ex rel.* JOHN IRELAND v. JOHN TAPSCOTT and others.

1. The refusal of a sheriff to pay back, on demand, money received through a mutual mistake, in excess of true amount of an execution collected by him, is a private matter to be settled between the parties, and is not a breech of his official bond, for which his sureties can be held responsible.
2. Where a party accepts, in full satisfaction of a demand he makes on a sheriff and his sureties for money received through mistake, a judgment obtained against himself, by one of those sureties, which judgment is, at his request, assigned to his son, and at the same time releases the surety assigning the judgment, "from all responsibility and liability in any way arising out of his being surety," etc., such assignment operates as a payment in full of the demand, and inures to the benefit of his co-sureties and principal, and is a bar to any action which may be brought against him or them therefor.

APPEAL from *Tourgee, J.,* at Fall Term, 1872, of ALAMANCE.

The suit was brought by the relator against the defendant Tapscott, as sheriff, and the other defendants, his sureties, on his official bond for 1858, to recover the sum of $204.19, which sum the plaintiff alleged the defendant had received by mistake as sheriff of Alamance County, in excess of the true amount due on a certain execution issued by the Court of Pleas and Quarter Sessions of Caswell County against the relator, and which the defendant refused to return to him on demand. The defendant's counsel moved to dismiss the action, for the reason that the facts stated in the plaintiff's complaint, was not sufficient to support his action on the official bond of the defendant, Tapscott, his demand not being embraced in any of the conditions of that
(301) bond. This motion his Honor on the trial below refused, and the defendant excepted.

The defendant then introduced evidence tending to show that this demand of the relator had been settled at the instance of the defendant, by one G. M. Hazell, who was also a surety on his official bond, and

who held an execution against the relator, and which had been levied on his, the relator's, mill and land; that this judgment and execution was assigned to a son of the relator on account of the embarrassment of the latter, and that in consideration of such assignment, the relator and his sons executed to Hazell a paper in these words:

"STATE OF NORTH CAROLINA,
Alamance County.

Know all men by these presents, that we, John Ireland, John R. Ireland, and W. W. Ireland, for value received, do hereby release G. M. Hazell from all responsibility and liability in any way arising out of his being surety on John Tapscott's official bond as sheriff of said county, or in any other way.

Given under our hands and seals this 5 November, 1869."

Signed, sealed and witnessed.

The witness, W. J. Murray, testified that he drew the foregoing paper at the request of the relator and Hazell; that he first drew an instrument in all respects similar, except that John Tapscott's name was inserted in connection with Hazell; that the relator refused to sign the first, saying that "he did not wish to hurt Tapscott, but would hold on to him in order to get after the Griffises," the other sureties.

The counsel for the relator insisted, as there was no special plea of "release," no evidence tending to show one should be (302) allowed to go to the jury, and asked his Honor so to rule.

It was contended on the part of the defendant that the instrument read to the jury was a release, and as such operated to discharge the other obligors in the bond of the sheriff, the defendant Tapscott.

His Honor charged the jury that the instrument referred to, and above set out, was not a "release," but a "covenant not to sue," and was not a bar to this action. The defendant excepted.

There was a verdict and judgment for the relator, from which the defendant appealed.

W. A. Graham for appellant.
J. W. & J. A. Graham, contra.

PEARSON, C. J. We are inclined to the opinion that a refusal (304) to pay back money received by a sheriff in excess of the amount, balance due upon an execution in his hands, by a mistake in the mode of calculation, or by a mistake in reference to the introduction of other private matters of business on a "settlement" (meaning an account stated), is not a breach of the official bond of the sheriff, and is a private matter to be settled between the parties in correction of a mutual mistake, with which the security of the sheriff had no concern.

The cases cited by plaintiff's counsel, to the effect that if a sheriff in order to make the money, is forced to sell an article, and the proceeds of sale is in excess of the amount due on the execution, the excess belongs to the defendant in the execution, and for a refusal to pay, an action lies on the bond, because he collected the money, *virtute officii,* are wide of the mark, when relied on to support the position, that money received by mutual mistake, was collected *virtute officii.*

We put our opinion on the ground, that Hazell, one of the sureties on the bond, at the instance and request of the plaintiff, transferred to a son of the plaintiff a judgment against the plaintiff, which had been duly levied on his land, which transfer the plaintiff accepted in full satisfaction of any right of action which he may have been entitled to on the sheriff's bond, by reason of the alleged mistake. Suppose Hazell had paid to the plaintiff the amount of his claim in money, would not such payment have operated to extinguish the claim, so as to inure to the benefit of the other obligors? It can make no difference, that instead of paying money, Hazell paid money's worth, to wit: a judgment which he held against the plaintiff, that was actually
(305) levied upon the property, and of course, was as good to him as cash.

PER CURIAM. Error.

E. PAYSON HALL and wife AMANDA, v. BURTON CRAIGE and J. W. HALL.

The addition of the word "executors," in a judgment confessed by a defendant, is mere surplusage, and does not prevent his being charged, *de bonis propriis,* with the amount.

APPEAL from *Cloud, J.,* at ROWAN, Fall Term, 1872.

The complaint was against the defendants as individuals, and alleged that at June Term, 1860, of IREDELL, the defendants, as executors of one Solomon Hall, confessed a judgment in favor of the *feme* plaintiff, then Amanda Neely, for $13,000, and offered in evidence the transcript of the record of said judgment. To the introduction of the transcript, the defendants objected. His Honor overruled the objection and the transcript was read.

The defendants then offered to show the circumstance under which the judgment was confessed, and that it was done voluntarily and without any consideration, which being objected to by the plaintiffs was excluded by the Court. They then proposed to prove that early in the war they proposed to pay off the plaintiffs, in good notes due their testator, and that the plaintiffs declined to receive them, but told defend-

ants if they would proceed to collect the notes they would take the money. The defendants collected the notes in Confederate (306) money, which they tendered to the plaintiffs, who refused to take it. This evidence being also objected to by plaintiffs, was excluded by the Court. The defendants offered to show that the money collected on the notes, and which the plaintiffs refused to receive, was kept by them separate from other moneys, and that they had the same now for the plaintiffs, and subject to their disposal. This evidence, upon objection by the plaintiff, was likewise excluded by the Court.

His Honor was asked by the defendants to charge the jury, that there was a variance between the allegations of the plaintiffs' complaint, in which it was charged that the defendants as individuals owed the plaintiffs, and the evidence produced on the trial, to wit: a judgment against them in *antre droit,* which instructions his Honor declined to give.

Verdict and judgment for plaintiffs. Appeal by defendants.

Smith & Strong, and *Blackmer & McCorkle* for appellants.
Bailey, contra.

SETTLE, J. This case was before us at January Term, 1871, and is reported in 65 N. C., 51.

Although it involved at that time only a question of practice under the Code of Civil Procedure, we took occasion, in order to save further litigation, to express an opinion upon the point which is now presented for decision.

We listened with attention to the suggestions of the able counsel, who argued the case for the defendants at this term, but we are unable to see any reason for changing our opinion.

All of the points made by the defendants in the record before us are based upon the assumption, that they are liable only *de bonis testatoris;* but as that foundation must fall, all of the super- 307) structure must fall with it; the principal and incidents go together.

The fact that the defendants are styled "executors," etc., in the judgment of the Superior Court of Iredell County, can avail them nothing. A train of decision fixes their liability *de bonis propriis,* and the addition of the word "executors," in said judgment is mere surplusage.

The defendants' counsel attacked the form of the judgment in this case, because it does not distinguish the principal from the sum allowed as interest as directed by the Revised Code, chap. 31, sec. 90.

To this it was replied by Mr. Bailey that it appeared from the record that there had been several payments, which had discharged all

of the interest due, and also a portion of the principal, leaving only principal money due, and therefore the judgment was properly rendered.

At all events it is evident that the point was not intended to be presented by the record. *Kesler v. Hall,* 64 N. C., 60; *Hailey v. Wheeler,* 49 N. C., 159.

PER CURIAM. No Error.

Cited: *McLean v. McLean,* 84 N. C., 371.

L. D. CHILDS v. SILAS N. MARTIN and others, Directors, etc.

This Court will not review a decision or determination affecting neither the actual nor legal merits of a controversy. Therefore, an appeal from an order continuing in force a former order made in the cause, was dismissed.

MOTION to vacate an order restraining defendants, etc., heard (308) before *Logan, J.,* at Fall Term, 1872, of MECKLENBURG.

From the decision of his Honor, refusing to vacate the order restraining the defendants from further proceedings in foreclosing a certain mortgage, the defendants appealed. The point decided being simply a matter of practice, the facts necessary to an understanding of the same are sufficiently stated in the opinion delivered by the Court.

Bynum for appellants.
Schenck and *Bailey, contra.*

RODMAN, J. A brief statement of the proceedings in this case will make our opinion intelligible.

On 17 June, 1872, the plaintiff, Childs, issued a summons against numerous defendants, returnable to Fall Term of Mecklenburg Superior Court. On 22d June, Childs applied to the Judge of the Ninth District for an order restraining defendants from proceeding to foreclose a certain mortgage, and the Judge made the order restraining them until further order. At the same time, he directed the defendants to be notified to appear before him on 12th July. On that day, the defendants moved to vacate the restraining order, and the plaintiffs moved for an injunction. The Judge refused both motions, and continued the hearing of the case and also the restraining order until 22 July. From this order the defendants appealed to this Court. In the view we take of the case the amendment of the complaint, by adding other plaintiffs, is immaterial.

The only question as we conceive, is, was the order of the Judge one from which the defendants could appeal? The C. C. P. is liberal in giving the right to appeal? But it is of the nature of an appeal, that it must be from some determination, which affects in whole or in part the legal or actual merits of the controversy. It cannot be from a mere adjournment or continuance of an action, a mere post- 309) ponement of a determination for a reasonable time, or for an unreasonable time, provided it be for one which must necessarily expire before the appeal can be heard in the Appellate Court. Section 345 of the C. C. P. directs that a Judge in a case like this shall give his judgment *within* ten days; in this case the postponement was slightly beyond that time. But the section must necessarily be held merely directory, from the impossibility of this Court's giving any redress.

PER CURIAM. Appeal dismissed.

Cited: Wallington v. Montgomery, 74 N. C., 374; *Mitchell v. Kilburn, Id.,* 484; *Sutton v. Schonwald,* 80 N. C., 23; *Capel v. Peebles, Id.,* 92; *Long v. Gooch,* 86 N. C., 710; *Lutz v. Cline,* 89 N. C., 188.

SARAH V. YOUNG, in her own right, and as Adm'x *cum test. annexo* of Robert S. Young, v. ALFRED YOUNG and others.

1. A, in his will, gave to his wife "all my estate, real, personal and mixed, to be managed by her (and that she may be enabled the better to control and manage our children), to be disposed of by her to them, in that manner she may think best for their good and her own happiness": *Held,* to be a gift to the wife in trust, not for herself nor for the children alone, but for both, to be managed at her discretion for the benefit of herself and children.
2. *Held further,* that the trust is coupled with the power to dispose of the property among the children at her own discretion as to time, quantity and person; and that no one of them is entitled, as of right, to have a share of the property allotted to him upon his arrival at age.
3. This Court will not adjudicate a hypothetical case, which may or may not arise, for the mere purpose of advising as to circumstances altogether contingent and uncertain.

ACTION, brought to obtain the construction of a will, heard before *Logan, J.,* at Fall Term, 1872, of CABARRUS.

In 1864, Robert L. Young, the testator, was killed in one of the engagements of the late war, having first made and published the following as his last will and testament, to wit: (310)

"I, Robert S. Young of the county of Cabarrus, and State of North Carolina, do make this my last will and testament, revoking all wills or parts of wills heretofore made by me.

"To my beloved wife I give all my estate, real, personal, and mixed, to be managed by her (and that she may be enabled the better to control and manage our children), to be disposed of by her to them in that manner she may think best for their good and her own happiness.

"Witness my hand," etc.

Which will was duly admitted to probate, and the plaintiff, his widow, appointed administratrix with the will annexed.

As alleged in the complaint, the testator died seized of a large estate, real and personal, the latter, or most of it, being lost by the results of the war, leaving the defendants, his children, all under age at his death. That she has kept the children together, educating and maintaining them, and managed the estate to the best advantage.

The two eldest of the children had attained their majority before this action was instituted.

The plaintiff contends, that under a proper construction of the will of her husband, his estate is vested in her absolutely.

If not, and she is declared to be a trustee for the children, she prays directions as to the proper execution of that trust.

The defendants, admitting the allegations of the answer, contend that it was the true intent and meaning of the testator, as expressed in his will, to vest in the plaintiff the estate in trust for their benefit, with a limited power of disposal. Otherwise if the plaintiff is
(311) not a trustee, she can have only a life estate, as there are no words of inheritance.

His Honor, after argument in the Court below, adjudged:

1. Under the will the plaintiff has a general power in trust, which is to be construed equitably and liberally, that the *substantial intention* of the testator may be carried out, the plaintiff having both the power and intent.

2. Taking in consideration the value of the estate and the condition of the family of the testator in life, each child is to be raised and educated to his or her majority.

3. As each child arrives to his or her majority, such a portion of the estate is "to be disposed of by (her)," the plaintiff, to them, as a prudent parent would bestow upon a child starting in life.

4. The plaintiff is to "manage" all the property of the testator's estate received by her under his will in a prudent and economical manner, to effectuate and carry out the substantial instructions of said will as above stated, reserving and retaining at all times a sufficiency for her own comfort and "happiness."

5. The plaintiff has no right to convey any of the property as her own, but at her death the heirs of the testator will be entitled thereto.

From this judgment both plaintiff and defendants appealed.

Wilson for the plaintiff.
Battle & Son and *Allison* for defendants.

READE, J. The will which we have to construe is as follows:

"To my beloved wife I give all my estate, personal and mixed, to be managed by her (and that she may be enabled the better to control and manage our children), to be disposed of by her (312) to them, in that manner she may think best for their good and her own happiness."

Two of the defendants, have arrived at age, and the widow files her complaint, in which she says, that she has kept the property together and raised and educated the children; but now a controversy has arisen between her and the two defendants who have arrived at age; she claiming that the property "vested in her absolutely"; and they claiming that it "vested in her in trust for the benefit of the children." And thereupon the plaintiff, who is the widow of the testator, and administratrix with the will annexed, demands judgment of the Court.

"1. Whether, according to the proper construction of said will, it was the purpose and intent of the testator to vest the estate absolutely in the plaintiff? or,

2. To vest the same in her in trust for the benefit of the children?"

The defendants in their answer, state their claim somewhat differently from what the plaintiff does. They say, that the estate vests in the plaintiff, "in trust for the benefit of the defendants, with a limited power of disposal." And they further insist, that if the widow is not such a trustee then the most that she has is a life estate.

The construction which his Honor below put upon it is, that the widow has "both a power and an interest." And that "each child is to be reared and educated to his or her majority," and then to have a portion of the estate allotted; that the widow has "no right to convey any of the property as her own; but at her death it goes to the children."

1. We do not agree with the plaintiff that the property is her's absolutely. There is nothing in the will to indicate that his children were not objects of the testator's bounty. There is nothing like disinheriting them. On the contrary the gift is expressed to be in part "for their good," and it would be both unnatural and unusual for a father to disinherit all his children, all of whom were (313) young and dependent, and some of whom were too young ever to have offended him.

2. We do not agree with the defendants that the widow is simply a trustee for them, with a power of disposal to them, without any interest in her own right. There is nothing in the will to indicate that the testator intended to leave his wife without the means of support,

or to make her dependent upon the children. On the contrary, to show that she was an object of his bounty, the property is given to her, to be managed by her in part for "her own happiness," and to show that he did not intend to make her dependent upon the children, the property is given to her, to be managed by her as she may think best "to enable her the better to control and manage the children."

3. We do not agree with his Honor's construction that each child, as he or she becomes of age, is entitled to have a portion allotted.

4. It is evident that his wife and children were alike the objects of the testator's bounty.. It is also evident that he did not intend any immediate division of his property; but that he desired it to be kept together in the family, just as he would keep it if he could live, and under the management of his wife, whom he intended to put in his stead, with all the power and discretion over it, and over the children, which he would have, if living. The only difference being, that, while he could dispose of the property, if he chose to do so, outside of the family, and to the entire exclusion of the children, he intended that his wife should use and manage it inside of the family, using her own judgment and discretion as to the time when she would give off any portion to any one of the children, and as to *how much* she would give, and what she would give, discriminating according to her own judgment, so as to advance "her own happiness," and the "good of the children." And by the good of the children, he did not mean
(314) their pecuniary advancement only or mainly; but their moral, mental and religious training, and their filial duty and subjection. And herein is answered the argument of the counsel for the defendants, that as the management of the property was given to the widow to enable her to control and manage the children, it must be that the intention was to limit the time of such management of the property to the period when she was entitled to control the children, viz: during their minority. It is true, the mother's control over, and duties to the child, do in one sense partly cease at the child's majority; but it is equally true, that just then the child's filial duties to the mother begin afresh, and ever after grow and grow, as he goes forward to manhood and she goes backward to childhood. And it seems that this affectionate husband, and equally affectionate father, did not intend that at any time during the lifetime of his wife any one of his children should have the right to say, "give me the portion that falleth to me," but he intended, that, whether a child should get little or much, or sooner or later, must depend upon his good behavior and the confidence which he should inspire in his mother.

5. Our conclusion is, that the gift is to the wife *in trust,* not for herself, and not for the children, but for both, to be managed at her

discretion for the benefit of herself and children. That the trust is coupled with the *power* to dispose of the property among the children, discriminating at her own discretion as to time, quantity and person. The *trust* is, that it shall be managed and disposed of for the family. The *power* is, that she may discriminate as aforesaid. It is a vested interest in the children, subject to be divested by the exercise of the power as aforesaid. And, upon failure to exercise the power, or upon its partial exercise only, in the disposition of the property, so much as remains undisposed of at the death of the mother will (315) go to the children as tenants in common.

6. We are asked by the plaintiff "to declare how she shall execute the trust, if it be a trust." We can not do that further than we have already done. We cannot suppose cases, which may or may not arise, and pass judgment. We can only say, that the defendants who have arrived at age have no right, on that account, to have a share of the property allotted to either of them.

There is much learning in the books in regard to the creation of trusts and powers, in wills and other instruments; and numberless cases have arisen requiring construction. And for the sake of uniformity, and in order that too much might not be left to individual opinion, arbitrary or technical meanings have been given to words and phrases, sometimes so as to defeat the intention of the testator; but in the case before us, we have followed the plain and natural meaning of the language, which we believe to be in exact accordance with the testator's intentions. The case was very well argued on both sides. And although we have not displayed in this opinion the learning and cases cited, yet we have carefully examined and considered them, and we think that the principles which we have laid down are the legitimate conclusions from them. The principal cases in our own Court to which we would refer, are *Little v. Bennett,* 58 N. C., 156; *Alston v. Lea,* 59 N. C., 27, and *Cook v. Ellington, Ibid,* 371. And of the elementary writers, 1 Redfield on Wills, ch. 11; Jarman on Wills, and Hill on Trustees.

The judgment below will be modified in conformity with this opinion, and the cost will be paid out of the assets of the testator's estate.

PER CURIAM. Modified.

Cited: Russ v. Jones, 72 N. C., 55; *Crudup v. Holding,* 118 N. C., 231.

Dist.: Baker v. McAden, 118 N. C., 745; *Fellowes v. Durfey,* 163 N. C., 312.

(316)

JOHN L. HINTON v. BENJAMIN F. WHITEHURST and others.

1. The personal estate in the hands of an administrator, constitutes the *primary* fund for the payment of the debts of the intestate. By an Act of Assembly 1846, the lands of the intestate, is a *secondary* fund, liable only to be used in the payment of debts, when the primary fund is exhausted.
2. When an administrator two years after his qualification delivers certain slaves, the only personal estate of his intestate to the next of kin, and took from them refunding bonds, and in a suit against the administrator and heirs-at-law among whom the lands of the intestate had been divided, upon an old judgment: *Held*, that by the emancipation of the slaves by the sovereign, the condition of the refunding bonds were fulfilled, and that the lands were subjected to the payment of the plaintiff's debt.

ACTION, tried at Spring Term, 1872, of PASQUOTANK, before *Albertson, J.*, upon the following case agreed.

At Spring Term, 1870, of PASQUOTANK, the plaintiff obtained two judgments, one on a bond given by Grandy Harris, as principal, and Davis Whitehurst as surety, and the other on a bond given by the same parties to Jemima Thornton, against Benjamin F. Whitehurst, Adm'r of the said Davis Whitehurst, one of the defendants in this suit. On the trial then had the Court found "the defendant had fully administered and had no assets; that he had settled the estate of his intestate, and had taken refunding bonds from the next kin; that the actions had commenced after the expiration of two years from the administration by defendant, and is therefore as to him barred by the statute of limitations, but that the debts exist against the next of kin of the intestate, not being so barred as to them; that the debts were $1,411.29, with interest, etc., and $200, with interest," etc. On motion, defendant recovered his costs of plaintiff.

Grandy Harris was solvent until the results of the war made him insolvent, and he has continued to be since that time in insolvent circumstances. At the expiration of two years from his quali-
(317) fication as administrator, Benjamin F. Whitehurst, one of the defendants, delivered over the property of the intestate, consisting of slaves, to the distributees (the widow being one), and took refunding bonds as prescribed by law. The property so delivered was of greater value than sufficient to satisfy the claims, and remained in possession of the next of kin until the said slaves were emancipated by the sovereign. It is admitted that Benjamin F. Whitehurst, the administrator, knew that the bonds sued upon were still outstanding and unpaid at the time he delivered up the property to the next of kin.

The defendant, Benjamin F. Whitehurst's intestate, the said Davis Whitehurst, died seized and possessed of certain land, which, on a

petition for partition, was allotted to his heirs-at-law, the other defendants in this suit, before 1860, and which has continuously remained in their respective possessions up to the bringing of this action, except that after the judgments obtained as before set out, Forbes and wife, and Wood and wife had sold their several shares allotted to them for valuable considerations. The sale was before the commencement of this action. The plaintiff makes no claim against Benjamin F. Whitehurst individually, but only against him as administrator of Davis Whitehurst.

If, upon the foregoing statement of facts, the Court should be of opinion that the plaintiff is entitled to any relief, judgment should be rendered in his favor for such relief, otherwise for the defendants. His Honor being of opinion with the defendants rendered judgment as follows:

1. A judgment against B. F. Whitehurst, administrator of Davis Whitehurst, is denied.

2. Judgment against the lands of the other defendants is denied.

3. Judgment against the other defendants is denied in this action, the proper remedy in the first instance being upon the refunding bonds. (318)

4. Judgment against the plaintiff for cost.

From which judgment the plaintiff appealed.

Smith & Strong for appellant.
Batchelor & Sons for defendants.

PEARSON, C. J. By the common law, the heir is bound for no undertaking or debt of his ancestor, except covenants real, warranties, and debts charged on the land by *deed;* hence, the old form "For the payment of which I hereby bind myself and my heirs."

The personal estate is the *primary* fund for the payment of debts. An heir who paid a specialty debt, *i. e.* a bond in which he is expressly charged, had relief in equity, by which to be subrogated to the rights of a creditor, who had forced him to pay a debt, and have compensation out of the personal estate. This doctrine is treated of in the books under the head of Marshaling Assets.

By the statutes of this State, the land of deceased debtors is made liable for all of the debts as a *secondary* fund, in case the debt can not be made out of the personal estate, and the real representative is allowed to make up a collateral issue with the personal representative, by which to put upon him, if he applies for license to sell the land for the payment of debts, or upon the creditors if they seek to charge the land, because of the default of the personal representative in failing to apply for license to sell the land, the *onus* of showing that all of the

personal property is needed for the payment of debts, and will not be enough, so as to show that it is necessary to resort to the secondary in aid of the primary fund.

The administrator delivered the slaves to the distributees, taking refunding bonds as required by the statute; the distributees kept the slaves until emancipation. His Honor was of opinion, that the distributees could be charged on the refunding bonds for the value of the slaves, and consequently that the land could not be reached (319) until that fund is accounted for. We think the distributees do account for the slaves, by the fact of their civil death, and that this saves the condition of the refunding bonds.

The refunding bond has this condition "he will refund and pay his ratable part of such debt out of the part or share allotted to him." Rev. Code, ch. 46, sec. 24.

In reply to a *sci. fa.*, to show cause why execution shall not issue against him for his ratable part of a debt, the distributee alleges that the share allotted to him, to-wit: the slaves, has been lost by civil death, emancipation, without default on his part. This is good cause, and accounts for the slaves very satisfactorily; for it was the debt of the intestate, and never was the debt of the distributee, except in respect to the property which is lost, without a *devastavit* on his part.

Suppose a judgment against an administrator fixing him with assets, by reason of a slave, the property of the intestate, in his hand to be administered. Judgment *"de bonis intestatris."* Execution returned "no goods of the intestate to be found." *Sci. fa.* or debt suggesting *devastavit,* to charge the administrator *"de bonis propriis";* he alleges the death of the slave after the judgment without default in him: This is a good cause. Upon a strict analogy it follows that a distributee, who is bound to refund a ratable part of a debt out of the slave allotted to him, is not bound *de bonis propriis* in the first instance, for it is not his debt except in respect to the property allotted to him; by selling the property he makes a ratable part of the debt his own, and is chargeable *de bonis propriis,* but if the property dies a natural or civil death before he is fixed by judgment, the condition of his bond is saved.

We concur with his Honor in the opinion that the administrator is not liable. We think the parties to the refunding bonds are not liable; and our conclusion is, that the primary fund being accounted (320) for, the debt stands as a charge upon the land in the hands of the heirs.

In respect to the shares of the *femes covert* that have been converted by sale, the husbands are chargeable with a *pro rata* contribution, unless the purchase-money is secured for the separate use of the *femes covert,* in which event the fund will be charged.

Judgment below reversed. This opinion will be certified, to the end that judgment may be entered in the Court below, fixing the contribution and other matters of detail.

It is clear that under the old system our case would have been the subject for an original bill to marshal the assets, etc. In no point of view can it be treated as a fit subject for a "special proceeding" before a Judge of Probate for license to sell land to pay debts.

PER CURIAM. Reversed.

Cited: *S. c.*, 71 N. C., 66; 73 N. C., 157, and 75 N. C., 178; *Bason v. Harden*, 72 N. C., 285; *Badger v. Daniel*, 79 N. C., 384; *Worthy v. Brower*, 93 N. C., 350; *Lee v. Beaman*, 101 N. C., 299; *Glover v. Flowers, Id.*, 142.

MARY PORTER v. LEVI JONES.

Residents of other States in the Union can sue in the Courts of this State, *in forma pauperis*. C. C. P., sec. 72.

MOTION, before *Mitchell, J.*, at Fall Term, 1872, of ALLEGHANY.

The defendants filed an affidavit charging that the plaintiff had sued *in forma pauperis*, and that she was a non-resident, living in the State of Tennessee. The facts stated were admitted by plaintiff. The defendant then moved to dismiss the action upon the ground that a non-resident can not sue as a pauper in the Courts of this State. His Honor refused to allow the motion. Defendant appealed.

Folk and *Armfield* for appellant. (321)
J. W. Todd for plaintiff.

SETTLE, J. The sole question in this case is, can a non-resident of this State, but a resident of another State in the Union, sue in our Courts as a pauper?

The Code of Civil Procedure, sec. 72, enacts, that "any Judge of the Superior Court may authorize *any person* to sue as a pauper," when he shall comply with the terms of the act, etc., etc.

The expression, *any person*, is very broad and comprehensive, as is also the language in the Rev. Stat., ch. 31, sec. 47, and Rev. Code, chap. 31, sec. 43, but we can find no case in this State in which the right of a citizen of another State to sue as a pauper has come under review.

If we admit, as was argued by the able counsel for the defendant, that in England foreigners were excluded from the benefit of this class

of legislation, still that does not establish the position for which he contended; for while the States of this Union are sovereign and independent for certain purposes, they are united for others.

A citizen from a sister State stands on a very different footing from a citizen of a foreign government; for the Constitution of the United States declares that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State." And again, "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." These quotations illustrate the comity which our forefathers thought should exist between the citizens of the several States.

It can not be that precedents from the English books can afford light in construing the relations between citizens of the several States of the Union.

Our conclusion is, that there was no error in the ruling of his Honor, permitting the plaintiff, who resides in Tennessee, to (322) sue in our Courts as a pauper.

PER CURIAM. Affirmed.

Cited: Christian v. R. R., 136 N. C., 322.

STATE v. NICK ALFORD.

A person standing in *loco parentis*, can not be held criminally responsible for correcting the son of the woman, with whom, at the time, he was living as man and wife, unless the punishment inflicted exceeded the bounds of moderation and tended to cause permanent injury.

INDICTMENT for assault and battery, tried at WAKE, Spring Term, 1872, before *Moore, J.*

The battery was alleged to have been committed on a boy, the son of the woman with whom the defendant was living as man and wife. The evidence on the trial is fully stated in the opinion of the Court.

The jury under the charge of his Honor found the defendant guilty. Motion for a new trial; motion overruled. Judgment and appeal by defendant.

Busbee & Busbee for defendant.
Attorney-General Hargrove, contra.

BOYDEN, J. In this case his Honor charged the jury that if they believed the evidence, the battery was excessive and the defendant was guilty.

The evidence was, that the defendant lived with the mother of the boy, and although they were not married, they acted and lived as man and wife, and the mother committed the custody of the boy to the defendant; and that for some misconduct, the defendant (323) whipped the boy, who made considerable outcry, and four days afterwards there was a mark on his back the width of a broomstraw, two inches long, where the skin had been broken and there was some discoloration. The charge of his Honor was not in accordance with the law as laid down by this Court in the case of the *State v. Pendergrass,* 19 N. C., 365.

In that case the defendant was a teacher of a school of small children, that upon one occasion, after mild treatment towards a little girl six or seven years old, had failed, the defendant whipped her with a switch, so as to cause marks upon her body, which disappeared in a few days. Two marks were also proved to have existed, one on the arm, and another on the neck, which were apparently made with a larger instrument; but which also disappeared in a few days.

In that case, his Honor, the late Judge GASTON, as humane a Judge as ever presided in a Court, discussed the question at much length, and laid down the rule governing such cases. His Honor says "the line which separates moderate correction from immoderate punishment can only be ascertained by reference to general principles. Any punishment therefore which may seriously endanger life, limb or health, or shall disfigure the child, or cause any other permanent injury, may be pronounced in itself immoderate, as not only being unnecessary, for, but inconsistent with, the purpose for which correction is authorized."

But any correction, however severe, which produces temporary pain only, and no permanent injury, can not be so pronounced, since it may have been necessary for the reformation of the child, and does not injuriously affect its future welfare. "We hold therefore," says his Honor, "that it may be laid down as a general rule that teachers exceed the limits of their authority when they cause lasting mischief; but act within the limits of it, when they inflict tempor- (324) ary pain."

The same rule must govern this case. There is no evidence of malice, but the case states that the correction was for some misconduct of the boy. It is not pretended that any permanent injury was inflicted, or that an improper instrument was used in correcting the boy, and it is highly probable that the slight mark was caused by the resistance of the boy, as the case states that the boy made considerable outcry.

We, therefore, think his Honor should have instructed the jury, that as it appeared that the chastisement was for the misconduct of the boy, and as the defendant acted in *loco parentis,* and the injury did

not, nor was it in its nature, calculated to produce lasting injury to the boy, it did not exceed the limits of the power granted to the defendant, and he was entitled to a verdict of not guilty.

PER CURIAM. Error.

Cited: *S. v. Jones,* 95 N. C., 592; *S. v. Thornton,* 136 N. C., 616.

(325)

EBENEZER and J. C. FROST, Adm'rs of J. N. Frost, v. JOHN W. NAYLOR.

1. A *chose in action,* if selectel by the owner, may be allotted as a part of the personal property exemption, secured to the citizen by sec. 1, Art. X, of the Constitution.
2. The allotment of exempted property may be renewel from time to time so as to keep constantly in possession of the citizens $500 worth of personal property for the comfort and support of himself and family.

APPEAL from the Clerk, heard by *Cloud, J.,* at Fall Term, 1872, of DAVIE.

The proceedings were instituted upon the affidavit of the plaintiffs suggesting that the defendant, a judgment debtor, had property which could not be reached by an ordinary execution, and asking an order subjecting him to an examination in relation thereto. The order was granted, and in the examination which followed, among other things not pertinent to the points raised and decided by this Court, it appeared that the defendant, John W. Naylor, the judgment debtor, had or had had the control of a note in the hands of another party, for $78.70, which he claimed as part of his personal property exemption. It was also in evidence, *aliunde,* that the homestead and personal property exemption of the defendant had been allotted to him in 1869, and that this note of $78.70 had been given in part payment of the purchase-money for the land then assigned him, and which he had, since the assignment sold. The Clerk condemned the debt to the use of plaintiffs, and appointed a receiver, from which order the defendant appealed. Upon the hearing below, his Honor set aside the order of the Clerk, adjudging that the receiver return to the defendant the claim of $78.70, which he has a right to as a part of his personal property exemption, and that plaintiffs pay costs, etc.

From this judgment plaintiffs appealed.

(326) *Bailey* for appellants.
Gray for defendant.

READE, J. 1. The first question is, whether a *chose in action* can be selected by a debtor, as a part of his personal property exemption.

Under our statute (Rev. Code, ch. 45, s. 89), prior to our present State Constitution, certain articles were exempt from execution; "one cow and calf, ten bushels of corn, fifty pounds of bacon, farming tools for one laborer, one bed, etc., for every two members of the family, and such other property as the freeholders shall deem necessary for the comfort and support of the debtor's family—such other property not to exceed in value fifty dollars at cash value." And in *Ballard v. Waller,* 52 N. C., 84, the question was, whether a *chose in action* might be assigned under "such other property," etc. It was decided that it could not, for the reason that "such other property" must be understood to name such like property as had been expressly named. But the language in our Constitution is different. It does not mean any property, but exempts "personal property of the nature of five hundred dollars, to be selected by the debtor." A *chose in action* is property, and, if selected by the debtor, it must be exempt.

2. The second question is, whether the debtor is restricted to the first allotment of exempted property, or whether he may have it renewed from time to time, so as to keep constantly about him exemptions to the value of five hundred dollars? A like question arose under the former statute of exemptions, *supra;* and it was decided that the allotment should be made from time to time, and as often as the debtor might be pressed with executions; the policy being to enable the debtor not only to have the exemptions allotted to him once, but to keep them about him all the time, for the comfort and support of himself and family. *Dean v. King,* 35 N. C., 20. And such is the policy of our constitutional provision; and it allows the (327) debtor to *select* what he may think most useful. In this it differs from the former law, which either named the articles which might not be the most useful in certain cases, or allowed the "freeholders" to name the articles.

PER CURIAM. Affirmed.

B. F. MOORE, Comm'r, v. WILLIAM H. SHIELDS, Adm'r *de bonis non*, etc., Medora B. Harrison, and others.

1. As a general rule, the creditors of an ancestor are entitled to all the rents and profits received by the heirs, since the descent cast. If, however, the heirs are infants, and the guardian has expended the rents and profits, or any portion thereof, in the necessary maintenance and support of the heirs, only that portion unexpended belongs to the creditors.
2. A fund, in the hands of a Commissioner of the Court, in the nature of rents and profits, which fund originated in a compromise of a certain suit in equity, against the purchaser of land sold by order of the Court, and which sale, by the terms of the compromise, was rescinded,

belongs to the administrator and is assets for the payment of debts, subject to the exception in favor of the heirs being allowed necessary maintenance therefrom.

APPEAL from *Watts, J.*, at Fall Term, 1872, of HALIFAX.

This proceeding was instituted by the plaintiff, for the purpose of obtaining a decree, declaring the proper application of a certain fund, received by him as Commissioner of the Court, for the benefit of certain infant heirs, under an order of the Court in a former suit, in the decision of which the fund originated.

In the complaint, it is alleged by the plaintiff, and all the allegations are admitted to be true, that in 1861, one J. H. Harrison,
(328) of Halifax County, died intestate, and that letters of administration on his estate were, during that year, granted to B. D. Mann. That the intestate was indebted to the full amount of his personal estate; and being seized and possessed of a large real estate, it was deemed advisable by the guardian and friends of his heirs that it would best promote their interests to sell the same and convert it into money for investment. For this purpose, a petition was filed in the Court of Equity of Halifax County, in their names and that of their mother, who was entitled to dower in the lands sought to be sold, and a decree of sale obtained. That among the tracts sold in pursuance of the decree, was one of 1,400 acres, which with the dower theretofore allotted to the widow of the intestate, and the mother of the said heirs, was bid off by one J. J. Sherrod, in December, 1863, at the price of $30,000, several thousand dollars of which was paid in Confederate money, which was received by the guardian, of the said heirs, one W. H. Jones, a defendant herein, for the purpose of paying the large amount of taxes then due from the estate, and of supporting his wards, the orphans of the intestate.

At the close of the war, the heirs, by their guardian, the said W. H. Jones, sought, by a suit in equity, to collect from the estate of the purchaser, Sherrod, who was then dead, and one Asa Biggs was his administrator, the balance due for said land. Sherrod's administrator filed a petition in the cause, alleging that the price bid for the land was payable, according to contract, in Confederate money. This allegation was denied, and after no little delay, the matters in dispute were compromised upon the terms following, that is to say: That the sale to Sherrod should be rescinded, and the land become the estate of the parties entitled to it at the time of the sale, and that beside the sums previously paid by Sherrod, his administrator should de-
(329) liver the note due for the rent of 1870, to-wit: for $160, and pay the further sum of $6,110, with interest from 1st January, 1870, making in the aggregate $6,247.42, on the 16th day of May, 1860, of which one-third was decreed to the widow of the intestate, for the

damage sustained by her in respect of her right of dower in the premises. The balance, after deducting costs, attorney's fees, etc., due the wards, was $3,727.98, and two-thirds of the note of $160, due 1st January, 1871.

On account of the insufficiency of the bond of the guardian, and the guardian's failure to renew it, it was decreed by the Court that the fund should be delivered to the plaintiff, as commissioner for investment.

At the death of the administrator, Mann, in 1863, the estate of Harrison, his intestate, had not been settled up, and there were still outstanding debts to a large amount; nor had there been an administrator *de bonis non* appointed at the time of the compromise before alluded to.

One of the heirs, Medora B. Harrison, is of age, and with the guardian of the others, claims that the fund in the hands of the plaintiff, should be delivered to them. The fund is also claimed by the administrator. The plaintiff asks the advice of the Court as to whom it belongs and how he shall dispose of it.

Shields, one of the defendants, and administrator *de bonis non* of the said J. H. Harrison, in his answer, alleges that he has received nothing from the personal estate of the intestate, and that nothing can be now realized therefrom, and the estate is largely in debt, enough in fact to absorb the $6,727.98, the amount received upon the compromise alluded to before. That if this fund is not available, the real estate will have to be sold. He insists that the fund should be applied to the payment of debts.

In the interest of the heirs, it is alleged that the fund received from Sherrod's estate, was for the use and occupation, rents and profits of the tract of land purchased by Sherrod, and as such the heirs are entitled to it. The guardian, Jones, further alleges, (330) that owing to his inability to realize anything in the way of income from the land during the war, and since, on account of the litigation in regard to it, his expenditures for the wards, entirely for necessary purposes, have largely exceeded the income, which necessary expenses he has from time to time advanced, being under the impression that the estate was entirely solvent, and that the fund in question belonged to the heirs. He asks for an account of his guardianship, and that he be reimbursed those sums necessarily expended for his wards, and that the fund be paid to them.

His Honor being of opinion that the fund in the hands of the plaintiff as commissioner, was in lieu of rents and profits arising from the land sold during the possession of the purchaser, and is the property of the heirs-at-law, adjudged and decreed: 1st. That the defendant, Jones, the guardian, is entitled to so much of the fund as will reimburse

him for all necessary advancements made to his wards, over and above the income received by him; and that an account be taken, and the plaintiff pay over to the guardian such sums as are thus ascertained to be due. 2d. That in the meantime the fund to remain in the hands of the commissioner. From which judgment, the defendants, Shields and Medora B. Harrison, appealed.

Gatling, Batchelor, Edwards & Batchelor for appellants.
Moore and *Clark & Mullen, contra.*

RODMAN, J. 1. We have no difficulty in saying that the fund in the hands of Mr. Moore must be considered as the rents and profits of the lands. It is not a part of the land, because that remains in specie, in the possession of the heirs and it does not appear that it has been wasted or dilapidated.

(331) 2. As to the application of the fund, we think we are bound by the decision in *Washington v. Sasser,* 41 N. C., 336. Previous to that decision it was the general opinion of the profession, founded on what was said in *Harrison v. Wood,* 21 N. C., 437, that the heir might hold against the creditors of his ancestor, all the profits of the land which accrued from the time of the descent cast up to a sale under process at law, or to a decree in equity, and that his right in this respect, was the same in a Court of equity as at law. The general rule that the creditors of the ancestor are entitled to all the rents and profits received by the heir, since the descent cast must now be considered established by *Washington v. Sasser.* It is supported by other authority. 2 Story Eq. Jur., 1216, and *Curtis v. Curtis,* 2 Bro. Ch. Cas., 628—633.

It is said, however, that the creditors are the only persons who can demand the application of this fund to the debts, and they ought to be parties, or some of them in behalf of all. They are substantially parties, for the administrator represents them, and there is no more reason for their being personally parties to a proceeding to subject the rents and profits than for their being such in a proceeding to sell the lands. In either case they may come in if they have any reason to do so; if, for example, by reason of any adverse interest in the administrator, or from his misconduct he is not properly representing them. But until they do come in personally, the administrator is their trustee and representative. It is true, that an administrator is not accountable to the creditors for the rents and profits of the lands, unless he actually receives them, nor is he entitled to receive them any more than he is to sell the land, except upon the insolvency of the personal estate, and upon a proper action in Court for that purpose. It is his duty, by statute, to obtain an order to sell the land; it is not

expressly made his duty to proceed to obtain the rents and profits, but it is his duty in a proper case to do so, as a part of his general duty to collect the assets. If he fails to do either, he can (332) not be charged with the value of the land in one case, or with the rents and profits in the other as assets. The creditors may, as to the lands, obtain a judgment compelling him to sell them, and they may in like manner obtain a judgment that the rents and profits be paid to him, to be administered, if they be content that he shall administer them; or by a creditor's bill they may have lands and profits administered by an officer of the Court, as personal assets; upon such a bill would be, thus procuring an equality of distribution and excluding the administrator from his right to prefer. In the present case the creditors have not thought proper to come in, and the Court without some reason for it, will not take from the administrator the administration of the assets whether real or personal, which is his of right.

Again, it is said for the heirs, that the land should be sold and the proceeds exhausted in preference to the rents and profits. There is no such rule of law, and we do not know of any reason why this should be so as a general rule. The creditors are entitled to have their claims paid; but if there be more property than enough for this, it is no concern of theirs what particular property is applied for that purpose. That must be a matter of discretion in each case depending on the circumstances, and a Court will always make its judgments as to the selection of the property to be applied, such as to promote the interests of the heirs. But there is no case for selection made here. There is but one fund in Court. And if we could, in this case, order a sale of the land without its being applied for, we should think that in most instances it would be for the interest of the heir to extinguish the debts by the rents and profits not needed for his maintenance, and save the land. No reason is presented to make this an exception.

3. *Washington v. Sasser* also decides upon the authority of (333) *Thompson v. Brown,* 4 John, C. C., 619, that if the heir be an infant and the guardian has expended the rents and profits, or any part of them in his maintenance, only the part remaining unexpended is liable to the creditors. We think that when a guardian has disbursed the income for the maintenance of his wards *bona fide,* and in ignorance of the insolvency of the estate, his equity not to be compelled to pay those sums over again to the creditors is a plain one. In this case the guardian has not actually disbursed any part of the fund, it not being in his possession; but he says that he has made advances or incurred liabilities for the wards, depending on the fund in question for reimbursement, and that would be the same thing as disbursing. We agree with his Honor, the district judge, upon this point.

So much of the fund as will be equal to the advancements of the guardian, made as aforesaid, will be adjudged to be paid to him; the residue of the fund will be paid to the administrator, to be applied by him in due course of administration. If the parties do not agree upon the amounts, a reference must be had to take the necessary accounts. The costs will be paid out of the fund.

If the parties desire it, the case may be remanded for further proceedings in the Superior Court, in conformity to this opinion.

PER CURIAM. Judgment accordingly.

Cited: *S. c.*, 69 N. C., 50; *Hinton v. Whitehurst,* 71 N. C., 69; *German v. Clark, Ib.,* 421; *Wetherell v. Gorman,* 73 N. C., 384; *Jennings v. Copeland,* 90 N. C., 580; *Coggins v. Flythe,* 113 N. C., 119; *Shell v. West,* 130 N. C., 173.

(334)

C. S. WOOTEN, Adm'r of WAIT THOMPSON v. JOHN V. SHERRARD and others.

1. The maker of a note payable on demand, may at any time before the demand, make a tender, which will have the same effect, as if the note was payable on a certain day, and the tender was made on that day.
2. Confederate treasury notes were issued by that government with the intent that they should circulate as money, and practically, both by banks and individuals, they were deemed and treated in all ordinary business as money.
3. The Courts of this State have habitually treated notes payable in Confederate money, as having all the attributes of promissory notes, and a tender of the like money in payment of such, which the payee refused to receive, will not bar the debt.

APPEAL from *Clarke, J.,* at Jan. (Special) Term, 1872, of WAYNE.

Plaintiff brought this action upon the following bond, given to his intestate:

"With interest from date, we promise to pay Waitmore Thompson the sum of twenty hundred dollars, for value received. 6 October, 1862."

JOHN V. SHERRARD. [Seal.]
WM. LEWIS. [Seal.]
JOHN COLEY. [Seal.]

Upon which a payment of $60, was indorsed 12 Jan., 1867, and also another payment of $134, 16 Sept., 1869.

The defendants did not deny the execution of the bond; but alleged that the note was given for borrowed Confederate money, and that

there was an express understanding between the parties, at the time the bond was given, to the effect, that it should be solvable in Confederate currency, at any time within twelve months after its date. They further alleged, that a tender of payment in Confederate money, to the full amount due on the bond, was made by defendant Sherrard, once or twice before the expiration of the twelve months, and several times afterwards, and that the plaintiff's testator each (335) time refused to accept the same.

The defendants, Sherrard and Lewis, further answered specially that they had been declared bankrupt, and had received their discharges in bankruptcy.

When the case was called in the Court below, the defendant, Coley moved for a separate trial, which was objected to, but allowed by the Court, and the case was tried as against Coley alone. On the trial, the defendant, Coley, called Sherrard, the principal in the bond sued on, and proposed to prove that at the time the bond was given there was an agreement and understanding between him and the plaintiff's intestate. This being objected to, the defendant proposed to show that Sherrard had received his discharge in bankruptcy, which testimony was also objected to. His Honor overruled both objections, and the allegations contained in the answer of the defendants were proven by the evidence of Sherrard.

Upon issues submitted to them, the jury found the following facts:

1. That the bond sued on was given for Confederate money.

2. That it was the understanding, when the bond was given, that the obligee, the intestate of the plaintiff, would receive in payment of the bond Confederate money at any time within twelve months from its date.

3. That a tender of Confederate money had been made as alleged.

His Honor having held that the tender by Sherrard discharged the bond *in toto* gave judgment in favor of the defendants and against the plaintiff for costs. From this judgment the plaintiff appealed.

Faircloth for appellant.
Smith & Strong, contra.

RODMAN, J. The complaint alleges, that on 6 October, 1862, (336) Sherrard borrowed of Thompson $2,700 in Confederate money, and gave him a note for that sum payable on demand in dollars generally, to which Lewis and Coley were sureties. Some small payments were made on the note in 1867 and 1869, but a residue remains due. The plaintiff is administrator of Thompson.

The answer admits the execution of the note, and that it has not been paid in full, but says that at the making of the note it was agreed be-

tween Thompson and Sherrard, that the latter might pay it at any time within twelve months after its date, in Confederate money, and that within that time Sherrard did tender the amount due, which Thompson refused to receive. Sherrard and Lewis plead their certificates of discharge in bankruptcy. Issues were submitted to the jury, and they find the defences above set forth to be true. The Judge gave judgment for defendants; from which plaintiff appealed.

We think it immaterial, whether the evidence of Sherrard to prove that Thompson agreed to take payment in Confederate money at any time within twelve months after the date of the note, was competent or not. The construction of the note would be the same in either case. The maker of a note payable on demand, may at any time before demand make a tender which will have the same effect as if the note were payable on a certain day, and the tender was made on that day.

The act of 1866 makes the note presumptively payable in Confederate money, and the presumption is not rebutted or attempted to be.

The only question, therefore, is as to the effect of the tender of Confederate money in May, 1863. We have twice considered this question recently. *Terrell v. Walker,* 65 N. C., 91; S. c., 66, N. C., 244.

(337) Since these decisions we have considered the subject in every light in which it has occurred to us, and we have seen no reason to doubt of their soundness.

If a contract to pay in Confederate money is to be governed by the rules which apply to contracts to pay money generally, it can not be contended that a tender which the creditor refuses, bars the debt. 2 Pars. Cont. 638. If such contract is to be regarded as being for the delivery of specific articles, a tender would have a different effect. *Patton v. Hunt,* 64 N. C., 163.

At first it might have been a debatable question as to how, upon general principles of equity, justice, and public convenience, such contracts should be treated. That question must now be considered settled by the view which has been heretofore uniformly taken of them, by the usage of the people, the enactments of the Legislature and the decisions of our Courts. Confederate treasury notes were issued by that government, with the intent that they should circulate as money. They were never pretended to be made a legal tender, as United States treasury notes were, but for several years they did circulate as money among the millions of people within the lines of the Confederate States, just as the United States treasury notes did without those lines.

Notes intended and agreed to be payable in them, were written payable in dollars generally. Practically they were deemed and treated in all ordinary business as money, both by banks and individuals.

The Convention of 1865, and the Legislature of 1866, by the ordinance and acts, which have been so frequently referred to in the decisions upon this subject, spoke of them as money, and provided a scale, by which their value at different dates, should be ascertained and enacted that a note given upon a loan of Confederate money should be deemed payable in gold of the value of the loan *at the date of the note.* (338)

Thus, certainly, declaring that such notes were not to be treated as contracts for specific articles, because upon a breach of such a contract, the well known and the only just rule fixes the damages at the value of the article *at the time for the delivery.* And in respect to contracts strictly for the future delivery of such articles, as cotton, wheat, etc., it is at least doubtful, whether a Legislature could constitutionally alter that rule.

The Courts of this State have habitually treated notes payable in Confederate money, as having all the attributes of promissory notes, and in no single instance, has it been suggested that they were to be governed by the rules applicable to contracts for specific articles. Actions of debt have been maintained on them. *Parker v. Carson,* 64 N. C., 563 Payments made in them have been pleaded and treated as payments of money. Interest has been adjudged on them, at the rate fixed by law for money contracts. The interest has been habitually calculated by the Clerks of Courts, as statutory damages for the detention of money. They have been considered negotiable by endorsement, and the endorsers held liable as such. *Woodfin v. Sluder,* 61 N. C., 200; *Phillips v. Hooker,* 62 N. C., 193; *Summers v. McKay,* 64 N. C., 555. None of which incidents attach to contracts for the delivery of specific articles. Sheriffs and clerks, executors and guardians, have been held justified in receiving payment in them, while they scarcely would have been in receiving strictly specific articles.

It is true, that notes payable on their face in bank bills, have been regarded as contracts for specific articles. *Patton v. Hunt, ubi sup.,* 206. But that would not be so if the mode of payment did not appear on its face, nor except under peculiar circumstances would parol evidence be received to prove such an agreement. But bank bills can not be considered in the same light as Confederate treasury notes. They have never been the *sole* currency of the country, as these were; and there has never been a statutory presumption, that contracts (339) for *money* were payable in them. The view which this Court took of such contracts from the first, has been also taken by the Supreme Court of the United States in *Thorington v. Smith,* 8 Wall, 1, and in all of the Southern States whose reports I have examined.

In Virginia alone, in the first case which occurred on this subject, *Dearing v. Rucker,* 18 Grat., 434, a majority of the Court regarded

contracts payable in Confederate money, as contracts payable in specific articles, and held that the damages for a breach were the value of the money *at the time of its delivery.* MONCURE, J., dissented. The question occurred to the learned and able Judge, who delivered the opinion of the Court, what was to be done when the delivery was to be made at a date which came after the close of the war? To be consistent, he would have been obliged to hold, that a delivery then of the worthless paper would have been good, although the payer had received value; but he shrunk from this conclusion, and thereby confessed the weakness of the argument. That Court has since then been constantly struggling to avoid the inequitable consequences of their general rule in particular cases. *Lohman v. Crouch,* 19 Grat., 331; *Magill v. Manson,* 20 Grat., 527, until at last if they can be said to have any general rule, it is in conformity with ours. *Stover v. Hamilton,* 21 Grat., 273; *Parish v. Dyce, Ib.,* 303.

In its first decision that Court went on the idea that every transaction in Confederate money was a speculation in a fluctuating commodity, and concluded that the seller for future delivery, was entitled to the profits of the depreciation. As to the country generally, however, it may have been in Richmond, the theory was not true in fact until very near the close of the war, and as soon as it became true, the money ceased to circulate. Our Courts have gone on the equity, that the borrower ought to return the value which he received. That (340) is the foundation of our legislation and of our decisions.

But even in Virginia, where that consequence might seem to follow from the theory, that Confederate treasury notes were specific articles, it has never been supposed that a tender and refusal barred the debt. *Magill v. Manson, ubi supra.*

In Tennessee, the doctrine finally established is substantially the same with ours. 1 Heisk.

In Georgia it seems that the jury finds the value of the contract at discretion. *Cohen v. Ward,* 42 Ga., 337. In all the States, however, except our own, the law seems to be in a disastrous state of uncertainty, from which we have happily escaped through the wisdom and moderation of the Legislature and of our predecessors.

It should not escape attention that whatever rule may be applied to contracts for the payment of money made during the war, cases will occur which appear hard. Whenever a thing which once had value loses it, the loss must fall on one of two equally innocent parties. No Court could or should be allowed to decide each case according to its particular equity. General rules must be established for the welfare and repose of society, they must be adhered to, unless shown to be plainly unreasonable.

PER CURIAM. *Venire de novo.*

Cited: Bank v. Davidson, 70 N. C., 120; *Wooten v. Sherrard,* 71 N. C., 374; *Love v. Johnson,* 72 N. C., 420; *Medicine Co. v. Davenport,* 163 N. C., 298.

(341)

GEO. W. McMINN v. JULIA A. FREEMAN, Exec'x, etc.

The purchaser of a bond from one who is not an agent of the obligee, but to whom the bond had been given for the purpose of handing it to a lawyer for collection, acquires no interest therein, and can not maintain an action for its recovery.

APPEAL from *Cannon, J.,* at Spring Term, 1872, of HENDERSON.

The plaintiff brought suit on a note given by the testator of the defendant to one Frances Bane for $100, in a Justice's Court, from whence it was carried by the appeal of the defendant, to the Superior Court.

It appeared on the trial that the plaintiff purchased the note of one J. D. Bane, a son of Frances Bane. The note was not endorsed, either by Frances, or J. D. Bane, though the plaintiff testified that it was his property, and that he gave valuable consideration for it—refusing to state, however, what that consideration was.

Frances Bane swore that the note was her property at the time the plaintiff stated he had purchased it; that at the suggestion of J. D. Bane, her son, she gave it to him to hand to some lawyer in Hendersonville for collection, which he promised to do. She further stated that J. D. Bane was not her agent to sell the note, or dispose of it in any manner, nor was he then, or at any other time, her agent for any purpose; that she never sold nor gave said note to J. D. Bane, and that she had never parted with the title thereto.

His Honor charged the jury that if they believed Frances Bane, the plaintiff could not recover. Plaintiff excepted.

Verdict and judgment for defendant and appeal by the plaintiff.

No counsel for appellant in this Court.
Coleman for defendant.

READE, J. The obligee in the bond sued on, delivered it to (342) her son to deliver to a lawyer for collection; and the plaintiff says he bought it of the son, and he now holds it without endorsement. The question is, did the plaintiff acquire any title to the bond or any right to maintain an action on the same?

Before the adoption of the Code, we suppose no one would have ventured the action. The Code, however, requires the "real party in interest" to sue. And if the plaintiff could show that he had any inter-

est in the bond, he could maintain the action without an endorsement of the bond to him. But he has no interest whatever in the bond. The son was not an agent to sell the bond, but simply to hand it over to a lawyer for collection. He was not the agent of the obligee to act for her generally; if he had been, there would have been some grounds for the plaintiff's claim. But he was agent for a special object only, and his powers were limited by his instructions. Story on Agency, 126.

PER CURIAM. No Error.

SIDNEY A. POWELL v. J. M. WEITH.

The mistake, inadvertence, surprise, or excusable neglect, styled in sec. 133, Code of Civil Procedure, as a ground for relieving a party from a judgment, etc., is a question of law, and if the Judge below errs in his ruling in regard thereto, this Court will review his decision. The Judge is the sole finder of the *facts* upon which application for such relief rests.

MOTION to set aside a verdict and judgment, the latter obtained at Fall Term, 1871, heard by *Tourgee, J.*, at Fall Term, 1872, of GUILFORD.

(343) The original action was *case,* commenced on 11 August, 1863, and returnable to Fall Term, 1863, of Guilford. No declaration or incipiter was filed until August Special Term, 1870. At Fall Term, 1870, the case having been removed into the new Superior Court in January, 1869, judgment was rendered in favor of the plaintiff.

Within the time prescribed by section 133, Code of Civil Procedure, the defendant makes this motion to set aside the judgment, on the ground of excusable neglect. His Honor overruled the motion and the defendant appealed.

Other facts, pertinent to the point made, are stated in the opinion of the Court.

Dillard, Gilmer & Smith, and *Scott* for appellant.
Morehead, contra.

READE, J. C. C. P., section 133, allows a Judge "in his discretion, and upon such terms as may be just, at any time within one year after notice thereof, to relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect."

We have repeatedly said, that what is meant by "mistake, inadvertence, surprise, or excusable neglect," is a question of law, and that if

the Judge below erred in his ruling as to the law we could review him, just as in any other case. And we have as frequently said that his Honor below is the sole finder of the *facts* upon which the application rests. Simple as this seems to be, we have hitherto been unable to induce the practice to conform to it.

After his Honor hears the evidence he ought to declare that it is, or is not sufficient to set aside the judgment. And, if both parties are satisfied with his ruling, there is an end of it; but if either party desires to appeal, then the case is made up for the Supreme Court, as in any other case. And when the case comes up we (344) consider his Honor's finding of the facts as we would a special verdict, or as a case agreed, and declare the law thereon. For example: The facts were that the plaintiff sued the defendant in 1863 for deceit in the sale of tobacco. The defendant employed John A. Gilmer, a lawyer practicing in the Court, to defend the suit, and left with Mr. Gilmer a written contract between himself and plaintiff, which Mr. Gilmer assured him was a complete defence, and that he need not give the case any further attention. That Mr. Gilmer engaged the assistance of Messrs. Scott & Scott, attorneys of that Court, and subsequently formed a law copartnership with his son, and died pending the suit. That the suit was pending at the adoption of the Constitution in 1868, and was transferred to the new Court within one year thereafter, and was tried at Fall Term, 1871, and was defended by Mr. Gilmer, Jr., and Messrs. Scott & Scott, when the plaintiff had verdict and judgment. That defendant was a resident of New York, and never gave the suit any attention after he employed Mr. Gilmer, and was not present at the trial. That defendant's counsel did not have the alleged written contract on the trial, but the plaintiff had it and exhibited it, but it was not used or asked for by defendant's counsel. The defendant had notice of the result of the trial soon after and took no steps for an appeal. And these facts were held by his Honor not to make out a case of excusable neglect.

The foregoing are the facts in this case, if we have gathered them correctly from the confused mass before us, and upon this state of facts we are of the same opinion with his Honor. But instead of stating the case in some such succinct way as above, we have twenty-one legal cap pages of testimony, not facts, but testimony, not one word of which is it proper for us to consider. And then we have twenty-one questions, many of them involved and immaterial, and all of them irregular, propounded by the defendant to his Honor, (345) which his Honor (protesting all the while as to their immateriality and as to the irregularity of being thus catechised) proceeded to answer *seriatim*, covering twelve pages. And then we have divers exceptions on the part of the defendant, not to the rulings of his Honor

as to the law, but as to his finding of the facts, not one of which we can review. And then we have nine exceptions on the part of the plaintiff to the defendant's exceptions, in which the plaintiff maintains that the Judge's finding of the facts were right.

We know the anxiety of counsel to get in everything on their side and the commendable disposition of the Court to indulge; but we earnestly press upon the attention of the profession and of the Courts, that such records have but little of the impress of "civil procedure," and tend to oppress suitors with costs and delay.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: *Keener v. Finger,* 70 N. C., 43; *Harrell v. Peebles,* 79 N. C., 30.

JOSEPH HASKINS v. J. M. WEITH.

MOTION to set aside a verdict and judgment, the latter obtained at Fall Term, 1871, heard by *Tourgee, J.,* at Fall Term, 1872, of GUILFORD.

The same facts are involved as in the case of *Powell v. Weith, supra.* From the decision of his Honor, disallowing his motion to set aside the judgment, the defendant appealed.

Dillard, Gilmer & Smith and *Scott* for appellant.
(346) *Morehead, contra.*

READE, J. The facts in this case are the same as in *Powell v. Weith,* ante 342, and the principles governing it are the same, and the decision is the same for the same reason.

PER CURIAM. Affirmed.

THOS. D. CARTER v. THE WESTERN DIVISION of the WESTERN N. C. RAILROAD.

When a summons has been served, and the complaint filed, the case is pending sufficiently to entitle a party to remove it to an adjoining Judicial District, if the presiding Judge is a party to the suit. Laws 1870-'71, ch. 20.

MOTION before *Henry, J.,* at chambers, in BUNCOMBE, on 15 November, 1872.

A summons had issued against the defendants, as officers of the Western Division of the Western N. C. Railroad (Judge Henry being one of them), returnable to Spring Term, 1873, of BUNCOMBE. This summons was served "by delivering copies to the defendants, 27 September, 1872." The complaint had also been filed, and the plaintiff had served a notice on the defendants to appear before his Honor at chambers, and show cause why the case should not be removed to some county in an adjoining Judicial District, in accordance with the provisions of ch. 20, Laws 1870-'71, for the reason that the presiding Judge was a party-defendant. There was a prayer in the complaint, for an injunction, which the plaintiff desired heard in vacation.

It was agreed, upon the hearing of the motion, that the pre- (347) siding Judge, though nominally one of the Board of Commissioners, appointed under an act of the General Assembly in 1869-'70, yet had not officiated in any of the material transactions of the Board; and the plaintiff offered that there might be a *nol. pros.* as to him, which was accordingly entered.

The defendants contended that the case could not yet be removed, because no answer had been filed, and the case had not been put at issue, nor had there been due return made of it, at the regular term to which the summons was made returnable.

His Honor ordered the cause to be removed, and the defendants appealed.

Battle & Son for appellants.
J. H. Merrimon, contra.

RODMAN, J. We think it unnecessary to examine critically Laws 1870-'71, ch. 20, p. 56, authorizing the removal of actions brought in the Court of a Judge who is a party to, or interested therein. The policy of the Act is obviously to enable any such action to be removed as soon as it is in a condition in which the Judge may be called on to take any action in it which may affect the interests of the parties. For the purposes of that act, the action is then pending.

PER CURIAM. Affirmed.

(348)

STATE v. BALIS HENDERSON.

1. In an indictment for murder, the assault is charged to have been made on one "N. S. Jarrett," and in subsequent parts of the indictment he is described as "Nimrod S. Jarrett:" *Held*, to be no variance.
2. The Supreme Court has recognized, since the adoption of the new Constitution, a Court of Oyer and Terminer, as a Superior Court. And there is nothing in the Code of Civil Procedure which repeals the acts under which Courts of Oyer and Terminer are held.

STATE *v.* HENDERSON.

INDICTMENT, charging the defendant with the murder of one Nimrod S. Jarrett, tried before *Henry, J.*, at a Court of Oyer and Terminer, under special commission, third Monday of December, 1872, in JACKSON, to which county it had been regularly removed from Macon.

The jury found "the defendant, the prisoner at the bar, guilty of the felony and murder of which he stands charged in the bill of indictment"; whereupon, his, the prisoner's counsel, moved to arrest the judgment, upon the ground that the assault is alleged in the bill of indictment to have been committed on one N. S. Jarett, and that Nimrod S. Jarrett is the person charged to have been murdered. This motion, his Honor overruled. The case states, that after sentence, the prisoner moved for a new trial, basing the motion upon his affidavit, in which it is stated "that since the trial he has discovered evidence that would have been material and important to him," etc., "and that his counsel did not advise him of its materiality." His Honor likewise overruled this motion, and the prisoner appealed.

No counsel for prisoner in this Court.
Attorney-General Hargrove for the State.

SETTLE, J. In the bill of indictment against the prisoner for murder, the assault is charged to have been made upon "one N. S. Jarrett."

In all the subsequent parts of the bill the deceased is described
(349) as "the said Nimrod S. Jarrett." After verdict, the prisoner's counsel moved in arrest of judgment for the variance in the name of the person assaulted and the person murdered.

In *S. v. Angel,* 29 N. C., 27, the Court say, the purpose of setting forth the name of the person who is the subject on which an offense is committed, is to identify the particular fact or transaction, on which the indictment is founded, so that the accused may have the benefit of one acquittal or conviction if accused a second time. The name is generally required as the best mode of describing the person; but he may be described otherwise, as by his calling or the like, if he be identified thereby, as the individual and distinguished from all others. And if the name be unknown, the fact may be stated as an excuse for omitting it altogether. In that case there was no variance in the name of the deceased apparent on the record; but the proof was, that "Robert B. Roberts," the deceased, was as well known by the appellations "Robert Burton," and "Burt," as by the name set forth in the bill of indictment, and the Court say the jury might therefore be well warranted in treating these, not as different names, but as different modes of calling the same name, for there could be no difficulty imposed on the prisoner in pleading former acquittal or conviction; for by proper averments that the Robert B. Roberts mentioned in the in-

dictment is one and the same person as the "Robert Burton Roberts," or "Burt Roberts," mentioned in the other, he could readily show the truth of the case. So in the case before us, the prisoner if indicted a second time, could plead former acquital or conviction, and by proper averments, shew the truth of the matter, and thus avail himself of all the purposes of setting forth the name of the injured person. In *S. v. Upton,* 12 N. C., 513, it is said the mispelling of the name is immaterial, since it appears throughout the indictment, to be the same person. The Anny murdered is "the said Anne," upon whom (359) the felonious assault was made. In our case, the N. S. Jarrett assaulted is referred to throughout the bill as "the said Nimrod S. Jarrett." We are well aware that the English authorities have not gone to this extent.

But all doubts that may arise upon conflicting authorities are met and removed by the enactment in our Rev. Code, ch. 35, sec. 14, which declares that no judgment, shall be stayed "by reason of any informality or refinement, if in the bill or proceeding sufficient matter appears to enable the Court to proceed to judgment."

It would appear to be a nice refinement to arrest a judgment for an informality in setting forth the name of the person injured, since it is a common practice with most persons to write their christian names sometimes in full and sometimes by the initials only.

This disposes of the only question raised by the prisoner on his trial in the Superior Court, but we have carefully examined the law to ascertain if the Court which tried him was properly and legally constituted.

This Court has recognized, since the adoption of our new Constitution, a Court of Oyer and Terminer as a Superior Court. *S. v. Baker,* 63 N. C., 276. And there is nothing in the Code of Civil Procedure which repeals the acts under which Courts of Oyer and Terminer are held. In Baker's case the record set forth the authority under which the Judge held the Court, but that was said to be unnecessary, because *prima facie* at least, when a Judge of a Superior Court holds a Court, it is to be taken that he is authorized to do so, and that it is in all things regular. In this case the Governor issued a commission to Judge Henry, authorizing him to hold a Court of Oyer and Terminer in the county of Macon. He proceeded to hold the Court in Macon, when the prisoner, on affidavit, asked for the removal of his case, and it was removed to the county of Jackson. Judge Henry then proceeded to the county of Jackson, after proper notice to the (351) county authorities, and held the Court, at which the prisoner was convicted This action, though novel, is fully authorized by the Act of the General Assembly, ratified 23 December, 1864. This Act requires, in express terms, that the transcript of the record shall set

out and contain a copy of the Judge's commission. In the case before us this was done, and the record contains no error of which the prisoner can take advantage.

PER CURIAM. No Error.

Cited: *S. v. Ketchey,* 70 N. C., 623; *S. v. Brite,* 73 N. C., 29; *S. v. Hester,* 122 N. C., 1050.

E. NYE HUTCHINSON, Ex'r of T. J. Holton, v. SAM'L P. SMITH and WM. GRAY.

A plat and deed for a lot, corresponding with the one in dispute, on the other side of the same square, being written admissions of the vendor, relative to the quantity of land sold, is admissible in evidence in a suit wherein such quantity is one of the points to be decided by the jury.

APPEAL from *Logan, J.,* at Fall Term, 1872, of MECKLENBURG.

The plaintiff, as executor, sold certain lots in the town of Charlotte, at which sale the defendant, Smith, was a purchaser and gave the note sued on for the amount of the purchase money.

In their answer, admitting the execution of the note, the defendants allege, that at the sale, "it was distinctly announced and well understood that the lot purchased by defendant, Smith, extended from the N. C. Railroad to the line of Mrs. Holton's dower, and although the note given to plaintiff specifies a certain number of feet, as the (352) front of said lot on Trade Street, without calling for the dower line, yet the defendant Smith supposed that the number of feet, so specified in the note, would extend to the dower line, especially as the note was drawn by the plaintiff, who well understood, and who has admitted since, that it was his intention at the time of the sale, to include all the lot from the railroad to the dower line." It is further alleged in the answer, that the plaintiff claims and proposes to sell fifty feet of the lots purchased by the defendant Smith. He further alleges that he has offered to pay the note sued on, provided the plaintiff would convey to him the quantity of ground he purchased, to wit: to the dower line; insisting that he should not be required to pay the whole note, unless the plaintiff be compelled to make him a deed according to the understanding.

The allegations in the defendant's answer were sustained by the evidence, and the jury returned a verdict in response to issues submitted to them: 1st. That the plaintiff is entitled to recover the amount of the purchase-money and interest; 2d. That the quantity of land sold was from the N. C. Road to the widow's dower; and 3d. That the plaintiff make a deed for that quantity.

The judgment of the Court was that the plaintiff recover the amount of the note and interest, saying nothing of the affirmative relief asked by defendants. From which judgment the defendants appealed.

Dowd for appellants.
Wilson and *R. Barringer, contra.*

PEARSON, C. J. This case presents the working of C. C. P. in a new phase. The action is for balance due on a note. The defendants make no defense and set up no counterclaim, but aver that the note was given for the price of a parcel of land in the city of Charlotte, and set up a claim, not as counter, or in bar of the plaintiff's (353) right of action, but as defendant and growing out of the transaction, that the defendant Smith is entitled to have a deed for the land purchased by him as a concurrent act with the payment of the price; but that a difficulty in the specific performance of the contract of purchase has been raised by reason of the fact that the plaintiff is not willing to execute a deed for the land that was sold by him and bought by defendant Smith, to wit: lots Nos. 1 and 3 on Trade Street, extending from the railroad lot to the dower lot, but insists upon stopping short of the dower lot by fifty feet, on the ground that the distance from the railroad lot to the dower lot, on measurement, turns out to be 174 feet, whereas it is recited in the note as being 124 feet, which the defendants allege was caused by mistake, and asks to have the mistake corrected so that the defendant Smith may get a deed for the land on payment of the purchase-money. Upon an issue submitted to a jury, it is found that lots Nos. 1 and 3 are bounded by the railroad lot and the dower lot, so as to take in the whole front.

We are of opinion that the plot and the deed made by plaintiff for a lot corresponding on the other side of the square was properly admitted in evidence. The deed and its recital, although made to another person, are admissions (certainly not less forcible because in writing) of the plaintiff relevant to the issue as to what land was sold.

After verdict, in this new phase of procedure and practice, there was a difficulty as to the judgment that should be rendered. His Honor rendered judgment that plaintiff recover the sum of $...., balance of the principal and interest of the note. From which judgment the plaintiff appealed. This appeal was for error in the reception of evidence, to wit: the plot and deed.

In this there is no error. The motion for a *venire de novo* was properly refused, and the judgment in respect to the ground upon which the plaintiff appealed is affirmed. (354)

See defendant's appeal, *post,* 35.

PER CURIAM. No Error.

E. NYE HUTCHINSON, Ex'r of T. J. HOLTON v. SAM'L P. SMITH and WM. GRAY.

Under our new system of pleading and practice, Courts are required to recognize both the legal and equitable rights of the parties, and to frame their judgments so as to determine all the rights of the parties as well equitable as legal.

This is the same action as that immediately preceding, brought to this Court upon the appeal of defendants. The facts are therein stated.

On the trial the plaintiff excepted to the admission of the plot and deed made to another party, who was also a purchaser of a part of the land sold. This was admitted by the Court, and the plaintiff excepted. For this alleged error in the admission of evidence the plaintiff appealed.

Wilson and *R. Barringer* for appellant.
Dowd, contra.

PEARSON, C. J. The same case is brought up by appeal on the part of the defendant.

The jury having found that the land sold was bounded by front on Trade Street, from the railroad to the dower line, the defendant moved that judgment be entered for plaintiff for balance of note, on (355) the condition that plaintiff execute a deed for the lots Nos. 1 and 3, extending in front on Trade Street from the railroad line to the dower line; which motion being refused, the defendant appealed.

There is error. A mind accustomed to the orderly proceedings and formal judgments in Courts of Law, and to the decrees in Courts of Equity, has no little difficulty in realizing the fact that under the new system the Court is required to recognize both the legal and equitable rights of the parties, and to frame *the judgment* so as to determine all of the rights of the parties, as well equitable as legal. See *Lea v. Pearce,* 76, *ante.* "A judgment is the final determination of the rights of the parties to an action." C. C. P., 216. "A judgment may grant to the defendant any affirmative relief to which he may be entitled." C. C. P., see 248. So the defendant was entitled to have the affirmative relief which he asked for, fixed by the judgment; in other words, the judgment under the new system should combine a judgment for the recovery of the plaintiff's demand, and also a decree in favor of the defendant upon his equity for a specific performance of the contract,

so as to make *"the judgment"* a final determination of the rights of the parties.

PER CURIAM. Error.

Cited: Lee v. Howell, 69 N. C., 204; *Paschal v. Brandon,* 79 N. C., 506; *Fisher v. Water Co.,* 128 N. C., 379; *Troxler v. Bldg.,* 137 N. C., 58.

(356)

TITUS T. GRANDY v. W. B. FEREBEE and EDWIN FEREBEE.

1. The declarations and acts of a third person are not evidence against a party, unless such third person be his agent; and the agency must be established before such acts and declarations are admissible.
2. A receipt for money given by an alleged agent for a specific purpose is not admissible to prove the fact of agency. The agency being established *prima facie* by other evidence, to the satisfaction of the Court, such receipt becomes then proper evidence.
3. The depreciation of Confederate money is not between private parties, constructive notice to the agent and the person paying the same, that the principal will not receive it. Otherwise, where the receiving agent is an officer of the Court, or one acting in a fiduciary capacity.

APPEAL from *Moore, J.,* at Aug. (Special) Term, 1872, of GRANVILLE.

The plaintiff, at Spring Term, 1867, of GRANVILLE, sued the defendants in debt upon their bond for $1,396.86, of date 1 January, 1858, and payable to plaintiff or bearer. At the return term of the writ, the defendants pleaded "payment and set off," and the cause was continued and regularly transferred and docketed in the new Superior Court.

Upon the trial in the Court below, to sustain the plea of "payment" (the execution and delivery of the bond being admitted), the defendant, W. B. Ferebee, was examined and in substance testified that in July, 1863, he met with a brother of the plaintiff in Camden County, and asked him if they were taking Confederate money in Granville, the place where the plaintiff and this brother resided. Upon being informed that they were taking such money in that section, he mentioned that the plaintiff held his bond (the one in suit); that he wished to pay it off, and asked the brother if he would take some money to the plaintiff for that purpose, that the plaintiff's brother consented to take the money, which in a few days afterwards was handed to him, Confed-
erate and Virginia Treasury notes, together with a note on (357)
plaintiff for about $60, amounting in all to about $1,698. For this, the brother gave the following receipt, which was read to the jury, to wit:

"24 July, 1863. Received of W. B. Ferebee for T. T. Grandy, sixteen hundred and ninety-eight dollars, in payment of a note of said Ferebee, held by T. T. Grandy.

"W. S. GRANDY."

There was a verdict allowing the set-off of $60 on the part of the defendants, and finding a payment of $1,638, and for the plaintiff for the balance of principal and interest of the bond declared on. Motion by plaintiff for a new trial; motion overruled. Judgment in accordance with the verdict, and appeal by plaintiff.

Lanier for appellant.
Hargrove and *Batchelor, Edwards & Batchelor, contra.*

READE, J. It is common learning that the declarations and acts of a third person are not evidence against a party, unless such third person be his agent. And it is equally well settled that the agency must be established otherwise than by such declarations and acts, before they are admissible. And it is also settled that just as the Court in all other cases must judge of the competency or admissibility of evidence, so in this case the Court must be satisfied that *prima facie* the agency is proved before the declarations and acts can go to the jury. *Monroe v. Stutts,* 31 N. C., 49; *Williams v. Williamson,* 28 N. C., 281. It follows, that to receive the declarations and acts along with other evidence tending to prove the agency, and submit the whole to the jury, from which to find the agency, without explanation that the declarations and acts themselves are not to be considered for that purpose, is erroneous.

In this case, the receipt which the alleged agent gave for the (362) money was a part of the evidence left to the jury, not merely to show that he received the money (for which purpose it would be competent, the agency being otherwise proved), but to prove the agency itself, for which purpose it was clearly incompetent.

For this error there must be a *venire de novo.* It is not necessary that we should notice the other points made, as they will probably not arise on the next trial, except the point made by plaintiff, that even supposing the agency proved, still the great depreciation of Confederate money at that time was constructive notice to the agent and the defendant that it would not be received. We have so held, where the receiving agent was an officer, such as Clerk, Sheriff, and the like, or was a guardian, administrator and the like; but the inclination of our opinion is against the plaintiff upon this point, the agency being a personal one. It would operate as a payment of the debt *pro tanto,* if it were so received, and would leave the plaintiff to his remedy against his agent.

PER CURIAM. *Venire de novo.*

Cited: *Henry v. Willard,* 73 N. C., 43; *Gilbert v. James,* 86 N. C., 247; *Johnson v. Prairie,* 91 N. C., 164; *Taylor v. Hunt,* 118 N. C., 173; *Summerrow v. Baruch,* 128 N. C., 204; *West v. Grocery Co.,* 138 N. C., 168; *Jackson v. Tel. Co.,* 139 N. C., 351.

(363)

PRISCILLA WALKER, FRANK WALKER and others v. A. A. SHARPE.

The Court below has no right to entertain a petition on the part of one entitled to the sole and separate use of certain property during her natural life, and then to her children, and her children, praying to have such property delivered over to the children, and such proceeding will be dismissed as on demurrer.

APPEAL from *Mitchell, J.,* at Fall Term, 1872, of IREDELL.

In the complaint, the plaintiffs demand an account of the fund in the hands of the defendant, and the payment of the balance when ascertained, "to the children of the said Priscilla," the petitioner.

The fund arises under the will of Wm. Welch, a brother of the plaintiff, Priscilla, who died in the State of South Carolina. In his will the testator directs his property of every description except negroes, to be converted into cash, and then divided into nine shares, each one of which is given to his several brothers and sisters, among the latter of whom he mentions Priscilla Walker. The testator further directs that the share to which each of his sisters shall be entitled, shall be settled for her sole and separate use during her life, and at her death to her children, and to the children of any predeceased child, such child or children to take the share of their deceased parent. In a codicil to his will, the testator appoints Wm. Welch, who is also executor, trustee for his sisters, and empowers him to sell any of the said property, if it should become to be the interest of the sisters and their children to do so, and reinvest the proceeds of such sale in such other real and personal property as he may think most to their advantage, taking titles to himself, as such trustee, upon the terms, conditions and limitations mentioned in his will, as to each of his said sisters.

The plaintiff, Priscilla's husband, died in 1857, and before the commencement of the present action, the trustee had not been changed until the present defendant was appointed by a Court (364) of Equity. At Spring Term, 1871, it was referred to the clerk to state an account of the fund in the hands of the defendant as trustee. Upon the coming in of the report of the clerk, the plaintiffs filed exceptions, which were disposed of by his Honor, to wit:

1. That the clerk allowed the defendant credit for all his payments, regardless of interest. It is considered by the Court below, that the testator in providing for his sister by giving her the sole and absolute

use of the property devised and willed to her during life, intended it as a provision for her family, and involved the expenses of such a provision. The exception is overruled.

2. Clerk has not stated an interest account from year to year, or how much interest, year by year, was due and how much paid out. By the Court below. Distinct vouchers were produced for each and every payment.

3. That defendant is allowed credit for payments to plaintiff Priscilla, exceeding yearly income. Overruled. Reason in answer to first exception.

4. That the clerk allowed credit for $600 paid for negro Vice, and allowed credit for interest $329. By the Court. At the urgent application of the plaintiff, Priscilla, her son of full age, and her son in law, and against the protestation of the defendant, as trustee, he made the purchase that was not opposed by any person. He charges interest, as he advanced the money for the benefit of the trust fund.

5. As to the price of Vice, there is no evidence or pretense that it was excessive. Confederate money at the time, 1863, was the common currency.

From this decision of his Honor, overruling their exceptions, and confirming the report of the clerk, the plaintiffs appealed.

(365) *W. P. Caldwell* for appellants.
Furches, contra.

PEARSON, C. J. This action presents on its face several peculiar features.

The defendant holds a fund in trust for the separate use and maintenance of the plaintiff, Mrs. Priscilla Walker, during her life, and then for her children and their representatives. The complaint, without an allegation that the fund is unsafe in the hands of the defendant, demands that the fund shall be paid over to the children, on the ground, "that owing to the casualties of the war and other causes, the plaintiffs, who are the children of said Priscilla, are greatly in need of funds; and the plaintiff, Priscilla, is desirous that they should now have the use of the fund, and is desirous that the same be paid over now to her children, instead of waiting until her death; and the other plaintiffs are desirous to take the fund, and if the Court requires it, they are willing to enter into bond to pay to the said Priscilla the interest, or exhibit to the Court her release to them for the same, which she is ready to give."

Here we have an instance of an unblushing attempt on the part of the children and sons in law of a weak old woman to get the sanction of the Court to a surrender of all her estate and her only means of main-

tenance, and thereby to subject herself to the tender mercy of the plaintiffs, who, "owing to the casualties of the war are greatly in need of funds."

The defendant does not object to being relieved of the trust fund, and submits to an account. The plaintiffs except, for that the master has allowed the defendant credit for expenses of the plaintiff Priscilla, exceeding the annual interest of the fund.

If this exception be made in the name of the plaintiff, Priscilla, the reply is, as the expenditure was made at her instance and request, she has no right to complain. If it be made in the name (366) of her children and sons-in-law, the reply is, wait until your time comes. It may be, that the annual interest now accruing, by the time Mrs. Walker dies, by prudent administration, will enable the trustee to balance account.

There was no error in overruling the exception. A further exception was taken, for that the defendant is allowed credit for the price of the negro woman "Vice," which was lost to the fund by reason of emancipation.

This purchase was made at the express request of Mrs. Walker, and had the full concurrence of her sons-in-law and children; so the objection comes with an ill grace from them, "their mouths are shut." There was no error in overruling the exception. On confirming the report no decree (or judgment, as we now call it), is entered.

From "the looseness of pleading" we are not able to say what judgment his Honor was about to pronounce except for the fact that his mouth was shut by the appeal.

The opinion will be certified, to the end that judgment may be entered dismissing the action as upon a demurrer in respect to Priscilla Walker, because she shows no cause of action, and in respect to the other plaintiffs because they have no interest in the fund until after the death of said Priscilla, and the consent on her part to surrender the life estate in favor of her children is not based upon any valuable consideration and is not entitled to the sanction of the Court.

Besides the principle that a Court of Equity will not enforce a voluntary executory agreement, there is in this case the further difficulty, the slave of a *feme covert,* should the husband die before the termination of the life estate, will devolve upon the wife, if she be surviving; if not, then upon her child or children. So the sons-in-law of Mrs. Walker have no present vested interest in the fund, which may be endangered if allowed to pass into their possession with the (367) sanction of the Court.

PER CURIAM. Action dismissed.

Cited: *S. c.,* 71 N. C., 258.

REUBEN PERRY v. SYLVESTER PEARCE.

Where a judgment which had been standing for several terms, and upon which an execution had issued and the land of defendant sold, had been set aside upon the motion of the defendant, it requires no notice of a motion on the part of the plaintiff to revoke the order setting the judgment aside, and to reinstate the same and the execution on the docket.

MOTION to reinstate a judgment and execution, heard before *Watts, J.*, at Fall Term, 1872, of JOHNSTON.

The action was debt on a bond, brought to Spring Term, 1867, of JOHNSTON, under our former practice, at which term the entry is made of the pleas of "payment and set-off." At Fall Term, 1867, "Judgment by default" is entered on the docket, and the case is thence regularly continued until the adoption of our Code of Civil Procedure, when it is transferred to the docket of the new Superior Court as required by law. At Fall Term, 1869, of the Superior Court, the judgment is made final for $582.80, with interest on $363.50, from 20 September, 1869, "according to specialty filed," and execution issued for the amount, 6 December, 1869. Upon the return day of the execution, the Sheriff returns that he has levied the same on the defendant's interest in certain lands, and sold the same for $400, the plaintiff being the purchaser, which money had been applied as part payment of the execution. No other property to be found. 7 March, 1870. At Spring Term, 1871, of the said Court, the defendant after due notice
(368) to the plaintiff, moves to set aside the judgment and execution, basing the motion upon an affidavit, in which he swears that he pleaded at the proper time and had a substantial ground of defence; that when the case was called at Fall Term, 1869, in the absence of his counsel, "Judgment" was written opposite the case. His counsel as soon as he came in, moved to strike out the entry, which was ordered by the Court. That the cause was referred and continued. Afterwards, in December, 1869, when the Court was not in session, judgment by default was entered for the whole amount of plaintiff's claim without the knowledge or consent of defendant or his attorney. That the arbitrators acted, and returned their award, 28 February, 1871. That at Spring Term, 1870, execution issued, and the land of defendant was sold, 7 March, 1870. That defendant had no notice that the judgment was entered till the last term of this Court, nor of the levy upon, and sale of his property, and had no knowledge of the same until a summons was served on him at the instance of the plaintiff demanding possession of the land.

The arbitrators filed an award 28 February, 1871, the terms of which it is unnecessary to state. His Honor granted the defendant's

motion and set aside the judgment and execution, and also the award of the arbitrators.

At the next term of the Court the plaintiff filed his own and other affidavits, denying some of the statements contained in that of the defendant, and showing that there were two original suits, one for debt and the other in assumpsit against the defendant, the latter of which was referred; that defendant had notice of the sale of his land and rented it of plaintiff after the sale; wherefore the plaintiff moved to revoke the order setting aside the judgment and execution and to reinstate the same. His Honor granted the motion, and the defendant, for the reason that no notice had been served on him of such motion, appealed.

Smith & Strong and *L. W. Barringer* for appellant. (369)
A. M. Lewis, contra.

BOYDEN, J. No notice of the motion on the part of the plaintiff was necessary, for the plainest reason, to wit: that at the term of the Court immediately preceding that, at which this motion was made, a previous judgment of three years standing, had at the instance of the defendant, been set aside, and the case placed upon the docket and stood regularly for trial at the time the motion was made to reinstate the original judgment; so that it was the duty of the counsel, to take notice of any motion made against the interest of their clients.

And besides, this motion to reinstate the original judgment, stood over for two terms before it was acted on, without any objection for the want of notice. As to the other point let it be granted that there was such irregularity in the original judgment, as would have entitled the defendant to relief, if the motion had been made in due time, still it is too late for the defendant to ask for relief at this late day. The judgment here stood three years, executions had issued thereon, the defendant's land sold purchased by the plaintiff, and by him rented to the defendant, before this application was made to set aside the original judgment. This makes it unnecessary to inquire into the regularity of the judgment, after such gross laches on the part of the defendant. Independent of this, the defendant in his affidavit to set aside the judgment does not swear that he has any defence to the suit, and it is to be inferred from his affidavit, that he owes the debt and merely seeks delay.

PER CURIAM. Affirmed.

(370)

WM. H. HOWERTON v. C. H. LATTIMER.

1. Testimony as to transactions which took place between the defendant and an agent, since deceased, is admissible evidence in a suit brought by the principal against such defendant. Especially so, if the acts and agreements of the agent were afterwards communicated to the principal and by him assented to.
2. Where a plaintiff requests the Judge, on a trial in the Court below, to instruct the jury that the defendant must support his defense, by a preponderance of testimony; and instead of so doing his Honor tells the jury that they must judge of the weight of the evidence, and if they believed the testimony of the defendant, they should find for him: *Held*, to be no error.

APPEAL from *Cloud, J.*, at Fall Term, 1872, of ROWAN.

The following is, in substance, a statement of the case by counsel, and sent up with the transcript of the record. The action was brought to recover the value of board supplied to defendant and his clerk, from 12 January, 1859, to 18 March, 1860.

On the trial below the account was admitted, but the defendant alleged that it had been settled by "an accord and on satisfaction thereof, with one Thos. Howerton, as the only authorized agent of the plaintiff."

In support of this allegation the defendant testified that some time in 1858 the plaintiff came to his store and requested him to let his father, Thos. Howerton, have such articles as he might apply for, and to charge the same to the plaintiff. In consequence of this request he let Thomas Howerton have a large amount of merchandise at different times, down to 1 May, 1860. That at the time the account was opened, Thos. Howerton was keeping a boarding house as the agent of the plaintiff. Soon after Thos. Howerton approached the defendant, the witness, and solicited him to board with him, and bring one of his clerks also to board at his house, stating that if he, the defendant,

(371) would do so, he would accept in payment of the board bill a credit of one-half thereof, upon his individual account, which he owed the defendant, and the other half upon the account made by him as the plaintiff's agent. Before the defendant testified to this conversation, it was admitted that Thos. Howerton was dead; and the plaintiff objected to the admission of any evidence of a conversation, or of any transaction with the deceased. On the part of the defendant it was stated that evidence would be offered tending to show that the conversation alluded to had been, by defendant, communicated to the plaintiff, and that he had assented to the arrangement. The defendant further stated that in pursuance of such arrangement, he and his clerk did board with Thos. Howerton, agent as aforesaid, as detailed in the account sued upon.

The defendant was further permitted to state, after objection by plaintiff, that on 29 January, 1859, there was a settlement between himself and Thos. Howerton, agent of the plaintiff, in which, one-half of the bill for board was credited on the individual account of Thos. Howerton, and the other half upon the account against plaintiff himself. That shortly thereafter he showed the plaintiff the statement of this settlement, and explained to him the agreement had with his father, and agent; that he, the plaintiff, made no objection to the arrangement, only suggesting that in future the goods furnished to his father, Thos. Howerton, should be charged to him as agent of the plaintiff, giving as a reason, that he, the plaintiff, might purchase goods at defendant's store for his own family, and that it might produce confusion if both accounts were kept alive. Plaintiff objected to the introduction of testimony relating to any transaction with Thos. Howerton prior to 12 January, 1859. Objection overruled, and the plaintiff excepted. Defendant further testified, that on 1 May, 1860, he had a final settlement with Thos. Howerton, in which the board bill was credited in accordance with the agreement, and that for the balance due by plaintiff to defendant, the said Thos. Howerton gave a note signed (372) by himself as agent. To this evidence the plaintiff objected. Objection overruled, and plaintiff excepted.

The plaintiff then offered to read in evidence certain affidavits made by one Whitted, a witness for defendant, the affidavits being made for a continuance of the cause at a preceding term, and which, it was alleged, contained contradictory statements. Defendant objected, and the objection was sustained by the Court.

His Honor was asked by plaintiff to instruct the jury:

1st. That after the account had been contradicted, if Thos. Howerton exceeded his authority as agent, in agreeing to credit defendant with his own account, no promise thereafter made by plaintiff, expressed or implied, is binding, as the same was without consideration. The Court charged the jury, that there was no evidence that any express promise was made by plaintiff after the account was contracted; but, if they found that during the time in which the board account was running, the plaintiff was informed of the agreement between defendant and Thos. Howerton, agent of the plaintiff, by which one-half the account was to be credited on the individual account of Thos. Howerton, and the plaintiff then assented to the arrangement, that this ratification would make the contract binding upon the plaintiff, although Thos. Howerton might have exceeded his authority at the time the agreement was made.

2d. That, as the defendant's answer admits the account and sets up matter in avoidance, the jury must be satisfied by the defendant of the

truth of this defence, by preponderance of testimony. The Court declined to give this instruction in the words employed, but charged upon this point, that the weight of testimony was a question for the jury:

That if, looking to all the evidence in this case, they believed
(373) the testimony of the defendant, he was entitled to a verdict; otherwise they should find for the plaintiff.

A book kept by Thos. Howerton, in which the charges for board were entered, without any credit, was offered in evidence. The plaintiff being examined, denied the statement made by defendant.

Verdict and judgment for the defendant. Motion for a new trial; motion overruled. Appeal by the plaintiff.

Bailey for appellant.
Wilson, contra.

RODMAN, J. 1. The first exception is, for the admission of the testimony of the defendant, as to his transactions with Thomas Howerton, a deceased agent of the plaintiff. The words of the *proviso,* in sec. 343, of C. C. P., do not cover such a case. That says that no party shall be examined as to any transaction between him and a person deceased, "as a witness against a party then prosecuting, or defending the action as executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee or survivor of such deceased person." The plaintiff is not prosecuting this action in any of those characters. It may seem that the plaintiff, under the circumstances, comes within the mischief intended to be remedied. Whether that be so or not, we would not be justified in extending the scope of the act, to include the case of a principal of a deceased agent, upon any conjecture, that the Legislature would have included such a case if it had occurred to them. But at all events, the evidence of the transaction became competent, when it appeared that it had been communicated to the plaintiff and that he assented to it.

2. The plaintiff requested the Judge to instruct the jury "that after the account sued upon had been contracted, if Thomas Howerton exceeded his authority in agreeing to credit defendant with his
(374) own account, no promise thereafter made by plaintiff, express or implied, is binding, as the same was without consideration."

This is so obscure that his Honor might well decline to give it as an instruction on that ground alone. We think there was evidence of a consideration for the promises of plaintiff.

3. The plaintiff also requested the Judge to instruct the jury, that the defendant must support his defence by a preponderance of testimony. His Honor told the jury, that they must judge of the weight of the evi-

dence, and that if they believed the testimony of the defendant they should find for him. We think this was proper.

4. In the course of the trial, plaintiff offered in evidence "certain affidavits, made by one Whitted, who had been examined as a witness for defendant, who had been sent by defendant to obtain a continuance of this cause, which affidavits it was alleged were contradictory in some particulars." These affidavits were made at the previous term, to procure a continuance, for the reason of the sickness and absence of defendant, and stated generally what the affiant expected that defendant would prove on his examination as a witness. Whitted was the agent of the defendant for certain purposes, but it does not appear that he was so for the purpose of swearing to the particulars of his defense. 3 Green. Ev., 235; note.

We think the affidavits were properly excluded.

PER CURIAM. No Error.

..Cited: Molyneux v. Huey, 81 N. C., 110; *Morgan v. Bunting,* 86 N. C., 69; *Roberts v. R. R.,* 109 N. C., 671; *Sprague v. Bond,* 113 N. C., 557.

(375)

STATE v. ISAIAH SHOAF.

On a trial of a defendant for receiving a stolen horse, it was in evidence, that one R was found with the horse at the barnyard of the prosecutor by his, the prosecutor's son, and that R offered to give the son $75 for the horse, knowing that it did not belong to the son, but the father, and that in company with the son he carried the horse off, promising to pay the $75 at a future time: *Held,* to be some evidence that R did not take the horse *animo furandi,* and that it was error for his Honor, on the trial below, to charge that according to such evidence, R was guilty of larceny.

INDICTMENT FOR LARCENY, and receiving stolen goods tried before *Cloud, J.,* at Fall Term, 1872, of DAVIDSON.

From the case accompanying the record it appears, that the defendant was charged with stealing a mare, the property of one Davidson Link, and in another Court with receiving the mare knowing her to be stolen. The evidence, as to the material facts, was, that the defendant was found in possession of the mare, eight days after she had been taken from the stable of Link, the prosecutor. That when arrested, he gave contradictory statements as to how he became possessed of the mare. A son of the prosecutor testified, that he was at his father's barnyard, and saw one Reed with the mare, with a bridle and halter on. That Reed told him, that he would give him, the witness, $75 for her; that they went to the meadow, Reed leading the mare;

when there, Reed said he would pay the witness the $75 the next time he saw him. That the night before this, Reed asked the witness where his father kept his mare. Witness had no authority to sell the mare, and Reed knew that she did not belong to him, but to his father.

It further appeared that there was a defect about one of the feet of the mare, and that she was tracked to within thirty yards of Reed's house. One Bell swore that he had sold to the defendant a bridle just before the alleged stealing of the mare, and that the one found
(376) on her at the time of the defendant's arrest was the same bridle to the best of his knowledge.

On the part of the defendant, the Court was asked to charge the jury that the defendant could not be convicted of receiving the mare, knowing her to be stolen, unless Reed was guilty of larceny; and that Reed was not guilty, if he got the mare as testified to by the son of the prosecutor, and believed that the son could not sell the same.

His Honor charged the jury if the son was believed, then Reed knew that he, the son, did not own the mare and had no authority to sell her; and that it was larceny in Reed to take the mare as testified to by the son, if he took her fraudulently. And that the defendant's guilt depended upon the fact, whether he received the mare from Reed, knowing she had been stolen.

Jury returned a verdict finding the defendant guilty. Motion for a new trial; motion overruled. Judgment and appeal by defendant.

Blackmer & McCorkle for defendant.
Attorney-General Hargrove, contra.

BOYDEN, J. In this case his Honor was requested to charge the jury, that Reed was not guilty of larceny if he got the horse as testified to by the son of the prosecutors, if he believed the son could sell the horse. His Honor declined to charge as requested, but instructed the jury that if the witness Link was to be believed, then Reed knew that the son was not the owner of the horse, and had no authority to sell.

But he undertook to sell upon a credit, and although he informed Reed that the horse belonged to his father, he did not inform him that he had not authority to dispose of the horse, although on the trial, he did testify that he had no such authority.

(377) We think the defendant was entitled to the instruction asked, as we infer from the case as sent here that Reed and his place of residence was well known, and as there is no evidence that he fled the county or attempted to conceal the horse or himself, there was no evidence of larceny.

Had it appeared that Reed had immediately fled the county with the horse, or that he had concealed himself or the horse, then his Honor

should have submitted the question to the jury, whether this trade and chaffering with the son about the trade was not a mere trick and artifice, thus fraudulently to obtain possession of the horse and then to flee the country, and deprive the owner of all redress; and if the jury should so find, then Reed was guilty of larceny, and the defendant would be guilty of the charge in the second count, if he knew of the theft of Reed; but otherwise they must find him not guilty.

PER CURIAM. *Venire de novo.*

(378)

STATE v. ELI SIMONS and GUS ALLEN.

The term "Criminal action" and "Indictment" are used in the Constitution, and in the Code of Civil Procedure, as synonymous: Therefore, it would be equally regular to entitle a case upon the records of the Court, either as "the People v. A. B.—Criminal action," or the "State v. A. B.—Indictment."

INDICTMENT for assault and battery before *Buxton, J.*, at ANSON, Fall Term, 1872.

The defendants were found guilty. There was a motion in arrest of judgment, "that the prosecution having been instituted since the adoption of the present State Constitution and for an offence committed since its adoption, it should have been entitled 'a criminal action' in the name of the people of the State, and should have been presented as a criminal action and not as an indictment under the old mode." Motion overruled, and defendant appealed.

Bennett for defendants.
Attorney-General Hargrove, contra.

BOYDEN, J. In this case a motion to arrest the judgment is made on the ground that the prosecution having been instituted since the adoption of the present State Constitution, and for an offence committed since its adoption; the case should have been entitled *a criminal action,* and not an indictment, as in the old form.

The following is a copy of the docket of the cause as it appeared at the time of the trial:

Criminal Docket, No. 41. (379)

STATE
v.
SIMONS & ALLEN. } *Defendants Plead Not Guilty.*

The counsel for the defendant, to sustain his motion, relies upon the following words in Article IV, sec. 1, of the Constitution: "Every

action prosecuted by the people of the State as a party against a person charged with a public offence for the punishment of the same, shall be termed a *criminal action.*" We understand the counsel to insist that it is necessary that a criminal action should be docketed in the following form:

THE PEOPLE *v.* SIMONS & ALLEN. } *Criminal Docket—Term* 18— *Criminal Action.*

And that the criminal action, so far as the accusation sent to the grand jury is concerned should run in this wise: "The jurors for the people of North Carolina upon their oaths present, and so on; and our attention is called by the counsel to section 12 of the Bill of Rights, which would seem to militate against his views, and argues that as criminal offences which had been committed before, or where indictments were pending at the time of the adoption of the present Constitution must necessarily be governed by the laws in force at the time of their commission, and that section 12 of the Bill of Rights is retained and refers only to such cases.

The counsel, to sustain his view of section 12 of the Bill of Rights, calls our attention to section 9, Article XIV, of the Constitution,
(380) which declares that all indictments which shall have been found, or may hereafter be found, for any crime or offence committed before the Constitution takes effect, may be proceeded upon, in the proper Courts, but no punishment shall be inflicted which is forbidden by this Constitution; and he insists that section 12 of the Bill of Rights, in which the word "indictment" occurs, was meant, so far as the denomination indictment is concerned, to apply to offences committed before the adoption of the Constitution, and that while it is still necessary to employ a written accusation in all criminal proceedings, that such accusation would be denominated a criminal action, save in the cases covered by section one, Article XIV. The Court do not concur in this exposition of section 12 of the Bill of Rights. The language of this section will not warrant any such construction. No person shall be put to answer any criminal charge, except as hereinafter allowed, but by indictment, presentment or impeachment; and then the 13th section contains this clause: "The Legislature may, however, provide other means of trial for petty misdemeanors, with the right of appeal." These provisions are manifestly prospective, and we think that beyond a doubt that now, as heretofore, no person can be put to answer any criminal charge, other than petty misdemeanors, but by indictment, presentment, or impeachment. We therefore think it clear that the terms *criminal action* and *indictment,* as used in the Constitution and in C. C. P., are synonymous.

Section 5 of the C. C. P. in defining a criminal action, uses these words: "A criminal action is, 1st, an action prosecuted by the *State,* as a party, against a person charged with an offence, for the punishment of the same; and 2d, an action prosecuted by the *State,* at the instance of an individual, to prevent an apprehended crime against his person or property." We think the foregoing expressions in the Constitution show that the terms the State, and the people of the State, mean substantially the same. It is true that the clause in the old Constitution requiring that all indictments should conclude, (381) against the peace and dignity of the State, is omitted in the present Constitution; we think that can make no difference, and that it would be equally regular to entitle a case either as the People against A B, criminal action, or the State against A. B, indictment. But as we have so long been accustomed to the latter form we still prefer it.

PER CURIAM. Affirmed.

ELIZABETH J. LARKINS and others v. PATRICK MURPHY, Adm'r *cum test. annexo* of Charles Henry, and others.

The taking and reporting an account by the Master, or Clerk, to whom the Court has referred it, involves the exercise of the judgment and discretion of such referee, which he can not delegate to another. And it is no proper exercise of his judgment and discretion when he simply adopts an account which has been stated by another, whether the account so adopted has been taken in the same suit, or in some other.

MOTION to set aside the report of the referee, and to vacate the decree confirming the report, heard before *Russell, J.,* at June Term, 1872, of NEW HANOVER.

From the record sent to this Court, such portions only are selected as present the point decided and are necessary to a proper understanding of the opinion delivered.

At Fall Term, 1863, of the Court of Equity of New Hanover County, a bill was filed, under the old system, by the plaintiffs in this proceeding and others, devisees and legatees of Charles Henry, dec'd., against the defendant, as administrator with the will annexed of the said Charles, and others, for a division of the property (382) according to the will of the testator and for an account. The case was continued from term to term, until the abolition of the Courts of Equity, when it was transferred under the provision of the Code of Civil Procedure to the new Superior Court. At the December Term, 1869, of that Court, it was referred to J. C. Mann, the Clerk, to state

the account prayed in the bill. Pending the reference, in September, 1870, the defendant filed before J. C. Mann, as Judge of Probate, an *ex parte* petition for an account of his administration of Chas. Henry's estate, to be used in a controversy in the Courts of Florida, in which State the testator left real and personal estate, and in which those entitled to it resided, with the exception of Elizabeth J. Larkins, his widow, and some of his minor children. In this petition, it was referred to G. D. Flack, Jr., the deputy clerk, to take the account prayed for, which account was by him then stated, and used for the purposes mentioned in the petition. This account of Flack's was adopted by J. C. Mann, the referee in the old suit, as his own, and returned to the January Term, 1872, of the Court; at which term, a decree confirming the same was made, and the estate in the hands of the defendant ordered to be distributed in accordance therewith. Subsequently a notice was served on the defendants, by the plaintiff's attorney, that a motion would be made at the ensuing Spring Term of the Court, to set aside the report of the referee and the decree confirming it, on the ground of irregularity in the report and want of notice, etc. At the hearing of this motion, his Honor set aside the report and vacated the decree, and ordered the account to be retaken, upon notice to the respective parties. From this order, the defendant appealed.

W. S. & D. J. Devane for appellant.
London, contra.

(383) READE, J. The taking and reporting an account by the Master or Clerk, to whom the Court has referred it, involves the exercise of the judgment and discretion of such referee, which he can not delegate to another. And it is not proper exercise of his judgment and discretion, when he simply adopts an account which has been stated by another, whether the account so adopted has been taken in the same suit, or in some other.

"A reference to the Master is generally made for one of the three following purposes, viz., the protection of absent parties against the possible neglect or malfeasance of the litigants; the more effective working out of details which the Judge, sitting in Court, is unable to investigate, and the supplying defects or failures in evidence." Adams Eq., 379. And in a note on the same page it is said: "The Master's is a branch of the Court."

To take and report an account falls under the head of "the working out of details."

When the Master has ascertained the facts and stated the account, he makes the report in which he sets forth the facts and his conclusions therefrom. And Mr. Adams says, "that it is frequently advantageous

but not necessary that he should also state the reasons which have induced his decision." If there is no exception to the report by the parties, it is confirmed as a matter of course. And if there is exception the *leaning* of the Court is in favor of the report.

From all this appears how important it is that the person taking the account and making the report should be the trusted and trustworthy appointee of the Court. And also how important it is that such person should find the facts himself and draw his own conclusions; and how improper it is for him to adopt the facts found and the conclusions drawn by another, whether that other be his own appointee or some third person.

In the case before us, the clerk to whom it was referred, instead of taking the evidence and drawing his own conclusions, adopted the account taken in another cause by some third person. For (384) this cause, the decree confirming the report was properly vacated.

In *Rowland v. Thompson,* 65 N. C., 110, it is said that the deputy of the Probate Judge, can not perform any duty in taking an account except what is merely ministerial—such as adding figures, calculating interest, etc., and if he does any other act such as deciding the competency of evidence or any legal question, the adoption of his action by the Probate Judge does not validate it. No hardship will result to the defendant by reason of setting aside the decree, on account of his having paid out money to some of the plaintiffs under it, because his payments will be allowed under any other decree.

PER CURIAM. Affirmed.

(385)

JOHN ANDREWS, Admr. of Elizabeth Andrews, v. F. MCDANIEL.

1. The real owner of a negotiable note, not indorsed, is the proper person to sue for its recovery under sec. 55, of the Code of Civil Procedure.
2. In a suit for the recovery of a negotiable note not indorsed, the evidence of an administrator (the plaintiff), is admissible to prove that his intestate bought the note, and gave therefor full value.

APPEAL from *Clarke, J.,* at Fall Term, 1872, of JONES.

The suit was brought on a note made by the defendant and one Pritchett, for $700, payable to one Thomas Wilcox, on the ... day of ..... 1861, the note not being indorsed. The plaintiff by his own evidence proved that his intestate in her lifetime bought the note from Wilcox, the payee, giving full value for it, in the notes of Wilcox and a balance in money. This evidence was objected to, but received by the Court. Defendant excepted.

Defendant asked his Honor to instruct the jury that as the note had not been indorsed to the plaintiff, he could not maintain the action.

This instruction the Court refused, and charged the jury that if they were satisfied that the plaintiff's intestate purchased and paid for the note, as stated by the plaintiff, he was entitled to their verdict.

The jury returned a verdict in favor of the plaintiff. Motion for a new trial on the ground of misdirection to the jury and the reception of incompetent evidence. Motion overruled. Judgment and appeal by the defendant.

Hubbard and *Haughton* for appellant.
Green, contra.

BOYDEN, J. Two objections are made by the defendant against the recovery in this case. First, that as the action is upon a nego-
(386) tiable note, without indorsement, the action should have been in the name of the payee in the note, although it was proved that the plaintiff was the real party in interest. It is a sufficient answer to this objection that C. C. P., sec. 55, expressly provides that every action must be prosecuted in the name of the real party in interest, except as otherwise provided in sec. 57. This section is in these words: "An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted," etc. It can not be pretended that this case falls within the exceptions mentioned in this section; and consequently the action must be prosecuted in the name of the real (not the legal) party in interest, which is the plaintiff. Could any language be more explicit?

As to the second question in regard to the competency of the testimony of the plaintiff, it will be remembered that interest in the cause excludes no one, and that parties, like others, are competent witnesses, except when testifying, to a transaction with a person since deceased, as a witness against the administration, etc., of the deceased, when the witness has "or had an interest to the affected"; which means, as Justice RODMAN says, in the case of *Whitesides v. Green,* 64 N. C., 308, "no interested party shall swear to a transaction with the deceased, to charge his estate, because the deceased can not swear in reply." Now, how does this apply to the case under consideration? Had this suit been instituted in the lifetime of the intestate, would he not have been a competent witness against this defendant to prove that he had purchased the note, and that he thereby became the real party in interest, as against the maker of the note, who is the defendant in the case? This is too plain to admit of doubt. Why, then, is not the plaintiff, the administrator of the deceased, a competent witness? He is not swearing to charge a dead man's estate, nor is he swearing to

any transaction between the intestate and the defendants, McDaniel, but to a transaction with the intestate and Wilcox, the (387) payee in the note, and of whom the intestate purchased the note sued on.

Upon what principle of law or reason, can it be insisted that the plaintiff is not as competent to give this testimony as the intestate would have been had he been alive and the suit in his name? Not interest, surely, for the intestate had the absolute interest, while the plaintiff is a mere trustee for the creditors and distributee of the intestate. Not because he is a party, for in that regard he stands exactly as the intestate would have stood.

PER CURIAM. No Error.

Cited: Jackson v. Love, 82 N. C., 407; *Kiff v. Weaver,* 94 N. C., 278; *Holly v. Holly, Ib.,* 673; *Thompson v. Osborne,* 152 N. C., 410.

THOMAS C. UTLEY, Guardian, v. THOMAS YOUNG et al.

1. Where the words "judgment according to report" were entered on the docket, and no final judgment was drawn up and signed by the Judge, and where the counsel for the party in whose favor such judgment was rendered, declined to draw up any final judgment, but filed exceptions to the report, during the week and before the Court was adjourned, and when at the next term of the Court the Judge set aside the "judgment according to report," and heard the cause on the exceptions to the report: *Held,* that this action was within the discretion of his Honor, and that it was not arbitrarily or unlawfully exercised.

2. Whether a sheriff is authorized, when not instructed to the contrary by plaintiff, to receive and defendant to pay Confederate treasury notes in payment of an execution, depends upon the fact, whether at that time in that county prudent business men were taking such Confederate notes in payment of similar debts.

ACTION on a former judgment rendered in the late County Court, tried before *Watts, J.,* at January (Special) Term, 1873, of WAKE. (388)

The plaintiff alleged his judgment, and that no part of it had been paid. The defendants admitted the judgment, but denied the allegation of non-payment—and said that execution was duly issued upon said judgment, tested of November Term, 1862, of Wake County Court, and returnable twelve months thereafter. That the said execution was placed in the hands of the sheriff of Wake County, by plaintiff for collection, and that the defendant some time in May, 1863, paid off and satisfied the same, taking the receipt of said sheriff.

At Special January Term, 1872, of Wake Court, by consent of parties it was ordered that said action be referred to George H. Snow, Esq., his award to be final as to matters of fact and subject to exception as to matters of law.

At Fall Term, 1872, of Wake Court, the said referee reported that he had heard the evidence, and that this action was brought upon a former judgment obtained at February Term, 1861, of the County Court of Wake County for the sum of $465.18, with interest on $387.50, from 17 Nov., 1860, till paid, and costs, $12; that execution upon said judgment was issued, returnable to November Term, 1862, and reissued to November Term, 1863, and placed in the hands of the sheriff of Wake County. That there were other executions in the hands of the sheriff issued from November Term, 1862, to November Term, 1863, at the same time, against the defendant Thomas Young; that 18 May, 1863, the defendant Thomas Young paid to the sheriff one thousand dollars in Confederate Treasury notes, and took a receipt for the same as follows:

"$1,000. Received of Thomas Young one thousand dollars, to be applied to the payment of his taxes for the year 1863, and the balance to be applied to executions against him in my hands for collection. 18 May, 1863. W. H. HIGH, Sheriff.
By G. W. NORWOOD, D. S."

(389)* That the sheriff failed to apply any part of the said $1,000 to the executions in his hands, as appears from record, and also failed to return said executions.

Upon this finding of facts the referee found the following conclusions of law: "That the sheriff in the absence of instructions to the contrary was justified in receiving Confederate Treasury notes in satisfaction of executions in his hands on 18 May, 1863, to the nominal amount of the notes." "That upon failure of the sheriff to apply the funds received to the executions, the law will make the application according to the teste of the executions," and that after paying taxes and executions having priority, the residue be applied *pro rata* to two executions in his hands in favor of the plaintiff against Thomas Young and others, which being done would leave a balance due the plaintiff of $189.04 on the 18 May, 1863, with interest from that time to 7 October, 1872.

This report was returned to October Term, 1872, and the following entry was made: "Report filed 4 Oct., 1872. Judgment according to report." At next Term the plaintiff gave notice of motion to file exceptions to report and to set aside the judgment rendered at October Term confirming said report. On motion of plaintiff's counsel it was ordered by the Court that the words "Judgment according to report," entered

at the last Term of this Court, be stricken out and that the plaintiff be allowed to file exceptions to the report of the referee as to the conclusions of law found by him. And thereupon the following exceptions were filed:

1st. "The referee finds, as a conclusion of law from the facts found by him in his report, that the sheriff was justified in receiving Confederate Treasury notes on 18 May, 1863, in satisfaction of the executions then in his hands, and referred to in the pleadings and report of the referee in this action, whereas, according to law, the said sheriff had no right to receive Confederate Treasury notes in satisfac- (390) tion of said executions, or any part thereof."

2d. "The referee finds, as a conclusion of law, that the Confederate Treasury notes received by the sheriff on said day was a satisfaction of said executions to the full amount of their nominal value and were not liable to be scaled; whereas, according to law, the said Confederate Treasury notes could only be received, if at all, in satisfaction of the said executions, at their value according to the rate of depreciation on the said 18 May, 1863."

And the cause coming on for trial, on motion of defendant's counsel, it was adjudged by the Court that the exceptions be overruled and the report of the referee be confirmed in all respects, and that the plaintiff recover according to the report, and costs. Plaintiff appealed from the judgment of the Court, overruling his exceptions to the report of the referee.

Defendants appealed from the order of the Court that the entry made at the last preceding Term be stricken out.

The following facts were found by his Honor in reference to the motion of the plaintiff to strike out the words, "Judgment according to report," and to allow him to file exceptions thereto: The report of the referee was filed on 4 October, 1872. When the case was on trial before the referee the questions of law were raised and discussed by counsel, and the counsel for plaintiff was informed in general terms as to what the decision of the referee was, but had not read the report. On Tuesday of the second week of the term, it having been understood by the Court and bar that no litigated cases would be tried, the Court called over the docket hurriedly to enter judgments in plain actions, to hear motions, etc. When this case was called the counsel on one side or the other asked for judgment according to report, and the other side assenting, the entry was made by the clerk by order of the Court, "Judgment according to report." The Court was kept open (391) during the whole week by order of the Judge. During the week, when the counsel for the plaintiff took up the report to draw the judgment and read it over, they declined to draw up any final judgment for the signature of the Judge, thinking that the questions of law presented

by the report of the referee ought to be passed on by the Court. No final judgment was drawn up and signed by the Judge. They drew up the exceptions before set out, filed them in the office of the clerk and gave notice to the defendants that they had filed the said exception, all of which was done during the week and before the adjournment of the Court. The defendants insisted that the final judgment was rendered before exceptions were filed at the Term of the Court, and refused to allow exceptions to be filed.

Batchelor, Edwards & Batchelor for plaintiff.
Busbee & Busbee and *Moore & Gatling* for defendant.

READE, J. 1. There is no doubt that it was within the discretion of his Honor to set aside the judgment and allow exceptions, and there is nothing in the case to indicate that his discretion was arbitrarily or unlawfully exercised. There is, therefore, no error in the matter appealed from by the defendant, and this will be certified and there will be judgment against the defendant in this Court for the costs of his appeal.

2. Whether the sheriff was authorized to receive and the defendant to pay Confederate Treasury notes on 18 May, 1863, depends upon whether prudent business men usually received them in payment of such debts at that time in Wake County. This *fact* is not found either by the referee or by his Honor, and we can not try the fact. *Atkins v. Mooney,* 61 N. C., 31; *Emmerson v. Mallett,* 62 N. C., 236;
(392) *McRay v. Smitherman,* 64 N. C., 47; *Greenlee v. Sudderth,* 65 N. C., 470.

If prudent business men usually received Confederate Treasury notes at that time and in payment of such debts, then the sheriff, having no instructions to the contrary, was authorized to receive them and the defendants to pay them, and the debt was satisfied as against the defendants. If the sheriff was not authorized to receive them, then the plaintiff had his election to disregard them altogether and hold the defendants still bound for the whole debt, or to hold the sheriff liable for the *value* of the Confederate notes and the defendants for the balance.

There is error in the matter appealed from by the plaintiff, and there will be judgment for the plaintiff in this Court for the cost of his appeal.

If the propriety of receiving the Confederate notes is the only fact which the parties desire to litigate, there may, *by consent of parties,* be a reference to the clerk of this Court to find that fact; in which event this opinion need not be certified nor the cause remanded, but there may be judgment here in conformity to the report of the clerk.

PER CURIAM. Error.

Cited: Purvis v. Jackson, 69 N. C., 482, 485; *Melvin v. Stevens,* 84 N. C., 82.

T. C. UTLEY, Guardian, v. THOMAS YOUNG et al.

See same case *ante.*

In this case the defendant appealed.

PER CURIAM. Judgment against the defendant for costs of appeal.

(393)

JOSEPH SIMMONS v. JOSEPH CAHOON.

Where it appeared that the plaintiff sold a horse to the defendant for $125 payable in Confederate notes, or $100 in bank notes, at a given time, at defendant's option, and defendant offered to pay in Confederate notes and plaintiff refused to receive them, and both parties differed as to the contract, and agreed that the plaintiff should call at the defendant's house and get $125 State scrip in payment of debt, and plaintiff did not and never has called, and defendant has always been ready: *Held,* that the parties had rescinded the first contract, and by the latter contract the plaintiff was to call for the same as a condition precedent to the payment of it, and as he had not called he could not recover.

APPEAL from *Moore, J.,* at Fall Term, 1872, of TYRRELL.

The action was commenced before a Justice of the Peace, and brought up by appeal to the Superior Court. The facts of the case are fully stated in the opinion of the Court. His Honor charged the jury that the facts did not constitute a tender, and were no protection to the defendant.

Verdict for plaintiff, etc., and the defendant appealed.

Busbee & Busbee for appellant.
Smith & Strong, contra.

READE, J. The plaintiff sold the defendant a horse, for which the defendant was to pay at a given time $100 in bank notes, or $125 in Confederate notes, at the defendant's option. At the time specified the defendant offered to pay $125 in Confederate notes, taking out his pocket book and showing the money. The plaintiff refused to take the Confederate notes because of their depreciation; and demanded that the defendant should give him his bond for $100, and differed with the defendant as to the terms of the contract. The plaintiff then said he would take $125 in State scrip; to which defendant assented, and

offered to go immediately home, some distance off, and get the
(394) scrip. But the plaintiff said no, I will call at your house as I pass this evening, and get it. This was assented to by the defendant. When the plaintiff passed the defendant's house, the defendant had the money ready and called the plaintiff to stop and get it. Plaintiff said he would call on his return and get it. But he did not call and never has called; and the defendant has always been ready. Both the State scrip and the Confederate notes became worthless by the results of the war.

Under the charge of his Honor the case was made to turn upon the validity of the tender of the Confederate notes; his Honor instructing the jury that it was not a sufficient tender. However that may be, it is outside of the case; because the first contract was rescinded, and the parties compromised their controversy by entering into the *new* contract. By the terms of the new contract, the plaintiff was to call at defendant's house and get the State scrip. This he has never done. And having failed to comply with his part of the contract to call at defendant's house, which was precedent to the defendant's undertaking to pay, he can not recover. *Erwin v. R. R.*, 65 N. C., 79, is directly in point.

PER CURIAM. *Venire de novo.*

(395)

JOHN H. POWELL, administrator of Uriah Denning, v. THE WILMINGTON & WELDON RAILROAD COMPANY.

1. The Judge who tries a cause has no right to intimate in any manner his opinion as to the weight of the evidence, nor to express an opinion on the facts.
2. Where there is *any* evidence to the contrary, it is erroneous in the Judge to say, "We are not informed" of a fact upon which it is for the jury to pass.
3. Proper time to ask for particular instructions is at or before the close of the evidence and before the Judge has given such instructions to the jury as he may think the case requires.

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

The plaintiff claimed damages for injuries received by his intestate, Uriah Denning, on the defendant's road. Said intestate, on 6 December, 1870, took passage on a freight train of the defendant at Goldsboro, going to Mount Olive, a station on said road south of Goldsboro, on his own private business. The train had eight or ten freight cars and a conductor's car, in which passengers were usually carried and fare collected, and while going at about five or six miles per hour the conductor's car ran off the track, was crushed to pieces, and intestate of plaintiff received injuries of which he shortly died. At the time of

the occurrence, the intestate was a section master in the employment of defendant, and had a free pass over defendant's road; but the accident did not occur on the section of intestate. There was evidence on the part of the plaintiff that the car was unsound and old, and there was contradictory testimony on the part of the defendant as to the unsoundness of the car. One C. R. Clowe, whose duty it was to inspect trains and cars for defendant, testified for defendant that on 3 December, 1870, at Wilmington, he inspected the train, and said car was sound and in good order. One James King, a witness for defendant, testified that he was defendant's car inspector at Wilmington—that it was his daily labor, that he inspected this car on 3 December, 1870, and (396) that it was all right and sound. There was much evidence as to other points which it is not necessary to state.

Defendant's counsel asked for special instructions on sixteen points, some of which were granted and some refused by the Court; but as they are not necessary to an understanding of the decision, they are not stated. The defendant filed nineteen exceptions to the charge of his Honor, and those upon which the case is decided are fully stated in the opinion of the Court.

Verdict for plaintiff and judgment accordingly.

Defendant appealed.

W. T. Dortch and *Moore & Gatling* for appellant.
Smith & Strong, contra.

RODMAN, J. We do not feel at liberty to express any opinion upon most of the interesting and important questions of law which the counsel were prepared to discuss and upon which they invited us to enter.

We have several times said that on mere matters of practice which were presented in a case we would express an opinion, even when it was not absolutely necessary to a decision of it. We have supposed ourselves at liberty to do this, not only because it is convenient to the profession and the public that such questions should be settled at the earliest period, but also because by the Code this Court has jurisdiction to prescribe rules of practice where they have not been already prescribed by statute or by its own rules or decisions. In respect to questions of public law (as distinct from rules of practice, which are called the law of the Court), it is different. If on any one exception we are plainly compelled to grant to the appellant a *venire de novo,* to go beyond that and undertake to decide other distinct and different questions, although presented by the exceptions, would be to decide upon a hypothetical state of facts which may not be pre- (397) sented again, ad we do not, in general, feel justified in doing it.

In the present case the defendant excepts to the general tone of the Judge's instructions to the jury as plainly intimating his Honor's opinion as to the weight of the evidence, and he has singled out particular passages as especially obnoxious to this criticism. We think that the general tone of the instructions is warmer and more animated than is quite consistent with the moderation and reserve of expression proper in "stating the evidence to the jury in a plain and correct manner and declaring and explaining the law arising thereon." C. C. P., 237. There are passages also which a jury might fairly understand as expressing an opinion on the facts. For example, that which says "if we believe the witnesses it (the car) was a rotten shell," etc. No doubt the Judge had in his mind the witnesses for the plaintiff only, but there was contradictory evidence as to the rottenness of the car and the expression implies that upon the whole evidence, or by a preponderance of evidence, the car was rotten, and ignores the evidence of defendant on that point.

Again "we have not been informed that the inspector was competent," etc. Now, when a Judge says "we are not informed" of a fact upon which it is for the jury to pass, if he keeps within the line of duty he can only mean that there is *no* evidence of that fact. In this case there was *some* evidence, slight, perhaps, bearing on the competency of the inspector, viz: it was his profession; he had experience in it for a certain time; his intelligence, or the want of it, manifested on the witness stand, etc. The language also implies that there was a presumption against the competency and fidelity to duty of the inspector, requiring to be rebutted by evidence in favor. But this is incorrect.

(398) The presumption is that every professor of any profession, art or trade, has at least ordinary skill in it; and that every man does his duty with ordinary diligence, *cuique credendum est sua art.* The presumption is a slight one by itself, but it requires to be rebutted by some evidence of a want of skill or of a breach of duty. The principle is too familiar to need illustration.

The skill of the inspector was a fact for the jury. For although when the facts are given, negligence is a question of law, yet the Judge can not find the facts any more on such a question than in any other. He can only say to the jury "If you find such facts there was negligence. If you find such other facts there was not."

We think the Judge erred in the matters stated.

We think it right to notice a practice which appears to have been adopted in this case, both because it is contrary to the Code, and to be disapproved of on its merits. C. C. P., sec. 238, "Every Judge at the request of any party to an action on trial, *made at or before the close of the evidence,* before instructing the jury on the law, shall put his

instructions in writing," etc. In this case it seems that particular instructions were not asked for until after the Judge had given such instructions to the jury as he thought the case required. To spring upon a Judge at this stage of a trial for the first time, numerous and difficult points of law not always expressed in the most lucid style, is evidently taking him at a disadvantage, and may be greatly abused. At the close of the evidence counsel may well be supposed to have determined upon the propositions of law upon which they intend to put their case, and they should *then* be presented to the Judge to be considered of by him.

The Judge may if he thinks proper, *then* indicate to counsel his views so as to enable them to direct their arguments accordingly; or if the matters require consideration, he may wait until the arguments have closed. We do not mean to be understood as saying that counsel are, or should be absolutely prohibited, even after the (399) Judge has finished his instructions to the jury from calling his attention to any point which he has inadvertently omitted, or his instructions as to which are not well understood. This is but right and proper; but it is evidently a different thing from the practice we are censuring.

PER CURIAM. *Venire de novo.*

Cited: S. v. Caveness, 78 N. C., 490; *Taylor v. Plummer,* 105 N. C., 56; *Marsh v. Richardson,* 106 N. C., 548; *Grubbs v. Insurance Co.,* 108 N. C., 479; *Posey v. Patton,* 109 N. C., 456; *Ward v. R. R.,* 112 N. C., 177; *Craddock v. Barnes,* 142 N. C., 99; *Withers v. Lane,* 144 N. C., 190; *McDonald v. McArthur,* 154 N. C., 12.

S. P. CALDWELL v. RUFUS J. BEATTY.

Where there is a petition for writs of *recordari* and *supersedeas*, and the prayer is refused by a Judge at Chambers, and appeal to this Court, and *procedendo* ordered to the end the prayer of petitioner be granted, and the proceeding was *ex parte*, and defendant had no notice: *Held, to be error* to enter up judgment against the defendant for costs of Supreme Court. Should the petitioner finally succeed in defeating the recovery of the plaintiff in the original action, then he will be entitled to have his costs in this Court taxed against said plaintiff.

APPEAL from *Logan, J.,* at Chambers.

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

Schenck for defendant.

No counsel for plaintiff.

BOYDEN, J. This was an application on the part of Caldwell, by way of petition for writs of *recordari* and *supersedeas;* the prayer of the petition was refused by his Honor, Judge Logan, and the defendant appealed to the Supreme Court, and this Court at the last term decided that his Honor was in error in refusing the prayer of the peti-
(400) tioner; and directed a *procedendo* to issue to his Honor, to the end the prayer of the petitioner be granted.

This proceeding was *ex parte* and of which Beatty, the plaintiff in the original actions, had no notice. Such notice was only to be given after the prayer of the petitioner was granted and the writs issued.

It was, therefore, error in the Clerk to enter up judgment for costs against Beatty; the judgment should have been against Caldwell, the petitioner, for the costs of the Supreme Court. The Clerk will, therefore, correct the record and enter judgment against the petitioner for the costs in this Court. Should the petitioner finally succeed in defeating the recovery of the plaintiff, Beatty, then he will be entitled to have his costs in this Court taxed against Beatty.

PER CURIAM. Error.

Cited: Weaver v. Mining Co., 89 N. C., 199.

CHARLES SKINNER v. D. G. MAXWELL.

While property is in the hands of a receiver, no right to it can be acquired by sale under execution; and it makes no difference that the receiver appointed decline to act, the property was, nevertheless, in the custody of the law.

MOTION for an injunction and the appointment of a receiver, heard before *Logan, J.,* at Fall Term, 1872, of MECKLENBURG, and the case was before this Court at January Term, 1872. At that Term this Court ordered its opinion to be certified to the Superior Court of Mecklenburg, and at that Term of said Court the defendant filed a plea since the last continuance. Notwithstanding this plea, his Honor, Judge Logan, gave judgment according to the opinion of the Supreme Court and appointed a receiver. From this judgment the de-
(401) fendant prayed an appeal, which was refused. At June Term, 1872, of this Court a *certiorari* was ordered and the cause accordingly came before this Court at January Term, 1873.

The other facts of the case are sufficiently stated in the opinion of the Court.

Dowd, Barringer and *Battle & Sons* for appellant.
Bynum and *Jones & Johnston* for plaintiff.

RODMAN, J. This case was before the Court at January Term, 1872, and is reported 66 N. C., 45. After the decree here directing the continuance of the injunction and the appointment of the receiver, the defendant filed in the Superior Court of Mecklenburg an answer since the last continuance, in which he set forth that on 8th January, 1872, he bought at execution sale all the interest of the plaintiff in the property in controversy in the action. He, thereupon, opposed the appointment of a receiver. The Judge nevertheless appointed one, and defendant appealed. His counsel complains in this Court, that the Judge would not consider the case made by his answer since the last continuance, upon its merits, but thought himself bound by the judgment of this Court to appoint a receiver under any circumstances. We will assume, without considering or deciding, that a Judge below is not bound to carry into effect a judgment of this Court, if in the meanwhile the relations of the parties have so changed as to make the judgment inapplicable or unjust. The defendant is certainly entitled to be heard here, upon the effect of the new matter set up in his answer, since the last continuance. And we put out of view for the present any questions which may be made upon the affidavits, as to the regularity of the sale, by reason of the property not being present, etc.

We can not, however, concede to the defendant that his answer is to be considered without reference to the antecedent pleadings. A Judge is bound to know all that the record shows to have been done in the action before him. When, therefore, the defendant al- (402) leges that he has bought the property in controversy at execution sale the Court must necessarily look at the record to see what property or interest is in controversy, and whether the interest, property or right, whichever it be, is one which could, under the circumstances, be sold under execution; for if it could not, the purchaser acquired nothing, except, perhaps, a right to be subrogated to the right of the creditor to the extent of the purchase-money. That, then, is the question we are to consider; whether the interest of the plaintiff passed to the defendant in the whole, or any part of the matter in controversy. If it passed in the whole, clearly the defendant is entitled not only to the rescission of the order appointing a receiver, but also to a vacation of the injunction and a dismissal of the bill. We turn to the complaint to ascertain the matter in controversy. It states on 12 November, 1871, plaintiff, being under age, bought of defendant a stock of confectionery and other goods, a soda fountain, and the good will of the business which defendant had previously carried on; that at the same time he paid a sum in cash, and gave his note with surety, payable at twelve months, for the residue of the purchase-money, and to secure the same executed to defendant a mortgage on the property purchased. Plain-

tiff took possession of the property, sold some of it in the usual course of a retail business, and from time to time replenished the stock by purchases by his own means or credits, and especially that in October, 1871, he purchased and added to the stock goods to the value of $2,200. Some of these have been sold, others remain in specie mixed with the original purchase. On 18 November, 1871, defendant entered into plaintiff's store, turned out his clerk, and has since then kept possession of all the goods found therein, and threatens to sell the same under the mortgage. The plaintiff charges fraudulent representations as
(403) to the condition and value of the property as an inducement to the purchase. He prays that the sale may be rescinded, the rights of the parties ascertained and declared, etc. For that present purpose it is unnecessary to notice the defence set up by the answer. Upon the pleadings an injunction was granted below, a receiver appointed, and an account ordered, etc., and this Court on appeal affirmed the judgment below. That was the condition of the case when the alleged sale of the plaintiff's interest under execution was made.

Of course we do not propose to decide now anything as to the merits of the case as appearing on the original pleading. But looking at the complaint only to ascertain the matter in controversy, it is evident that the claim is for two things, as to which it may turn out upon a trial, that the plaintiff's rights are different.

1. There is his right to make the defendant refund the cash paid by the plaintiff, or at least as much of it as plaintiff has not received by a sale of the goods purchased. This of course supposes the contract of sale rescinded. If that be done, the plaintiff of course renounces or loses all property in the subject-matter originally bought by him, except perhaps a property in the nature of a lien for any balance that may be found due to him out of that transaction. Upon the plaintiff's case, and speaking only as to the goods, etc., which defendant sold to plaintiff, clearly he has no vested estate in any tangible property which can be the subject of seizure and sale under a *fieri facias*. And, if we suppose the plaintiff to fail in his case so as not to be entitled to a rescission or avoiding of the sale, then he has nothing but an equity of redemption in the goods, which is not liable to sale under a *fieri facias*.

II. There are the goods which the plaintiff purchased after his transaction with the defendant, and added to the original stock.
(404) To the liability of these to sale under a *fieri facias*, several objections may be made.

1. That as these goods have been confused with those mortgaged to the defendant, by the plaintiff, they have become liable to the mortgage; or that being confused, they are incapable, without a trespass by the officer, of that separation and identification which is necessary

for a fair and valid sale. It is unnecessary to consider these questions, and we express no opinion on them.

2. That being in the hands of a receiver, they were in *custodia legis,* and hence not subject to execution sale. This last position we think is correct. The authorities on the general doctrine will be found referred to in Drake on Attachment, ss. 492 to 509. As to the case of a receiver in particular, the following authorities support the proposition: 2 Story Eq. Jur., s. 833; *Field v. Jones,* 11 Georgia, 413; *Martin v. Davis,* 21 Iowa, 535; *Glen v. Gill,* 2 Md., *Russell v. R. R.,* McNaughten & Gordon, 104, cases cited in note. The reason of it is this: When a Court of Equity has undertaken to adjudicate upon and distribute a fund among the parties entitled to it, it would be inconvenient if a Court of Law (or any other Court), could by its process interrupt the adjudication and create new rights in the property itself. This rule is not understood as absolutely preventing the acquisition of new rights to the fund in controversy after the commencement of the proceedings. Any person claiming to have acquired such an interest *pendente lite,* while he can not interfere under the process of another Court, may apply to the Court which has jurisdiction of the fund, *pro interesse suo,* and his claim will be heard. 2 Story Eq. Jur., s. 891—833, a. The limits of this principle are somewhat uncertain, but it is sufficient for the present case to say, that while property is in the hands of a receiver no right to it can be acquired by sale under execution. And it makes no difference that the receiver appointed declined to act; the property was nevertheless in the custody of the law. (405)

No reason appears why a received should not be appointed according to the order heretofore made. The order for the account may be modified by directing the referee (or the receiver, as the parties may agree), to separate the two classes of goods above mentioned, and to keep a separate account of the proceeds of each; and the defendant may present his claim under his purchase to the referee, to be passed on by him. If the receiver shall be chosen to separate the goods, he will be made a referee for this purpose, with power to take testimony, etc., and to report to the general referee.

PER CURIAM. Affirmed.

Cited: Brown v. R. R., 83 N. C., 132; *Pelletier v. Lumber Co.,* 123 N. C., 601, 602.

(406)

BOARD OF COMMISSIONERS of FORSYTH COUNTY v. JOHN BLACKBURN.

1. The judicial powers of the late County Courts are given by the Constitution of 1868, to the Superior Courts and the administration of the municipal affairs of the counties to the boards of county commissioners.
2. The Superior Courts have the right to amend the records, technically so-called, that is relating to their judicial action as Courts proper of the late County Courts.
3. Superior Courts will not compel the Clerk of the Superior Court, who has the legal custody of the records of the late County Courts to surrender such records to the Board of County Commissioners to be altered by said commissioners.
4. Entries on the books of the County Courts in relation to a vote of the people on the question of subscription or no subscription to the stock of a railroad company, and the action of said Court in relation to such subscription, and as to the Justices who were present, although not records, are written evidence, which the public and third persons may have an interest to preserve in its original integrity.

MANDAMUS, tried before *Cloud, J.*, at Chambers, 21 November, 1872.

The proceeding was by summons and complaint, and was to obtain a writ of mandamus, to compel John Blackburn, the defendant, as Clerk of the Superior Court of Forsyth, to deliver to the plaintiff the records of the late County Court of Forsyth, concerning the subscription of said county to the capital stock of the North Western Railroad Company.

An ordinance of the Convention of the State, passed 9 March, 1868, authorized the question to be submitted to the people of said county, whether they would subscribe one thousand shares to the stock of said company, and in pursuance of said ordinance, the Justices of Forsyth met at the Court House in Winston, on 24 March, 1868, and as the record states, a majority were present and made the order submitting the question of "subscription," or "no subscription."

An election was accordingly held, and the sheriff of the county reported that a majority of the votes cast were in favor of
(407) subscription, and the Justices of the County Court, a majority being present at the regular June Term, 1868, received the report and appointed an agent to subscribe for one thousand shares of stock in said company. The agent made the subscription, and bonds were caused to be issued by said Justices, to pay said subscription and were sold. Afterwards taxes were levied and collected to pay the interest on said bonds. The defendant refused to obey an order of plaintiff to give up the records, and plaintiff asks for this writ to compel the defendant to surrender said records, so that they may be altered

by the clerk of the plaintiff, so as to state that a majority of the Justices of Forsyth, *were not* present at the said meeting of said Justices on 24 March, 1868, and at the said June Term, 1868, and that certain Justices *were not* present, who are stated in the record to have been present.

The defendant admits the subscription and issue of bonds, and avers that a majority of the Justices *were present,* and that the Justices alleged to have been absent were not absent, and that the action of the Justices was in all respects in accordance with law; that he refused to obey the order of the plaintiff, because he was advised and believed that he could not lawfully surrender the records, and that plaintiff had no authority to amend the records as proposed by plaintiff. The holder of the bonds had no notice of this proceeding.

His Honor refused to grant the prayer of the plaintiff, and gave judgment for defendant.

W. H. Bailey for appellant.
McCorkle & Mastin, contra.

RODMAN, J. The County Courts which existed prior to the Constitution of 1868, had a certain strictly judicial power. They were properly Courts. In addition to this they were invested with (408) certain administrative powers over the municipal affairs of their counties, among others, with that of making contracts on their behalf, either first submitting the question to a vote of the people, or not, as the law might direct. By the Constitution these Courts were abolished; their judicial powers were given to the Superior Court, and the administration of the municipal affairs of the counties to the boards of county commissioners.

This Court has decided that the Superior Courts, are the successors to the judicial powers of the County Courts, have the right to amend their records technically so-called, that is relating to their judicial action as Courts proper. *Foster v. Woodfin,* 65 N. C., 29; *Stanly v. Massengill,* 63 N. C., 558; *Mason v. Miles, Id.,* 564.

It must be implied that no other body has that right. If therefore the action of the County Court of Forsyth, in declaring that a majority of the voters of the county had voted in favor of issuing the county bonds, was judicial action, and the entry on its minutes to that effect, and that a majority of the Justices were present and concurred in that declaration, and in the issuing of the bonds is a judicial record; then it follows that the Superior Court has the right upon a proper proceeding to amend that record; and the present plaintiffs have no such right, and their action must consequently fail. To show that the action of the Justices in the instance in question was judicial, or at

least so far partook of that character that the entry of it had the force and effect of a judicial record, we were referred to *S. v. McAlpin,* 26 N. C., 140; *S. v. King,* 27 N. C., 203.

These cases certainly establish that an entry of the action of a County Court in taking the official bond of a sheriff and of a constable, was considered a record technically and strictly. But the inference is not a necessary one, that an entry representing a contract
(409) for building a bridge or any similar matter would also have been so considered. At all events, in these cases no question as to the character of the entry with reference to the distinction we are now making was made by the parties or considered by the Court. We do not think they can be deemed authorities, for any purpose in this case.

The plaintiff's action is apparently founded on the idea that while the entries of the County Courts made in the course of their judicial duty are technically and properly records, yet those which concern merely its municipal action are not records but in the nature of entries on the books of a municipal corporation, and that as they have succeeded to the municipal powers of these Courts, their entries so far as they relate to these affairs must be in the power and control of the plaintiffs. It is only upon such a proposition that the plaintiffs can put their claim with any plausibility. Notwithstanding that we have not seen in any of our reported cases, any suggestion of such a difference between entries made by the same body and in the same books, turning upon the difference of the subject-matter, yet we are inclined to think the distinction a just one. It remains to be seen if it can avail the plaintiffs.

The difference in the character and effect of records of a Court, and entries in the books of a corporation whether municipal or private, is very great. The records of a court import absolute verity as to all the world; they can not be collaterally impeached or contradicted. If from accident or inadvertence they speak more or less than the truth, they may be amended so as to speak the truth by the Court which made them, or by any which has succeeded to its jurisdiction, but by no other. No amendment will be made except after notice to all persons interested; none will be allowed which will injure, that is, unjustly affect third persons, and an appeal will lie from any order for an amendment irregularly made, that is, not made accord-
(410) ing to the course and practice of the Court established by a long series of adjudications upon principles of justice and reason.

Entries on the books of a corporation do not import absolute verity, they are evidence between the corporators, and in certain cases be-

tween strangers; but in general they are not conclusive even between the corporators, except where they have the effect of an estoppel. Cole on Crim. Infor. and Quo Warranto, 227. They may be altered, but they can not be amended in the sense in which that word is applied to judicial records, and there exists no such safeguards against false and fraudulent alterations, as protect judicial records. There need not be notice to anyone; the law has provided no way by which persons interested to oppose the alteration may be heard against it, and no appeal will be from it to any Court. If altered, proof of their original condition, and of the circumstances of the alteration, would be always admissible. But although these entries are not records, they are written evidence which the public and third persons may have an interest to preserve in its original integrity. Whether or not a municipal or private corporation may alter its entries or minutes relating to a contract at will, it is not necessary to consider. Perhaps, being in possession of the books of entries, a Court would not generally interfere to prevent it, although cases may be conceived in which probably it would interfere in some way. But the plaintiffs can not put their claim to alter these books, on the ground of possession of property; for the possession and custody are by statute vested in the Clerk, and the property is in the State.

What the plaintiffs demand is that the Superior Court shall compel the Clerk to allow them to alter the original entries of the County Court upon the matters in question, by erasure, interlineation, or otherwise, so as to make them state respecting a matter of fact in which third persons are interested differently from what they now do. The proposition is in effect to destroy, mutilate or obscure those (411) entries as evidence of a past transaction. The plaintiffs do not demand that they be altered so as to speak the truth as the Court may find it to be; because if they had desired only that, they would have moved the Court to amend, when the truth of the fact could have been inquired into by the Court, and (supposing the jurisdiction of the Court) the amendment would be made accordingly. But they desire to alter the entries to make them conform to the truth as they have determined it to be; which in substance is to alter it at their discretion. For although the alteration they wish to make at present is set out, yet upon this application the Superior Court has no jurisdiction to inquire into its truth or propriety, and if it should grant this, it would on the same principle be compelled to allow any alteration which the plaintiffs might desire to make. Such alterations, if accompanied with a fraudulent intent, which we do not suppose to exist in the present case, would be spoliation of evidence. In its best aspect, it is but an attempt to obliterate or obscure evidence, the force and weight

of which, whatever it may be, should not be changed *ex parte,* and no Court will lend its aid in doing so.

PER CURIAM. Judgment affirmed.

Cited: *Geer v. Geer,* 109 N. C., 682.

(412)

THOMAS H. BREM v. JOHN ALLISON.

1. Where the suit is between a member of the firm and a stranger and the terms of the partnership which are in writing is not the question at issue, but comes up collaterally, it is not necessary to introduce the writing. *Oates, Williams & Co. v. Kendall,* 67 N. C., 241.
2. Where A having a bond against principal and surety and a member of a firm to which A is indebted, who is the son of the principal of the bond agrees to take the bond and credit A's account, which is done, and where A said he understood it to be a payment, and where the Judge who tried the cause refused to charge the jury that if A understood it to be a payment it was a payment and they must so find: *Held,* to be no error.
3. Where there is conflicting testimony and divers witnesses, it is seldom the case that the Judge can pick out any single witness, and say, if you believe him you must find for the plaintiff or defendant.
4. There may be cases where it would be proper, but generally it is safer to put the case to the jury upon all the evidence, with proper explanations.

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

The bond sued on was as follows:

$300. On the first day of January, 1860, we, or either of us, promise to pay W. F. Davidson, the sum of three hundred dollars for rent of his dwelling house and lot for the year 1859.

J. A. SADLER.
J. ALLISON.

W. F. Davidson, for defendant, testified that some time after the bond became due, the amount of it was paid to him, by James Sadler, Jr., son of the principal of said bond, by crediting the amount thereof upon the account of said Davidson, with the firm of Brem & Co., composed of the plaintiff, one Alexander and James Sadler, Jr., and that on getting his account credited with said firm for the amount of said note, he delivered the same to said James Sadler; and it was witness' understanding that the note was thus paid by said James Sadler,
(413) Jr., for his father, James A. Sadler, and not purchased by said James Sadler, Jr., for his said firm. The plaintiff testified that he, one Alexander and said James Sadler, Jr., were partners, all the

capital being his, and the others having an interest in the profits, as compensation for their services; that this note was received by James Sadler, Jr., and the amount of it credited on the firm account against Davidson, and it was placed by him, Sadler, Jr., among the assets of the firm; and that said Sadler, Jr., did not charge himself with the amount of the same or any part of it. That subsequently on dissolution of the firm several years before the commencement of this action, the said note and the other assets of said firm became the individual property of the plaintiff by the terms of dissolution. Defendant's counsel objected to witness Brem's speaking of the terms of the partnership or of the dissolution without producing the written evidence; but his Honor allowed witness to speak of so much of each as is stated above. Defendant excepted.

Defendant's counsel asked his Honor to charge the jury that if Davidson's version of the transaction was correct, the note was paid and the plaintiff could not recover. His Honer instructed the jury that if Sadler, Jr., paid the note for his father it was a discharge of the debt; but if he only took it in payment of Davidson's account and placed it among the assets of the firm, and the other evidence of plaintiff was believed, they should find for plaintiff.

Verdict for plaintiff. Judgment and appeal.

Wilson for appellant.
Dowd, contra.

READE, J. If the suit had been between the plaintiff and his co-partner, and the terms of the partnership had been the question at issue; and if the terms were in writing, it would have been necessary to introduce the writing as being the best evidence. But that rule does not obtain when the suit is between the plaintiff and a (414) stranger, and terms of the partnership is not the question at issue, but comes up collaterally. *Oates v. Kendall,* 67 N. C., 241. It is true, as contended for by the defendant, that "when the terms of a verbal agreement are ascertained, its construction, like a written agreement, is for the Court and not for the jury." That being conceded, then the defendant says he was entitled to the instruction asked for, viz: "That if Davidson's version of the transaction was correct, the note was paid and the plaintiff could not recover." The facts not disputed, are that one Sadler, as principal, and the defendant, as surety, executed the bond in controversy to one Davidson; and Davidson owed an account to the plaintiff's firm; that a son of the said Sadler was a member of the plaintiff's firm, and agreed with said Davidson to take from Davidson the bond in controversy and credit Davidson's account with the amount of it. And the fact in dispute was,

whether that was intended to be a payment of the bond by the principal obligor, Sadler, senior, through his son, Sadler, junior, and a discharge of the principal obligor, Sadler, senior; or, whether it was a purchase of the bond in consideration of the credit entered upon Davidson's account, for the benefit of the firm, without intention to discharge the obligors; in other words, whether it was a *payment* or a *purchase* of the bond.

To prove that it was a payment, the defendant examined Davidson, who testified "That sometime after the note became due, the amount of it was paid to him by James Sadler, Jr., son of the principal of said note, by crediting the amount thereof upon the account of said Davidson with the firm of Brem & Co., composed of the plaintiff, one Alexander and said James Sadler, Jr., in getting his account credited with said firm for the amount of said note. He delivered the same to said James Sadler, Jr., and it was witness' understanding that the (415) note was thus paid by said James Sadler, Jr., for his father, and not purchased by said James Sadler, Jr., for his said firm. That before the settlement took place he had an understanding with James Sadler, Jr., that if he would bring up the note on his father, he would give him credit for that amount, and that he would pay it in that way for his father."

Now, the bond being a negotiable instrument, and James Sadler, Jr., having given his own means, or rather the means of the firm for it, the reasonable inference would be that it was a purchase and not a payment; and that the obligors were to continue bound. Especially is it so when there is no pretence that the obligors had procured the payment to be made or moved in the matter at all. Under these circumstances it would be difficult to resist the conviction that the bond was taken for the benefit of the firm, and not for the benefit or in discharge of the obligors. Was there anything in "Davidson's version of the transaction" to rebut this reasonable presumption? It is true he says that *"the amount"* of the note was *"paid"* to him by James Sadler, Jr., by crediting his account, etc. And that is just as consistent with the idea of a *purchase* as of a *payment* of the note. And he says further that it was his "understanding" that the note was thus paid and not purchased. What did *his* understanding have to do with it? He parted with the bond for the value of it to the plaintiff's firm, and it was not *his* understanding that was to govern the transaction, but the understanding of the firm whose means went to pay for it. If it was true that he received the means of the firm for the bond from the son of the obligor (who from other parts of the evidence seems only to have been nominally interested in the capital of the firm) with the understanding that the firm was not to have the benefit, then he ought not to have been a partner to such a transaction.

And he says further that he had an understanding with James Sadler, Jr., before the transaction, that if he would bring the bond he would take it and give him credit for the amount, and that he (416) would pay it in that way for his father. And here again the reasonable presumption is that Sadler, Jr., only meant to change the debtor of the firm from Davidson to the obligors on the bond; either because the bond was thought to be better than Davidson or because Davidson desired to settle his account in that way. But the question is, could his Honor charge the jury, that if Davidson understood it to be a payment, then it was a payment, and they must so find. Of course he could not; for Davidson's understanding had nothing to do with the character of the transaction, and was not even competent evidence as to what was the intention of the other party. It was no more than his *opinion* of what the other party intended.

And again, suppose it be conceded for the sake of the argument, that Sadler, Jr., had said and did intend, that the obligors in the bond should be no longer bound on the bond, but that the bond should be considered as paid; could the obligors avail themselves of it as a defense when sued upon the bond by the plaintiff? There was no agreement *with them,* and if there had been, there was no consideration moving from them to support it. So that, putting the most favorable construction upon Davidson's testimony for the defendant, the Judge could not have given the instruction asked for.

There is another reason why his Honor ought not to have given the instruction asked for by the defendant. Where there is conflicting testimony and divers witnesses, it is seldom the case that the Judge can pick out any single witness and say, if you believe him, then you must find for the plaintiff. There may be cases where it would be proper, but generally it is safer to put the case to the jury upon all the evidence, with proper explanations, as was done in this case, *Steamboat Co. v. Anderson,* 64 N. C., 399.

His Honor left it to the jury to say from all the evidence (417) whether Sadler, Jr., paid the note for his father. If he did, it was a discharge of the debt. But if he only took it in payment of Davidson's account and placed it among the assets of the firm, and the other evidence of the plaintiff was believed, they should find for the plaintiff. This was at least as favorable for the defendant as he could ask. Indeed it would seem that his Honor might have charged that there was no evidence that Sadler, Jr., paid the debt for his father, in the sense that he was the agent of his father, or in any other sense that the defendant could take advantage of.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: Dail v. Sugg, 85 N. C., 106; *S. v. Rogers,* 93 N. C., 532; *Long v. Hall,* 97 N. C., 293; *White v. Barnes,* 112 N. C., 330.

DANIEL PERRY v. EDWARD HILL.

1. It is competent to prove by parol, the consideration of a written promise to pay money, at least when none is recited. *Robbins v. Love,* 10 N. C., 82; *Nichols v. Bell,* 46 N. C., 32, cited and approved.
2. When there is an entire verbal agreement, and a note given and read in evidence was only a part of said agreement, it is competent to prove such agreement by parol, nothwithstanding such note.

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

The complaint alleged that the defendant had converted plaintiff's horse and buggy, and this action was to recover their value. Defendant denied the conversion, and further answered that the plaintiff had compromised and settled the matter for a valuable consideration. The plaintiff and his son testified that the defendant borrowed plaint-
(418) iff's horse and buggy in Jones County in 1862, for the purpose of going to Kinston, soon after the fall of New Bern, and promised to return them the next day, which he failed to do. Defendant testified that he hired the horse and buggy from plaintiff, with an understanding that he should deliver them, for plaintiff, to Major Boon, a quartermaster in the Confederate army at Kinston, and that Major Boon would pay plaintiff the hire, that he delivered them to Major Boon according to contract, who used them in the service of the Confederate government and they were lost, and that he had compromised and settled with the plaintiff for valuable consideration.

Defendant offered to show as to the issue of accord and satisfaction, an agreement between him and the plaintiff on 14 January, 1868, that he, the defendant, would lend the plaintiff $25 ($75?), which should be returned in forty days, the plaintiff depositing with him as collateral security for said return a note on James and Starkey McDaniel, and that the plaintiff would never say anything again to the defendant respecting his claim for said horse and buggy, but that the accommodation of said loan should be in full satisfaction thereof; that said sum was in pursuance of said agreement loaned to the plaintiff, who thereupon gave and delivered to the defendant the instrument, a copy of which appears in the opinion of the Court. The evidence as to the accord and satisfaction resting in parol was objected to by plaintiff because a part of the agreement to-wit: that covered by the said instrument was reduced to writing, the objection was sustained and the evidence ruled out by the Court. Defendant excepted.

Verdict and judgment for plaintiff. Defendant appealed.

Smith & Strong for appellant.
L. J. Moore, contra.

RODMAN, J. The plaintiff complains that defendant con- (419) verted his horse and buggy to his damage, etc. Defendant denies the conversion, and further says that plaintiff compromised the matter for a valuable consideration, and said there should be no more difficulty about it. The vagueness of this statement of the defense, which does not show what was given upon the accord, nor that it was accepted in satisfaction might perhaps have justified the plaintiff in demurring to it, or in requiring that it be made more particular. He takes issue upon it, however, and the parties go to trial, upon the two issues. Evidence was given on both sides as to the alleged conversion of which as no exceptions are founded upon it, nothing need be said.

Upon the second issue as to the accord and satisfaction, the defendant offered to show that in January, 1868 (long after the alleged conversion), he had loaned the plaintiff $25 (so the record reads), but we suppose from what afterwards appears this sum was written by mistake for $75), to be repaid in forty days, the defendant taking certain notes as collateral security, and that in consideration of the loan plaintiff agreed that he would never say anything more about his claim for the horse and buggy. He also put in evidence the following writing: "New Bern, 14 Jan., 1868. Received of Capt. Edward Hill (the defendant) seventy-five dollars to be delivered to Capt. Edward Hill in forty days from this date. He, Capt. Edward Hill, holds note as collateral security against James McDaniel and Starkey McDaniel which was delivered to Edward Hill by Daniel Perry." The case then states: "the evidence as to the accord and satisfaction resting in parol, was objected to by the plaintiff, because a part of the agreement, to-wit, that covered by the above instrument, was reduced to writing; and the objection was sustained and the evidence ruled out by the Court. Defendant excepted." That is the only question presented. We think the evidence was admissible.

The general rule that a written contract can not be varied by (420) parol is not denied. But it was not sought here, to add to, alter, or contradict, the writing in any particular, but only to show what was the consideration for the loan of the money for forty days without interest, of which loan the writing is evidence. The rule has never been held to exclude proof of the consideration of a written promise to pay money, at least when none is recited. *Robbins v. Love,* 10 N. C., 82; *Nichols v. Bell,* 46 N. C., 32.

Besides there is another well recognized exception to the general

rule upon which the admissibility of the evidence in question may be supported. Greenleaf on Ev., S. 284, A, says: "Nor does the (general) rule apply in cases where the original contract was verbal and *entire,* and a *part only* of it was reduced to writing."

In *Twidy v. Saunderson,* 31 N. C., 5, PEARSON, J., says: "The rule is not applicable to the case under consideration, for the agreement was not reduced to writing. The *note* is not a memorial of the entire agreement, but is simply a part execution on the side of the defendant," etc. See also *Manning v. Jones,* 44 N. C., 368, and *Daughtry v. Boothe,* 49 N. C., 87.

In this case the defendant offered to prove, that the original agreement was verbal and entire; to-wit: That defendant should lend plaintiff seventy-five dollars, without interest for forty days, which loan for that time, plaintiff would accept in satisfaction of his claim for the horse and buggy, and would also deposit a note as collateral security, and execute his own note for the money, and stipulating for its return at the expiration of the credit.

Upon this alleged defence, the note actually given and read in evidence, was only a part of the entire original verbal agreement, and was executed in pursuance of it.

The defendant should have been allowed to prove the entire agreement if he could. The refusal to allow him was error, and there (421) will be a

PER CURIAM. *Venire de novo.*

Cited: Braswell v. Pope, 82 N. C., 60; *Ray v. Blackwell,* 94 N. C., 13; *Evans v. Freeman,* 142 N. C., 65; *Ivey v. Cotton Mills,* 143 N. C., 194; *Wilson v. Scarboro,* 163 N. C., 385.

IRVING C. STONE v. JAMES F. LATHAM and DAVID EDMISTON.

It is clear that the Court may appoint, control and remove its commissioner to sell land.

MOTION to set aside orders, decrees and proceedings in the case of Jane E. Martin *et al.* to the Court, made before *Watts, J.,* at Spring Term, 1872, of HYDE.

Jane E. Martin *et al.* to the Court, was a petition to sell land devised to be sold by the will of Marvel Wilkinson, in order to carry out the directions of the will. The sale was made and confirmed by the Court. Irving C. Stone was guardian of Jennie and Margaret Wilkinson, two of the tenants in common, who were infants, and he was commissioner, and made and reported the sale. Defendant, James F.

Latham, became the purchaser. Afterwards, the Probate Court of Beaufort, in which county he was originally appointed by the County Court, removed plaintiff, Irving C. Stone, and appointed James F. Latham guardian of the infants. And on supplemental petition, the Superior Court of Hyde annulled the decree, directing Irving C. Stone to collect the purchase-money and make title to James F. Latham; and it appearing that Latham wished to surrender his bid made on said land to defendant, David Edmiston, a decree was made directing James F. Latham, to collect the purchase-money, and to make title to defendant Edmiston on his paying the said purchase-money.
And at Spring Term, 1872, Irving C. Stone made the motion (422) to set aside orders, etc. Motion disallowed; plaintiff appealed.

Fowle and *Busbee & Busbee* for plaintiff.
Phillips & Merrimon and *Battle & Sons* for defendants.

SETTLE, J. This Court can not consider the action of the County Court of Beaufort, appointing the plaintiff guardian to the two infants mentioned in the pleadings, nor the action of the Probate Judge of that county, removing him from the said guardianship, and appointing the defendant in his stead.

The only question for our consideration is presented by the action of his Honor in refusing to set aside the orders, decrees and proceedings had and done in this cause; by virtue of which the plaintiff was removed from the appointment of commissioner to sell the lands mentioned in the pleadings, and the defendant Latham appointed to collect the purchase-money and make the deed to the purchaser.

We take it as clear, that a Court may appoint, control and also remove its own commissioner in a case like the one before us.

The commissioner is but the finger of the Court, and acquires no adverse interest in the subject-matter; and the suggestion that he is not entirely under the control of the Court rests upon no sound foundation.

We answer the objection that this was done without notice to the plaintiff in the language of RUFFIN, C. J., in *Collier v. Bank,* 21 N. C., 328. "As our terms are at certain and short periods parties are charged with the knowledge of all the orders made in the cause, without service of a copy, unless specially directed." We deem it unnecessary to comment on the fact that the plaintiff now desires to complain of a sale which he made and reported to the Court as fair, and recommended the same for confirmation. To the objection of the plaintiff that the original purchaser has transferred his bid, etc., (423) we answer that the case shows that all the proceedings were had under the eye of the Court, and it is not alleged that the new

security for that part of the purchase-money which remains unpaid is insufficient or doubtful.

The plaintiff should be allowed compensation for making the sale.

PER CURIAM. Affirmed.

Cited: Clayton v. Jones, post., 499; *Ward v. Dortch,* 69 N. C., 279; *University v. Lassiter,* 83 N. C., 42; *Williams v. Whiting,* 94 N. C., 483.

R. B. ELLIS v. THE N. C. INSTITUTION for the DEAF and DUMB and the BLIND.

1. An appointee of a Board of Directors of an Institution authorized to make by-laws, is bound by all the provisions of the by-laws in force at the time of his appointment.
2. The appointment of a *de facto* Board of Directors must have the same force and effect, as if made by a regular legal board; and the acceptance of an appointment by one, is considered that the acceptance is to be governed by the by-laws then in force.

STATEMENT of facts, which might be the subject of a civil action, submitted to *Watts, J.,* at Chambers, in WAKE, 22 February, 1873, and by him determined.

"The plaintiff and defendant agree to the following statement of facts, which might be the subject of a civil action, and submit the same to the Court:

1. R. B. Ellis, the plaintiff, was on 13 June, 1870, duly elected by the then Board of Directors of the said Institution, steward (424) and physician of said Institution, and was notified of such election as follows, viz:

RALEIGH, N. C., 21 Sept., 1870.

To Dr. R. B. Ellis:—At a meeting of the Board of Directors of this Institution, held 13 June, 1870, you were elected steward and physician for the ensuing year ending 1 June, 1871. Your salary will be $900, and board of self, wife and child and servant. Please inform us whether or not you will accept the position.

W. J. PALMER, Secretary.

2. That plaintiff duly accepted the said position upon the terms offered, and entered upon the duties incident thereto; that he continued in discharge of the same until on or about 1 Feb., 1871, when he was removed by the present Board of Trustees of said Institution, or by persons claiming to be such Board and acting as such, under authority of an act of the General Assembly, ratified 21 January, 1871, acts of 1870-'71, chap. 35; that in compliance with a notice to that effect, he turned over to his successor in office of steward, all papers

and other property belonging to said office—said successor having been chosen by said Board of Trustees. That plaintiff received his salary, board, etc., up to the date of his removal; he was ready and willing to continue in the office of steward and physician, but signified no such readiness to said Board of Trustees; that no cause was assigned *to the plaintiff* for his removal.

3. That the following is one of the by-laws for the government of said Institution:

"(1) The officers of the Institution shall be elected by the Board of Directors in June of each year. The principal shall hold his office for the term of two years from the first day of September succeeding his election. The other officers shall hold their offices from 1 September succeeding their election.

"(2) It shall require five members of the Board of Directors (425) to displace any officer during his term of office."

The plaintiff was displaced at a regular meeting of said Board of Trustees (the full number seven being present), by a unanimous vote.

4. The board for plaintiff and family was reasonably worth $75 per month.

5. The successor to said plaintiff was paid a salary from the date of plaintiff's displacement.

6. The said Board of Directors before the displacement, had yielded peaceable possession of said Institution, upon demand, to defendants.

7. The steward is an officer of the Institution under the by-laws.

If the Court shall be of opinion that the plaintiff is entitled to recover, then judgment is to be entered in his favor for $750, and for costs.

If the Court shall be of opinion that the plaintiff has no right of action against the defendants, then judgment is to be entered for the defendants for costs.

If the Court shall be of opinion that the plaintiff is not entitled to recover anything, then judgment is to be entered in favor of the defendants for costs.

After argument, his Honor being of opinion with plaintiff, gave judgment accordingly. From this judgment the defendants appealed.

Busbee & Busbee for appellants.
Argo & Harris, contra.

BOYDEN, J. There are several questions raised in this case, but as one point is so clearly against the plaintiff's right to maintain this action, we deem it unnecessary to notice any other.

The case agreed states that the plaintiff was elected steward and

physician by the Board of Directors regularly in office in the
(426) Institution, for one year, and before his term of office had expired for which he had been elected, he was removed and displaced by the new Board who were appointed by the Legislature, under the act of Assembly passed 21 January, 1871, Laws 1870-'71, chap. 35.

The law creating this corporation authorized the making of by-laws for the government of the Institution, and the Board of Directors had, in pursuance of the law, enacted various by-laws, and among others there was one which prescribed that any officer elected might be removed by a certain vote of a majority of the Board. It is agreed that the steward was an officer of the Institution, and that he had been displaced or removed by the unanimous vote of the Board of Directors, at a regular meeting of the Board of Directors in office under the above recited act of the Legislature; that the plaintiff had been notified of his displacement, and in compliance with a notice to that effect the plaintiff turned over to his successor, as steward, all the property belonging to said office. But the plaintiff was willing, the case states, to continue in his office of steward and physician, but signified no such willingness to said Board of Directors. That no cause was assigned to the plaintiff for his removal. This raises the question, we think, which must determine the plaintiff's right in the case.

It is argued, with much earnestness, *First,* that the Board of Directors appointed by the Legislature were mere intruders into these offices, and were not even officers *de facto,* as they were in without any color of title to the office; and, *secondly,* that if they were officers *de facto,* the plaintiff was not subject to be removed by an action under this by-law, unless he had been notified thereof at the time he accepted the office, and that even then he could not be removed without a sufficient reason being assigned for his removal.

We think the counsel for the plaintiff is mistaken in the positions above recited. First, the Board were in, under the color of an act of the
(427) Legislature and the former Board had peaceably surrendered their positions in the Board to those Directors, and under the law as they supposed, they were exercising and discharging all the duties devolved upon such officers. This we hold constituted them officers *de facto,* and as has been decided at this term they are not officers *de jure.* And we hold that acts of this *de facto* Board in the discharge of the ordinary duties of the Board, are to have the same force and effect as if made by a regular legal Board. So, as we regard the law, the only question for us to decide is, whether the plaintiff, when he accepted this appointment and entered upon the discharge of his duties as an officer of the Board was bound by the by-laws of the institution in force at that time, without being specially notified thereof. Upon this

question the Court entertains no doubt, that every officer elected and inducted in office is bound to take notice of the by-laws and govern himself accordingly; so that the plaintiff having been elected as steward and physician of this institution when this by-law was in force, he is just as much bound thereby, as if it had been expressly stipulated, that he was to hold said office for the term of one year, unless he should be displaced by a vote of the Board, five of the Directors voting for his removal.

This disposes of the plaintiff's case. But we can not permit this occasion to pass, without remarking that we deem this by-law, not only proper and reasonable, but absolutely indispensable, and we can not see how such an institution could be managed at all, without the power to remove a disagreeable or objectionable steward and physician. Should it be manifest that his services as a physician were injuring instead of benefiting the patients; must he still continue to prescribe for the pupils until the close of the year? Should he furnish unwholesome provisions, must the pupils in the institution eat them or starve? Should he conduct himself in such a manner as to (428) render the pupils dissatisfied or disobedient; must such conduct be borne until the close of the year? Surely not.

These remarks are general and have no reference to the plaintiff. There are a thousand ways, by which a steward and physician might thwart and destroy the influence of the teachers over their pupils which might be difficult of proof although the Directors might be fully satisfied of their existence. So that to require a sufficient reason on the removal of such officers to be assigned, would be almost equivalent to having no right of removal at all.

PER CURIAM. Reversed.

READE, J., *dissentiente:* I do not think the rightful Board could have removed the plaintiff, *without* cause; and I do not think the wrongful Board could have removed him at all. And yet I do not think the plaintiff can recover, of the Institution, because, for some reason or other, he did not render the service; and it was not the fault of the Institution that he did not.

Whether the plaintiff has the right to recover, of those who wrongfully removed him, or of him, who wrongfully received the emoluments to which he was entitled, is not before us.

Cited: R. R. v. Cowles, 69 N. C., 64; *Norfleet v. Staton,* 73 N. C., 550; *Eliason v. Coleman,* 86 N. C., 238; *County Board v. State Board,* 106 N. C., 83.

(429)

THE PEOPLE OF NORTH CAROLINA *ex rel.* JOHN NICHOLS and others v. WM. H. MCKEE and others.

1. The Legislature, like the other departments of the State Government, acts under a *grant* of powers, and can not exceed that grant.
2. There is no express grant of power to the legislative department to appoint to office; but there is an express prohibition.
3. The general appointing power is given to the Governor with the concurrence of the Senate; the power to fill vacancies, not otherwise provided for, is given to the Governor alone, and *that*, whether the Legislature is in session or not, and without calling the Senate.
4. The Directors of the Institution for the Deaf and Dumb and the Blind are officers, made so by the Constitution and so called. The Legislature has no right to appoint such Directors.

QUO WARRANTO, for the recovery of the office of the "Board of Trustees of the N. C. Institution of the Deaf and Dumb and the Blind," determined at Fall Term, 1872, of WAKE, before *Watts, J.*

Defendants held, exercised and claimed the offices demanded by the plaintiffs, by and under an act entitled "An act to alter chapter six of the Revised Code, concerning the North Carolina Institution for the Deaf and Dumb and the Blind," ratified 21 January, 1871. The following was the case agreed:

"That on 1 March, 1872, the plaintiffs were appointed by the Governor of the State of North Carolina to the office of "The Board of Trustees of the North Carolina Institution for the Deaf and Dumb and the Blind"; that they accepted said office, were duly qualified thereto, and assumed the duties thereof; and immediately upon their acceptance as aforesaid, and before the commencement of this action, they notified the defendants of their said acceptance and demanded of them that they relinquish and surrender to plaintiffs said office, and turn over and deliver to them all books, money and other prop-

(430) erty belonging and appertaining to said office.

2. That the defendants are in possession of said office, exercising the powers and receiving the emoluments thereof; and have continued to exercise the powers and to receive the emoluments of the same, notwithstanding the plaintiffs' appointment, and the demand by them as aforesaid."

Upon the above state of facts (after argument) his Honor held:

(1) That the defendants are not entitled to hold said office, or to exercise the powers or to receive the emoluments thereof.

(2) That the plaintiffs are entitled to hold said office, and to exercise the powers and receive the emoluments thereof.

(3) That the defendants relinquish and surrender said office to the plaintiffs, and deliver to them all the books, money and property be-

longing and appertaining to said office His Honor gave judgment in accordance with his said ruling, and also that the plaintiffs recover of defendants their costs.

From this judgment the defendants appealed.

Fowle, Busbee & Busbee and *Merrimon* for appellants.
Batchelor, Edwards & Batchelor, contra.

READE, J. The theory of our State government is "that all political power is vested in and derived from the people." Con., Art. I, sec. 2. The Constitution is their grant of powers, and it is the only grant which they have made. "And all powers not therein delegated remain with the people." Art. I, sec. 37. This last clause will not be found in the former Constitutions of the State. The Constitution then proceeds to divide the government into three departments, Legislative, Executive and Judicial, and makes a grant of powers to each department, under its appropriate head, and directs that they shall be "forever separate and distinct from each other." Neither (431) is superior or inferior to the other, but each has its appropriate functions, and in the exercise of them, is independent and supreme. To the Legislative department is granted the power of *making* laws; to the Executive department the power of *executing* laws; and to the Judicial department, the power of *expounding* the laws.

It is true that their several functions sometimes shade into each other as do the colors of the rainbow; but still they are distinct—as where the Governor appoints and the Senate confirms; or where the Governor fills vacancies in the judicial department. It follows that it is not true, as contended for upon the argument, that the Legislature is supreme except in so far as it is expressly restrained. However that may be in other governments, or however it may have heretofore been in this State, it is plain, that since the adoption of our present Constitution the Legislative, just like each of the other departments, acts under a *grant* of powers, and can not exceed them. This being so, it is indispensable to good government that each department should confine itself strictly to the exercise of its legitimate functions. And then, however much they may shade into each other, there will still be harmony. It is only where the powers are brought in conflict that they become embarrassing and dangerous.

The first question is, to which of the departments has the Constitution granted the power of appointment to office? If the Constitution does not in *express* terms grant the power to any one of the departments, and we have to solve the question by *construction* or *implication,* then we would have to consider whether the duty in any given case, is a

Legislative, or an Executive, or a Judicial one; but if there is an express grant, then, of course, that must govern.

Under the first Constitution for the State, the Legislature was the general appointing power. It elected the Governor, his Council and other Executive officers, and the officers of the Military, the
(432) Judges of the Courts, Justices of the Peace, etc. The Governor had no appointing power, except to fill vacancies when the Legislature was not in session. Under the present Constitution there is an entire change. The people have reserved to themselves the election of almost all the officers in the State. There are still some of the officers, which, for convenience, are otherwise appointed or elected, or chosen, as the case may be, and we proceed now to enquire to which of the departments the power is given:

1. We will first consider, what express grant of appointing power is made to the Legislature.

"Art. II, sec. 20. The House of Representatives shall *choose their own* speaker and other officers.

Sec. 22. The Senate shall choose *its* other officers, and also a speaker *pro tempore* in the absence of the Lieutenant Governor, or when he shall exercise the office of Governor."

The forgoing are all the grants of powers of appointment to the Legislature under Article II, which is the legislative article. And it will be observed, that even these are not grants to the Legislature as a *body,* but only to each *branch* to choose its own officers. Under Article III, which is the Executive article, sec. 10, "The Governor shall nominate and by and with the advice and consent of the Senate, appoint all officers, etc., *and no such officer shall be appointed or elected by the General Assembly.*"

Except the foregoing, there is no other express grant of appointing power to the Legislature, and the section last quoted is only the power of one branch to confirm or reject the nominations of the Governor, with an express prohibition to the General Assembly as a body in regard to *all* officers. So, it is plain that there is not only no express grant of power to the legislative department to appoint to office; but there is no *express prohibition.*

2. In the second place we will consider what express grant
(433) of appointing power is made to the Executive Department.

Art. III, sec. 10. "The Governor shall nominate, and by and with the advice and consent of a majority of the Senators elect, appoint all officers whose offices are established by this Constitution, or, which shall be created by law, and whose appointments are not otherwise provided for, and no such officer shall be appointed or elected by the General Assembly."

That section, read without any verbal criticism, would seem to make the *Governor the general appointing power,* and to *exclude the Legislature* altogether.

Section 13 enumerates the principal Executive officers, and provides that, "If the office of any of said officers shall be vacated by death, etc., it shall be the duty of the Governor to appoint," etc.

The foregoing are all the express grants under the said Executive article. But under Article IV, which is the Judicial article, section 31, it is provided, that "All vacancies occurring in the offices provided for by this article of the Constitution shall be filled by the appointment of the Governor, unless otherwise provided for," etc. And, under Article VII, section 11, the Governor was authorized to appoint Justices of the Peace in each county, until elections could be held.

From the foregoing it is plain that the general appointing power is given to the Governor, with the concurrence of the Senate; and that the power to fill vacancies, not otherwise provided for, is given to the Governor alone, and that, whether the Legislature is in session or not, and without calling the Senate.

3. In the third place we are to consider what appointing power is expressly given the judiciary. It seems that the only power expressly granted to the Supreme Court, is to appoint its clerk; and to the Superior Court, to fill vacancies in their clerkships. (434)

Reading the whole Constitution, and without any hypercriticism, it is plain, that such officers as are not elected by the people at the polls, and most of them are so elected, are to be appointed by the Governor, the Senate concurring, except the immediate officers of each branch of the Legislature, and the immediate officers of the Supreme Court; and that all vacancies are to be filled by the Governor alone, except such as are otherwise specifically provided for. And the Legislature has no more right to appoint the Directors of the Asylums than the Governor has to appoint the clerks of the Legislature.

4. In the next place we are to inquire whether the Directors of the Insane Asylum, Deaf and Dumb Asylum, Penitentiary, etc., are officers; or whether they are only servants employees, or contractors of the State. The arguments upon this part of the case were exhaustive, and the citations of authorities abundant. The learned counsel who insisted that they are *not* officers, defined an office to be, a lodgment of some portion of the sovereignty of the State; and an officer to be, one who exercises some portion of the sovereign power. Take that to be so, for the sake of argument, or put it in another form, and say, that an office is a part of the government, and part of the State polity, and that an officer is one ho takes part in the government, and then try our case

by that test. The Constitution establishes—*i. e.*, "secures the permanent existence of,"—as a part of the State polity, certain charitable institutions for the care of the unfortunate, and penal institutions for the punishment of criminals; can these institutions exist without a Board of Directors? And is not such a board an office, a lodgment of a portion of the government? And are not the directors officers, taking part in the government? The *statement* of the case is enough. We do not pursue the argument further; because, the Constitution
(435) not only *makes* them officers, but in express terms *calls* them officers—which seems to have been overlooked by the learned counsel. Art. III., sec. 7. "The *officers* of the Executive Department and of the *public institutions* of the State, shall report to the Governor," etc. And note, that this is under the Executive Article of the Constitution.

The Governor with the advice of the Senate, having the appointment of all *officers;* and the directors of the Public Institutions being *officers,* it follows that their appointments are with the Governor and Senate, unless otherwise provided for. It is not pretended that they are otherwise provided for by *express* terms in the Constitution, but it is insisted that they are provided for by *implication:* (1) because the Legislature has *all* powers, except wherein it is restrained. But, we have seen that is not so; for the Legislature, like the other departments, acts under *a grant* of powers. (2) Because they have been provided for by law, to wit: by appointment of the Legislature, which, it is insisted, takes the appointment from the Governor which he would otherwise have had with the Senate under Art. III, sec. 10. On the other side it is insisted, in regard to this last position, that, "not otherwise provided for," means, not otherwise provided for *in the Constitution.* So that, one side insists upon reading the 10th section, "not otherwise provided for *by law.*" And the other side insists upon reading it, "not otherwise provided for *in the Constitution.*"

It has already been said in two cases in this Court, *Clark v. Stanley,* 66 N. C., 59, and *Holden v. R. R.,* 63 N. C., 410, what "not otherwise provided for," meant, "in the Constitution"; but they were *dicta,* and therefore we have considered it as an open question. And at the threshold of the discussion, we make these inquiries: Why should the Constitution give the general appointing power to the Governor and Senate, in all the offices named in the Constitution, and not give the same power in regard to offices to be created thereafter or which
(436) had been created before? And why should the Constitution expressly prohibit "the General Assembly" from electing any officer named in the Constitution, and permit the General Assembly to elect officers thereafter to be created?

The Constitution secures to the people the election of almost all the officers in the State. For such as they did not choose to elect, or, it was not convenient for them to elect, the most convenient other mode was prescribed, to wit: nomination by the Governor. Elections were taken away from the General Assembly, because it is a large body with two branches and is very expensive. *That* was one of the evils; there may have been others. Would not the evil exist in electing officers thereafter to be created, as well as officers named in the Constitution? Doubtless. And must we not construe the provision with reference to the evil? Put the election of half a dozen Directors, for a half dozen Institutions each, in the General Assembly, and circumstances would often occur which would make the expense and inconvenience enormous. But then it is said, that the election need not be by the Legislature itself, but that it may be otherwise provided for by law. But it is answered, why should it be supposed that it was the purpose of the Constitution to allow the Legislature to appoint other modes for filling offices than the mode prescribed in the Constitution? If the mode prescribed in the Constitution was not the best, why was it prescribed? If it was the best, why allow it to be altered? And especially why leave the mode at sea so as to engender conflicts between the Departments?

It was insisted by Mr. Battle with much confidence, that unless section 10 is so construed as to give the Legislature power to provide for filling offices, then the government can not be administered, and must fall; because no provision is made in the Constitution for filling *vacancies* in the *county* offices; and it would be impracticable for the Governor to fill them. The county offices and officers will (437) not be found under any of the articles of the Constitution, which we have been considering, but under the article, "Municipal Corporations." And while the *election* of all the county officers are provided for by the people at the polls; yet, if *vacancies* occur in some of them, the mode of filling them is not *named.* If there were *no* mode of filling still the result might not be disastrous; because, most of the offices are filled by several; and if one should die, a majority might act; but still it would be an *inconvenience,* which ought not to exist; and it is true also, that *some* of the offices are filled by a single officer. But suppose the fact be, that there is no *express* power in the Constitution for filling such vacancies, does it follow that the *Legislature* has the *inherent* power to fill them? Why the Legislature rather the Executive? If the Legislature has no power to fill vacancies in other cases, why assume it in this? And if the Governor has the power to fill vacancies in every other case, why deny it in this? If it be a *casus omissus,* and *necessity* implies a power somewhere, it ought to be implied to reside with the general power to fill vacancies—the Governor. But, there is

another, and, probably, a better way of meeting the difficulty. A county is a corporation; and, after its officers have been elected by the people according to law, and a vacancy happens which it is *necessary* to fill, it is inherent in the corporation to preserve its own existence; and the electors may fill the vacancy, just as the electors may fill a vacancy in the Legislature. And such legislation as would be necessary to conduct the election, would be legitimate. But it is not in the power of the Legislature itself to fill the vacancies; or to prescribe that they shall be filled otherwise than by the electors; unless the corporate authorities have the *inherent* right to fill the vacancies; in which case appropriate legislation to enable them to exercise their rights would be legitimate. And there is already such legislation.

(438) Our conclusion is, that the Legislature has no power to elect or appoint any officer in the State, except its own officers. Nor has it the power to provide for the appointment, or election, of any officer, whose office now exists, or which may hereafter be created; so as to take the appointment away from the Governor and Senate, or other appointing power, or the election away from the people. Nor can the constitutional rights of the Governor or the people be evaded by letting the offices to contractors.

The Deaf and Dumb Asylum was one of the public institutions of the State at the time of the adoption of the Constitution in 1868, governed by a Board of Directors. Article XIV, sec. 5, of the Constitution continues them in office until other appointments should be made by the Governor. The Governor made other appointments, who were in office 21 January, 1871, at which time the General Assembly passed an act abolishing the Board of Directors, and providing for a "Board of Trustees." We assume that the General Assembly had some sufficient reason for changing the *name* of the Board, but it left the Board, the office, to be filled by officers. And then the act proceeded to fill the office with the defendants, and to provide that the Governor should fill vacancies, "subject to the approval of the General Assembly, who themselves shall fill the vacancies, if they disapprove of the appointment made by the Governor."

The question is, had the Legislature the power to fill the office by the appointment of the defendants? We have already seen that there is no *express* grant of the power to the General Assembly. No such grant is to be implied, unless it be in regard to some appointment necessary to the exercise of its legislative functions, as its own officers. And, to make it plain, the power is expressly *prohibited,* Constitution, Article III, section 10. Therefore, the appointment of the defendants was void.

(439) It became the duty of the Governor under section 10 to appoint the officers. And if the Senate was in session he ought to

have sent the nominations to the Senate, because it was the original filling the office, and not the filling a vacancy, which latter he can do without the Senate. The Governor did not nominate to the Senate, but, as we assume, out of respect for the legislative action, and under a mistake as to his duties, he allowed the office to remain vacant until 1 March, 1872, after *Clark v. Stanley* was decided, when he filled the vacancies caused by his failure to nominate, by the appointment of the relators, whose term of office is limited by the act aforesaid "to 1 January, 1873, and until their successors are chosen."

Regularly, it was the duty of the Governor, on 1 January, 1873, to nominate to the Senate the successors of the relators. And then, the relators would have gone out of office. But their successors were not nominated at that time—the action of the Governor, as we assume, being postponed for this decision as to his powers and duty, and as to the powers of the Legislature over the appointments. Indeed, the Senate was not in session on 1 January, 1873, having taken a recess for some weeks. So, the relators' term continued until their successors are appointed.

The Senate being now in session, and the powers of the Executive and Legislative Departments being herein declared; and it being declared that the Governor, by and with the advice of the Senate, has the power of appointment; and it being of great public moment that the offices should be filled according to law; it is to be supposed that the relators' successors will be immediately appointed; and then, their term will end. But all that we can authoritatively *decide* is, that the defendants unlawfully hold and exercise the office of "the Board of Trustees of the Asylum for the Deaf, Dumb and Blind"; and the relators are entitled to hold and exercise said office until their successors are appointed according to law. There will be judgment that the (440) defendants be excluded from said office, and that the plaintiffs recover their costs. The statute, C. C. P., 375, authorizes the Court, in its discretion, to fine each of the defendants a sum not exceeding $2,000. But, as the defendants went into the office under an act of the General Assembly, we assume that they had no criminal intent, and, therefore, in the exercise of our discretion, and in respect to the General Assembly, no fine imposed. See *Welker v. Bledsoe,* 457, *post.*

PER CURIAM. Affirmed.

Cited: Welker v. Bledsoe, post, 457; *Battle v. McIver, post,* 465, 470; *Badger v. Johnson, post,* 471; *Rogers v. McGowan, post,* 521; *Howerton v. Tate, post,* 548, 553; *Brown v. Turner,* 70 N. C., 107; *Saunders v. Gatling,* 81 N. C., 301; *Eliason v. Coleman,* 86 N. C., 239; *Ewart v. Jones,* 116 N. C., 578; *Wood v. Bellamy,* 120 N. C., 222;

Day's case, 124 N. C., 367, 377, 394; *Cherry v. Burns, Id.,* 765; *Daniels v. Homer,* 139 N. C., 237; *S. v. Lewis,* 142 N. C., 640.

STATE v. SAMUEL McMILLAN and others.

1. It is no error in the Court below, on a trial of a defendant for larceny, "as upon a plea of not guilty," and after a verdict of guilty, to amend the record by inserting the plea of "not guilty."
2. In an indictment for larceny, the property stolen was charged as "the goods and chattels of S. L. Williams," and it appeared on the trial that it belonged to Samuel L. Williams: *Held,* that if the objection had been taken on the trial, it would have been a question for the jury, whether S. L. and Samuel L. were one and the same person: *Held further,* that the defendants were concluded by the verdict, which found them "guilty as charged in the indictment."

INDICTMENT for larceny, tried before *Buxton, J.,* at Fall Term, 1872, of RICHMOND.

It was charged in the indictment that the property stolen were "the goods and chattels of one S. L. Williams." The jury returned a verdict of guilty. The defendants moved for a new trial, for the reason, "that the plea of 'not guilty,' was not put in and entered (441) of record." His Honor refused the motion, because the case was submitted to the jury as upon the plea of "not guilty," and through inadvertence, no plea was entered of record, and directed then the record be amended by the insertion in the proper place of the plea.

Defendants then moved in arrest of judgment on the ground that the name of the prosecutor from whom the goods were stolen is charged in the indictment as "S. L. Williams," whereas it appears upon the trial that his name was "Samuel L. Williams." Motion overruled. Judgment and appeal.

No counsel for defendant in this Court.
Attorney-General Hargrove for the State.

READE, J. 1. The first motion on the part of the defendant was, for a new trial, on the ground that the plea of not guilty was not entered of record. His Honor refused the motion for the reason that the neglect to enter the plea was a mere inadvertence; the case having been put to the jury and tried "as upon a plea of not guilty," and therefore, his Honor directed the plea to be entered of record, so as to make the record speak the truth.

If the plea had been entered before trial, it is not pretended that upon this part of the case the defendant would have any cause to complain. But the point which he makes is, that the Court had not the power to have the plea entered after trial and verdict. There is no doubt that his Honor had the power to have the plea entered. For this, *S. v. Roberts,* 19 N. C., 540, is express authority, and other authorities are abundant.

2. The second motion for the defendant was in arrest of judgment, for the reason that the indictment charged the articles stolen, as the property of S. L. Williams; whereas, it appeared upon the trial that the owner's name was Samuel L. Williams.

If this objection had been taken on the trial, it would have (442) been a question for the jury whether S. L. Williams and Samuel L. Williams were different persons. If they were, and the property was Samuel's, then the jury ought to have acquitted the defendant. But if they were one and the same person, and he was known by one name as well as the other, and especially if he was generally called S. L. Williams, then the jury ought to have convicted; for, although it is best to give the name in full, yet a defendant may be described by his initials, if he is usually known by them; and so may the person injured, or the owner of property be described.

But if that were not so, still the defendant's motion in arrest of judgment cannot avail him, because the verdict concludes him. Let it be true that the defendant upon the trial offered evidence, which, in his opinion, was sufficient to prove that the owner's name was Samuel L. Williams, and a different person from S. L. Williams, still he is concluded by the verdict, which finds it to have been the property of S. L. Williams, as charged in the indictment. A motion in arrest of judgment is for errors upon the face of the record. And here there are none.

PER CURIAM. No Error.

Cited: *S. v. Hester,* 122 N. C., 1050.

(443)

STATE v. HARDY JONES.

The opinion of an expert, as to cause of death, is competent evidence for the State.

MURDER, tried before *Clarke, J.,* at CRAVEN, Fall Term, 1872.

Upon the trial, one Brown, a Justice of the Peace, testified that Hardy Jones, the prisoner, was arrested for larceny and brought before him as a Justice of the Peace; that he examined the case and

ordered him to give bond, etc. The prisoner ran off and escaped. In the absence of a regular constable, Brown deputized one John M. Thorpe to arrest Hardy Jones. Hardy Jones came to Brown's house and Thorpe arrested him there. Thorpe called on Robert Miller and Henry Bennett to assist him, and they, with the prisoner, started for New Bern.

John M. Thorpe testified that on the way, Robert Miller said he wanted to get water, and put his gun down and got down to drink. Hardy Jones grabbed the gun and said, "Now, now, now," three times; Miller caught the gun; Hardy Jones jerked it away, shot Robert Miller and ran off.

Doctor C. Duffy, Jr., testified that he saw Miller the day after he was wounded; that the gunshot wound caused his death; that the arm must have been bent and the gun in front. This evidence, as to the opinion of the physician, was objected to by prisoner's counsel but heard by the Court. Verdict, guilty. Rule, etc. Judgment and appeal.

Haughton for appellant.
Attorney-General Hargrove, contra.

READE, J. There was no exception to the charge of his Honor, which was clear, and in all respects just to the prisoner. And the record proper is sufficient in form and substance. The only point made was as (444) to the competency of the *opinion* of the physician who was examined for the State, as to the cause of the death of the deceased, and of his posture and position at the time he was shot. It was not denied that the opinion was competent as to the cause of death, but it was insisted that it was incompetent as to the posture and position. We suppose an expert might express an opinion of the posture and position from the range of the shot, and other circumstances; but, however that may be, it was in this case wholly immaterial and could not have done the prisoner injustice; and therefore it is no ground for a *venire de novo.*

PER CURIAM. No Error.

Cited: *S. c.*, 69 N. C., 16.

BROWN, DANIEL & CO. v. P. B. HAWKINS.

Where a motion to discharge a warrant of attachment had been made in the Superior Court, and the motion allowed, and the plaintiff appealed to the Supreme Court and that Court had reversed the order, and upon the opinion being certified to the Superior Court, for further proceedings, and the case being called, his Honor heard affidavits of facts, alleged to have existed at time of first decision, and gave judgment, discharging the warrant: *Held*, to be erroneous, and that the decision first made was final, at least as to facts existing at the time of that decision.

MOTION to dismiss a warrant of attachment, heard before *Watts, J.*, at Spring Term, 1872, EDGECOMBE.

This case was before this Court at June Term, 1871, and this Court decided as follows: "Order discharging the attachment modified by refusing the motion, but allowing the defendant to take the property, provided an undertaking be filed as required by C. C. P., sec. 213." (445)

When the case was again before the Superior Court of Edgecombe, motion to dismiss was again made, and an affidavit as to facts existing at the time of the former motion, was offered, and his Honor again gave judgment discharging the warrant of attachment, and the plaintiff appealed.

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

BOYDEN, J. The counsel for the defendant and his Honor have wholly mistaken the effect of the decision of this Court in this very case made at June Term, 1871, and upon the very point now in question. Upon what ground it was supposed that without any change in the facts of the case, as they existed at the time of the first decision, the Court below could rehear and revise the decision of this Court, we are at a loss to conceive. It is not to be tolerated that a party should bring in his case for a decision of the Court, and after an appeal to the Supreme Court and a decision against him, and when the case is about to be proceeded with in the Court below, the party may then supply facts which existed, when the first decision was made, and demand a new hearing upon the very point theretofore decided.

The decision first made during the subsequent progress of the cause, must be regarded as final, and conclusive, at least so far as regards the facts that existed at the time of that decision.

We do not say that circumstances may not arise after a motion to discharge an attachment that would authorize the party to make a second motion after the first decision. But certainly it must be upon a state of facts not existing at the first decision.

Here, if we could regard the affidavit of Wynne, there is no pretence of any new facts, but it is a mere attempt to supply a supposed (446) defect in the case as first made. The decision of his Honor is reversed and the costs to be taxed by the Clerk.

PER CURIAM. Reversed.

Cited: *Penniman v. Daniel,* 91 N. C., 433.

Dist.: *Love v. Young,* 69 N. C., 66.

A. C. SOUTHERLAND v. ELIZABETH STOUT.

Where a father having a life estate only, makes a deed in fee simple for land, with warranty; his heir, with or without assets, is rebutted by the warranty, except, in cases where the rule of the common law is changed by statute, or where the heir can connect himself with the outstanding remainder or reversion.

APPEAL from *Mitchell, J.,* at Fall Term, 1872, of ASHE Court.

Plaintiff claimed two tracts of land, alleging that he was the owner of the same in fee.

Defendant denied all the allegations of the complaint.

On the trial plaintiff introduced a deed from one Cox to John Potter and a deed from Potter to Samuel McQueen and a deed from McQueen to the plaintiff. The deed from Cox to Potter conveyed only an estate for the life of Potter, but contained a clause of general warranty of the land to Potter and his heirs. The deed from Potter to McQueen was a deed in fee simple, and contained a covenant of general warranty from the grantor for himself and his heirs to the grantee and his heirs, and the deed from McQueen to the plaintiff was of the same character. It was admitted that these deeds all covered the lands described in the complaint.

Plaintiff proved that defendant stated in a conversation that the said John Potter was her father and that she had lived on the land all (447) her life, and now claimed it as her own; she also stated that her father died in 1860. The deed from McQueen to plaintiff was dated 1861.

Defendant insisted that if this was so, as the deed from Cox to Potter conveyed only a life estate, the deed from Potter to McQueen passed an interest, and consequently it created no estoppel against Potter's heirs. His Honor was of opinion with the defendant. Judgment for defendant. Plaintiff appealed.

G. N. Folk, J. W. Todd, for appellant.

Furches, S. Trivett, contra.

PEARSON, C. J. If the defendant, or her father, had purchased the reversion which remained in Cox, after the life estate was carved out, the very interesting question in respect to the doctrine of estoppel, which was argued by Mr. Folk with much learning, and upon which the case turned in the Court below, would have been presented to us for a decision. But neither the defendant nor her father acquired that reversion, and she defends this action against one claiming under her father, simply on the ground of an outstanding title in the heirs of Cox, with whom she has no connection.

"When both parties claim under the same person, neither shall deny the title of the person under whom both claim." The exception is not based on the idea of an estoppel, but is a rule of practice which has become a rule of law, adopted by the Courts for the administration of justice, by dispensing with the necessity of requiring the plaintiff to prove the original grant and *mense* conveyances (which in many cases it was out of his power to do), upon proof that the defendant claimed under the same person. An exception is made to this exception when the defendant can show that the true title was in a third person, paramount to the title of the person under whom the plaintiff (448) and the defendant both claim; and that the defendant has acquired this paramount title from such third person, or can connect himself with such third person, as by showing that he holds possession for him or under him. *Love v. Gales,* 20 N. C., 363; *Copeland v. Sauls,* 46 N. C., 70; *Newlin v. Osborne,* 47 N. C., 163.

In our case both parties claim under Potter; certainly, if Potter had been sued after the death of Cox, he could not have defeated a recovery in the face of his own deed, on the ground of an outstanding title in the heirs of Cox; and I am inclined to the opinion that the present defendant, who is his heir-at-law, upon whom his rights and duties devolved by act of law, as his real representative, stands in his shoes, and can not in the face of the deed of her ancestor set up an outstanding title as a defence to an action brought by one claiming under the deed of her ancestors.

The decision, however, is not put upon that point, for besides the deed of the defendant there is a general warranty by which he binds himself and his heirs to warrant and defend the title to McQueen, which warranty the plaintiff acquired as incident to the estate derived from him—a covenant which runs with the estate. An heir is not bound by the warranty of his ancestor to render to the *feoffee* other lands of equal value, should the land be recovered by title paramount, unless he receives *real assets* from the warranting ancestor; but according to the rule of the common law an heir is rebutted upon setting up claim to the land in all cases of warranty, whether lineal or collateral,

except "warranties commencing by disseizen," whether he receives assets or not from the warranting ancestor.

The first exception made by statute to this rule of the common law is by Statute, Edw., I., which enacts, that the warranty of a tenant by the curtesy shall not rebut the heir of the wife, unless assets come from the husband.

The next exception is by force of the statute *"de donis,"* upon the construction of which it was held, that the issue, or the remainder-
(449) man or the reversioner, upon whom the warranty of the tenant in tail falls as his heir, shall not be rebutted, unless assets descend. The next exception is by force of the Statute Henry VII, that the warranty of a widow, shall not rebut the heir of the husband, except there be assets derived from the mother.

The last exception is by force of the Statute of Ann, which provides that the warranty of no tenant for life, shall rebut the remainderman or the reversioner upon whom the warranty falls as heir of such tenant for life, and that no collateral warranty shall rebut, except made by one having an estate of inheritance in possession, in which case it does rebut the remainderman or reversioner, upon whom the warranty falls as heir.

The Statute, Rev. Code, ch. 43, sec. 10, is a re-enactment of the Statute of Ann, made first because estates tail were converted into estates in fee simple. The last clause in the section was inserted to qualify the words "abolished and void, used in the two preceding clauses, by it such warranties, that is, collateral warranties, and all warranties descending upon an heir, entitled to a remainder or reversion, is allowed the effect of a personal covenant of quiet enjoyment, by which the heir if he receives real assets, is bound to pay a purchaser damages to the amount of the consideration paid for the land, in case of eviction by title paramount, in lieu of "other land of equal value," so as to put *such warranties* upon the same footing as lineal warranties which the Court had been forced after the action of ejectment was substituted for real actions, for the sake of giving a remedy, to treat as personal covenants for quiet enjoyment, by reason of the fact that there could not be "a vouchee" upon a covenant real or the old warranty, except in real actions. *Rickets v. Dickens,* 5 N. C., 343; *Williams v. Beeman,* 13 N. C., 683.

(450) But a warranty may also be used "by way of rebutter," against the claim of the heir with or without assets, except where this rule of the common law is changed by statute. In *Moore v. Parker,* 34 N. C., 123, where the father had a life estate, and the remainder in fee was limited to his daughter, and the father sold in fee with warranty, it is held: "The warranty does not bar or rebut the daughter, for she

claims by purchase, and not by descent," and the decision is put upon the operation of this Statute.

See Lord Holt's opinion, set out in Butler's note to Coke, title "Warranty." *Taylor v. Shufford,* 11 N. C., 130; *Lewis v. Cook,* 35 N. C., 195; *Spruill v. Leary, Id.,* 225, *Id.,* 408; *Myers v. Craige,* 44 N. C., 169; in which cases the subject of warranty is fully discussed.

It is said the defendant has lived on the land all of her lifetime, and is now claiming it as her own; her father died in 1860. The warranty falls upon her as his heirs, she shows no title, and does not connect herself with the reversion or remainder, which is outstanding in the heir of Cox. As she does not come within any of the statutes, making exceptions to the rule of the common law, it follows that she is rebutted by the warranty of her ancestors.

PER CURIAM. Reversed.

Cited: Bell v. Adams, 81 N. C., 122; *Starnes v. Hill,* 112 N. C., 26; *Smith v. Ingram,* 130 N. C., 102; *Wiggins v. Pender,* 132 N. C., 638; *Hauser v. Craft,* 134 N. C., 330.

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(451)

R. S. PULLEN et al. v. BOARD OF COMMISSIONERS OF THE CITY OF RALEIGH.

1. A city or town can levy a tax upon such subjects only as are specified in its charter; therefore the city of Raleigh can not levy a tax upon the money or credits of its citizens, as they are not mentioned in its charter as the subjects of taxation.
2. *It seems* that the word "property" is used by the Constitution in a sense to make it exclude "money, credits, investments in bonds," etc. Art. V, sec. 3.

Controversy without action before *Watts, J.,* at Fall Term, 1872, of WAKE under section 315 C. C. P.

The following is a statement of the controversy and the decision of the Judge upon it:

Certain resident citizens of the city of Raleigh, who are tax-payers, being advised that they are not subject to be taxed on account of debts and securities for money held by them, and lately demanded of them, for 1872, having proposed to the Board of Commissioners of said city to make up and refer the matter in difference, and the proposition having been acceded to by the said authorities, the said citizens, to wit: R. S. Pullen, D. M. Barringer, B. F. Moore, on behalf of themselves and other citizens of the said city, from whom such tax has been demanded, of the one part, and the city of Raleigh and Mr. Grausman, tax collector of the said city of Raleigh, of the other part, submit for the decision of the Court whether they are bound to pay the tax aforesaid.

The matters of difference arise in this wise: The estate and property of said citizens required by the city authorities to be listed for taxation for city purposes as of 1 April, 1872, did not include solvent credits or securities.

After this, to wit, on 4 June, 1872, it was ordered by the
(452) Board of Commissioners of the city that their clerk obtain copies of the lists of personal property as given in to the State and county tax listers, and such lists be adopted by the Board for city taxation of 1872. In pursuance of this order, the clerk did obtain copies of the State and county tax lists, as given in by the said R. S. Pullen, D. M. Barringer, B. F. Moore and other persons aforesaid, which said list included their solvent debts and securities for money, upon the value of which said solvent debts and securities so given in for State and county taxation, the like tax as had been laid by the city on the value of the real estate of the said R. S. Pullen, D. M. Barringer, B. F. Moore and others, situate in the city, to wit: one dollar and twenty cents on each hundred dollars value was ordered to be collected by the said city collector; and he has accordingly demanded such tax from the said R. S. Pullen and others.

On the one hand it is insisted by the Board of Commissioners of the city that they had the rightful power to levy such tax upon the solvent credits and securities aforesaid, and that such levy has been duly and lawfully made.

On the other hand it is denied by the said R. S. Pullen and the other named persons that their solvent credits and securities are subject to be assessed for taxation by the city, and further, that if the same be so subject such tax has not been levied in a due and lawful manner. The charter of the city is made a part of the case.

MOORE & GATLING and
WM. H. BATTLE & SON,
For R. S. Pullen and others.
J. C. L. HARRIS,
City Attorney.

Upon the foregoing case the Court gave judgment as follows:

(453)

NORTH CAROLINA—Wake County.
Superior Court, Fall Term, 1872.

R. S. Pullen and others, plaintiffs,
v.
The Board of Com'rs of the City of Raleigh, Defendants.

This case having been submitted by the parties upon the facts agreed

without action, and having heard the arguments for the plaintiffs and defendants, I decide as follows:

The city of Raleigh being a municipal corporation organized and acting under a charter granted by the State (which charter is made a part of the case agreed), claims the right under section 9, Article VII, of the State Constitution and its charter above referred to, to levy a tax upon all solvent credits and securities held by persons residing in said city. The plaintiffs contend that the city authorities have no such power, but can only tax *property* in the more limited sense, excluding from the meaning of the word "property" the choses in action and securities spoken of above.

The case is this: the plaintiffs are citizens of and residents within, the corporate limits of the city of Raleigh, over whom and their property the authorities of said city have legal power and authority under the Constitution and laws of the State. These parties own certain solvent credits and securities, upon which the city authorities have assessed a tax for city purposes. The amount and kind of this property and tax assessed are not stated. The question is, therefore, presented, have the authorities of the city a right to levy a tax for city purposes upon the solvent credits and securities owned by the plaintiffs and others in like condition. Sec. 9, Art. VII, of the Constitution, provides that "all taxes levied by any county, city or township shall be uniform and *ad valorem* upon all property, in the same except property exempt by the Constitution." It is contended for the defendants that this is a constitutional provision for the taxation of all property by the city authorities, and providing further the way in which this (454) tax shall be levied.

For the plaintiffs it is contended the word "property" here used must be taken in its restricted sense, and was not intended to embrace choses in action and securities of the kind mentioned or intended herein.

My opinion is that this section was intended to declare simply the manner in which municipal corporations should levy taxes, to-wit: that they should be "uniform and *ad valorem*," and not to declare the subjects to be taxed by them. This was to be done by other parts of the Constitution when the general subject of taxation was treated of and provided for, and by general laws passed under the Constitution by the Legislature on this subject. And by sec. 4, Art. VIII, a general power is given to the Legislature to provide for the organization of cities, towns, etc. This seems to give a general control to the Legislature on the subject of municipal corporations, and the Legislature may, under it, restrict the power of taxation by these corporations as it may think proper, due regard being had to other parts of the Constitution. My opinion, therefore, is that the right of the defendants to levy this tax

does not depend on, and is not controlled by the said 9th section of Art. VII of the Constitution, but must depend on the charter granted by the Legislature to this corporation, or the general law of the State in relation to towns, etc. Upon examination of the charter and this general law, I am of opinion that no such power as that now claimed by the defendant is granted by either.

My opinion, therefore, is that the plaintiffs have judgment that the defendants have no right to tax solvent credits and securities, and that such tax is illegal.

S. W. WATTS, J. S. C.

From this judgment the defendants appealed to the Supreme Court.

(455) *Moore & Gatling* and *Battle & Son* for the plaintiffs.
Argo & Harris for the defendants.

PEARSON, C. J. The power of the city authorities to tax debts and securities for money held by the citizens, depends upon the charter.

That instrument enumerates, *nominatim,* the subjects of taxation, eight in number, beginning with real estate, situate in the city, and ending with encroachments on the streets, by porches, etc., but no one of these eight specifications uses any word which, by the utmost stress of construction, can be made to embrace "debts and securities for money."

The word "property," about which so much was said on the argument, is not used in that enumeration of the subjects of taxation. In regard to that word, by the bye, we see that the Constitution does not make it include "money, credits, investments in bonds," etc.

"Real and personal property" is used in a sense to exclude such "credits and investments." Cons. Art. V, sec. 3.

We concur with his Honor, for the reasons given by him.

PER CURIAM. Judgment affirmed.

Cited: Wilson v. Charlotte, 74 N. C., 756; *Latta v. Williams,* 87 N. C., 129; *S. v. Bean,* 91 N. C., 558; *Vaughan v. Murfreesboro,* 96 N. C., 321; *Winston v. Taylor,* 99 N. C., 213; *Plymouth v. Cooper,* 135 N. C., 7; *Charlotte v. Brown,* 165 N. C., 437.

Overruled: Redmond v. Commissioners, 106 N. C., 127.

(457)

THE PEOPLE OF N. C. *ex rel.* G. W. WELKER and others v. M. A. BLEDSOE and others.

1. The trustees of the University, the Directors of the Penitentiary, of the Lunatic Asylum and of the Institution for the Deaf and Dumb and the Blind, are public officers.
2. The act of the General Assembly, entitled, "An act for the better government of the Penitentiary," ratified 1 April, 1871, violates section 10 of Art. III, of the Constitution, and is therefore void.
3. By virtue of Art. III, sec. 10, of the Constitution, the Governor shall nominate, and by and with the advice and consent of a majority of the Senators-elect, appoint the Directors of the Penitentiary, and such other officers as are therein prescribed.

Quo warranto, to determine who constitute the proper and legal "Board of Directors of the Penitentiary," heard and determined by *Watts, J.,* at Fall Term, 1872, of WAKE.

The facts agreed and submitted to his Honor in the Court below, are substantially the following:

1. That on 1 March, 1872, the relators were appointed by the Governor of the State to the office of "The Board of Directors of the Penitentiary," that they accepted said office, and were duly qualified thereto, and took upon themselves the performance of the duties thereof, and claim that they are entitled to receive the emoluments of the same; and that immediately upon their acceptance of said office, and before the commencement of this action, they notified the defendants thereof, and demanded of them that they should relinquish and surrender to the relators, all books, papers, money and effects belonging and pertaining to said office, with which demand, the defendants refused and still refuse to comply.

2. That by an act of the General Assembly, entitled "An act for the better government of the Penitentiary," ratified 1 April, 1871, said defendants were appointed a Board of Directors for said (458) Penitentiary, that they accepted said appointment, qualified thereto and took upon themselves the burden of performing the duties thereof; and that by virtue of said appointment, the defendants claim to be in the lawful possession of said employment, and in rightful exercise of the powers and duties incident to the same, and that they refused and still do refuse to relinquish and surrender said employment to the relators. That said General Assembly convened on the 3d Monday in November, 1871, and adjourned on the—day of—, 1872.

On the above state of facts, after argument of counsel and upon motion of the counsel for the relators, it was adjudged by the Court:

(1.) That the defendants are not entitled to hold and occupy said office, nor to exercise the powers, nor to perform the duties, nor receive the emoluments thereof.

(2) That the relators are entitled to hold and occupy such office, and to exercise the powers and perform the duties and receive the emoluments thereof.

(3) That the defendants be ousted from said office and the relators put in the same; and that the defendants relinquish and surrender to the relators all books, money and property belonging to the same.

(4) That the relators receive of the defendants their costs of suit.

From this judgment the defendants appealed.

Battle & Son and *Fowle* for appellants.
Batchelor. Edwards & Batchelor, contra.

PEARSON, C. J. This case is governed by *Clark v. Stanley,* 66 N. C., 59. The Court, however, was willing to hear further arguments and to review its decision, as the questions are of the first impres-
(459) sion, and one of them, and that one on which the greatest stress is now laid, was not fully argued.

1. The question upon which that case turned was, what constitutes a public office? It was held that the duty of appointing proxies and directors on the part of the State, in all railroads in which the State has an interest, is a public office, and it is announced as a principle of law—an agency for the State is a public office; duration and salaries are not of the essence. The duty of acting for and in behalf of the State constitutes an office. According to this principle, the Trustees of the University, the directors of the Penitentiary, of the Lunatic Asylum and of the Institution for the Deaf and Dumb and the Blind are public offices. This is put beyond any room for doubt by the Constitution, Art. XIV, sec. 7, "No person shall hold more than one lucrative office under the State at the same time: *Provided,* That officers in the Militia, Justices of the Peace, *Commissioners of Public Charities,* and commissioners appointed for special purposes shall not be considered officers within the meaning of this section."

2. Have the defendants a right to the office of the directorship of the Penitentiary? This is to be decided upon in the first instance. C. C. P. sec. 370. The solution of the question involves the construction of Art III, sec. 10. Has the General Assembly power to provide by law for the appointment or election by its own body of these officers, or is the appointing power vested in the Governor by and with the advice and consent of a majority of the Senators elect?

The stress of the argument was put on the position, that by its proper construction the Constitution only vests in the Governor the power of appointing all officers whose appointments are not otherwise provided for by that instrument, or whose appointments shall not be otherwise

provided for by law, and that in this instance the appointment of these officers has been otherwise provided for by law, to-wit: (460) the statute under which they claim. In other words, that the General Assembly may from time to time provide for the appointment or election of officers by its own body, and thus take such appointments out of the operation of the general words of the Constitution.

It would be an anomaly, if the Constitution leaves it in the power of the General Assembly to assume itself the duty of appointing or electing public officers, and thus open a door to defeat the express provisions of the instrument, and to encroach upon the functions assigned to a co-ordinate branch of the government.

This is the question now presented for our consideration. Creating an office is an act of legislation. Filling an office is an executive act. This is a fundamental principle. Accordingly, by the English constitution, the power of appointment is solely in the crown and the parliament has nothing to do with it. The Constitution of the United States gives to the President the power of appointment subject to the confirmation of the Senate, but Congress as a body has nothing to do with it. The framers of our old Constitution in 1776, had an extreme jealousy of the executive, and favored the legislative branch of the government. The colony was at war for its independence, and the governors had sided with the crown. This accounts for the fact that the power of appointment (except to fill vacancies until the meeting of the Legislature) is taken from the Governor and conferred upon the General Assembly. The election of the Governor and his council, and of his generals and field officers, is given to the General Assembly, as well as the election of the judges and other public officers and the appointment of Justices of the Peace.

But the Governor was Captain General of all of the military force of the State, and for fear, although stripped of the appointing power, and to be elected by the Legislature the Governor might endanger the liberties of the people, his eligibility to office is re- (461) stricted to three years in six.

By amendments to the Constitution 1836, the distribution of powers is left as before, save that the election of the Governor is taken from the General Assembly and given to the people, and the term of office is fixed at two years.

By the present Constitution a very important change is made. The result of a recurrence to fundamental principles, *i. e.*, the election of the Governor, Judges and other chief public officers, is taken from the General Assembly and given to the people, and the residuary appointing power is vested in the Governor with advice and consent of a majority of the Senators-elect, and the General Assembly as a body have nothing to do with it.

This general view prepares the way for a particular consideration of the Constitution now before us for construction. Art III, sec. 10, "The Governor shall nominate, and by and with the advice and consent of a majority of the Senators-elect, appoint all officers, whose offices are established by this Constitution, or which shall be created by law, and whose appointments are not otherwise provided by law, and no such officer shall be elected or appointed by the General Assembly." The Governor shall nominate, etc., "all officers whose appointments are not otherwise provided for." Here we have words in the present tense, and we have an instrument to construe by which provision is made for the election of the chief officers and for the appointment or election of many of the inferior officers. For instance, Trustees of the University to be appointed by the Board of Education; Sheriffs, Constables, &c., to be elected by the people, and Justices of the Peace by the people of the township; thus taking from the General Assembly the power exercised by that body of appointing Justices of the Peace, in fact taking from the General Assembly the power of electing or appointing any officer, except such as are strictly appurtenant—clerks, doorkeepers, &c., (462) and confining the General Assembly to the duty of legislation by drawing a sharp line between legislative and executive acts, which was not attended to in the old Constitution, although in the Declaration of Rights it is set out as a fundamental principle: "The legislative, executive and judicial departments ought to be forever separate and distinct from each other."

The grammatical force of the words in this section and the context of the whole instrument, force the conviction upon us that the meaning and intent was to vest in the Governor the power to appoint all officers whose appointments are not otherwise provided for by that instrument, and we can see nothing to justify adding the words, "or whose appointments shall not be otherwise provided for by law" (that is, by the General Assembly). If, besides the grammatical construction of these words, and a general view of the context by which our conclusion is arrived at, a critical view be taken of the whole section, it is seen that the draftsman, in reference to the establishment and creation of offices, had two ideas in his mind—one, of the present offices which are established by this Constitution, that is offices that are hereby made or are recognized as existing under the former government; the other, of the future offices which shall be created by law. But in reference to the appointment of officers, the draftsman had but one idea in his mind, to-wit: that of the present, which is expressed by the words, "whose appointments are not otherwise provided for," and the other idea, to-wit: that of the future, is excluded by the omission of the words, "or whose appointments shall not be otherwise provided for by law." With-

out these words, we can see no ground on which the position taken by the counsel of the defendants can be supported. In so grave an instrument, it cannot be supposed that words necessary to express the meaning were omitted by oversight. There is no rule of construction to justify the adding of these words. Indeed, the negative words show that these words were intentionally omitted, for this addition would include the power of the General Assembly to provide for the appointment of such officers, by its own action, and thus make an absurdity, or at all events invite an encroachment by the legislature upon the executive branch of the government. (463)

The idea that the Constitution leaves it in the power of the legislative branch of the government to encroach upon the functions of the Governor, by providing from time to time other modes of appointment or election, and especially the mode of appointing or electing by the General Assembly itself, could only have suggested itself to a mind accustomed to look at the subject from the "standpoint" of the old Constitution, under which the General Assembly had the power of appointment as well as of legislation; but such an idea cannot be entertained by a Court whose duty it is to look at the subject from the "standpoint" of the new Constitution, and to divest itself of the habits of thought and association belonging to the past. It was said on the argument, "if the construction of section 10 is taken to be, 'whose appointments are not otherwise provided for by this Constitution,' there will be nothing for it to operate on, because the Constitution provides for the election or appointment of all the officers of the State." Such is not the fact. The appointment of the Trustees of the University is provided for, but the appointment of the directors of the other public institutions of the State, Art. III, sec. 7, is not otherwise provided for by the Constitution, nor is the appointment to the office of Keeper of the Capitol, all of which offices are established by the Constitution; nor is the appointment of such officers as should be deemed necessary to conduct the Penitentiary provided for, or the appointment of officers to fill any new office that "shall be created by law."

We have seen that the power to appoint all officers whose appointments are not otherwise provided for by the Constitution is vested in the Governor by express affirmative words. But to make assurance doubly sure, there is also an express prohibition against the exercise of this power by the General Assembly, "and no such officer shall be appointed or elected by the General Assembly," that is no one to fill an office established by this Constitution or an office which shall be created by law. Take it in any point of view, the appointment of the defendants by the General Assembly is not war- (464)

ranted by the Constitution, and they unlawfully hold and exercise the office of the Directors of the State's prison.

It was also said on the argument, the Constitution makes it the duty of the General Assembly to provide for the erection and conduct of a State's prison, Art. XI, sec. 3, and this includes the appointment of the directors. *Non sequitur.* Providing funds, making regulations and creating the necessary offices for the management of the institution, are acts of legislation; but filling these offices by competent men, is a different matter—that is an executive function. The affirmative words of Art. III, sec. 10, by which the power of appointment is vested in the Governor, and also the negative words by which the General Assembly is prohibited from its exercise, shows the meaning of the Constitution to be a division of power in respect to the Penitentiary, as in respect to the other public institutions and offices, so as to put the responsibility of creating the necessary offices upon one branch of the government, and the responsibility of properly filling such offices upon another.

By the Constitution "the sword," that is the physical power of the State and the power of appointment to office, unless when other provision is made by the Constitution, is vested in the Governor. "The purse" and the duty of making laws is vested in the General Assembly. So the judiciary is given the power to decide all questions of law or equity, and to act as umpire and settle all questions of constitutional right should there be an adverse claim under the authority of
(465) these branches of the government.

We declare our opinion to be that the defendants hold and exercise unlawfully the office of Directors of the State Prison. For the judgment and procedure proper to enforce it, I refer to the opinions *Badger v. Johnson, post,* 471; *Nichols v. McKee, ante,* 429, and *Rogers v. McGowan, post,* 521.

PER CURIAM. Judgment affirmed.

Cited: Nichols v. McKee, ante, 440; *Battle v. McIver, post,* 470; *Badger v. Johnson, post,* 471; *Rogers v. McGowan, post,* 521; *Overton v. Tate, post,* 548; *Brown v. Turner,* 70 N. C., 107; *Cloud v. Wilson,* 72 N. C., 158; *Eliason v. Coleman,* 86 N. C., 239; *Ewart v. Jones,* 116 N. C., 578; *Day's case,* 124 N. C., 377; *Cherry v. Burns, Ib.,* 764.

JAMES L. HENRY v. STATE OF NORTH CAROLINA.

A Judge of the Superior Court, holding Courts of Oyer and Terminer under commissions from the Governor, is entitled to reasonable and just compensation, which, being ascertained upon a reference to the Clerk, the Court recommends the General Assembly to allow.

PETITION of his Honor, *James L. Henry,* Judge of the 11th Judicial District, to the Supreme Court, preferring his claim against the State for compensation for holding terms of a Court of Oyer and Terminer.

The material allegations of the petition, and which were reported by the Clerk, are:

That Judge Henry, being duly commissioned by Governor Caldwell to hold Courts of Oyer and Terminer in the counties of Macon and Yancey, appointed and held the same. That at each of the Courts, prisoners were put upon trial, and removed their cases to adjacent counties, in which he appointed terms to be held, which were held and at which the prisoners were tried.

For the State it was submitted by the Attorney-General, that Judge Henry should be paid by the counties in which the Courts were held, and not by the Public Treasurer.

The Clerk reported as a just compensation for the services (466) rendered, $350, with the reimbursement of the costs of the petition.

Bailey and *Badger* for the petitioner.
Attorney-General Hargrove for the State.

RODMAN, J. It cannot be doubted that Judge HENRY rendered service to the State in his official character, and under a legal commission from the Governor, for two weeks in one county, for one week in another, for three days in another, and for two days in still another, making in all three weeks and five days of service. That his services were performed in accordance with law, this Court decided in the case of *S. v. Baker,* 63 N. C., 276, and again at this term in affirming the sentence which he passed on Henderson, ante, 348, tried for murder at one of the Courts held by him, for which he claims compensation. That Judge Henry has a just claim for compensation is not denied by any one. The questions are as to its amount, and whether it should be paid by the State or by the several counties in which the Courts were held. There are various statutes bearing on the question incidentally, but none directly, or indirectly providing for the compensation of a Judge in a case like this. It would be useless to refer to the several statutes, and it would be almost or quite impossible to draw

from them any certain conclusion. We do not feel bound to do so, as we would be in the case between individuals, in which it would be necessary for us to determine the absolute rights of the parties. In this case we can only recommend to the Legislature. And we do accordingly recommend as equitable, that the State pay Judge Henry, three hundred and fifty dollars, in full compensation for his services in holding the Courts mentioned in his petition. The petitioner will pay the costs of this Court, for which we recommend also that the
(467) State shall idemnify him.

PER CURIAM. Recommended accordingly.

THE PEOPLE OF THE STATE OF NORTH CAROLINA *ex rel.* KEMP P. BATTLE, v. ALEXANDER McIVER.

1. An officer elected by the people holding over his regular term on account of the failure of his successor to qualify, holds over until the place is filled at "the next general election" had by the people.
2. The Governor never nominates to the Senate to fill vacancies. He does that *alone* in all cases.
3. Where officers have to be appointed to fill a regular term, then he nominates to the Senate, unless it be an officer who is elected by the people, and then he never nominates to the Senate, but fills the vacancy or term by his own appointment (unless there is an officer holding over) until the people can elect. Art. III, secs. 1 and 13, Constitution.

CASE AGREED, without action, to recover the office of Superintendent of Public Instruction, submitted at the January Term, 1873, of WAKE, before *Watts, J,* and by him determined.

The relator, Kemp P. Battle, seeks to recover of the defendant, Alexander McIver, the office of Superintendent of Public Instruction, in and for the State of North Carolina, and the same is resisted by defendant.

At an election held in April, 1868, S. S. Ashley was duly elected to fill said office for the legal term thereof. The said Ashley very soon after his election qualified, and entered upon the discharge of the duties of his office, and continued to hold such office until about 1 October, 1871, when he resigned and his resignation was duly accepted.

Immediately after the resignation of said Ashley, the Governor proceeded to fill said office; which he did by the appointment, ac-
(468) cording to law, of the defendant, McIver, thereto. The defendant accepted the appointment and was duly qualified, and entered upon the discharge of the duties of said office, and has held it up to the present time.

At an election held on the 1st Thursday in August, 1872, James Reid was duly elected to fill said office during the next term thereof.

On 8 November, 1872, the said James Reid died without having qualified, and before the time had arrived at which he could legally qualify and enter upon the duties of the office.

On 14 January, 1873, the Governor assuming and taking for granted that the office of Superintendent of Public Instruction was vacant in consequence of the death of James Reid aforesaid, attempted to appoint the relator, by granting to him a commission in due form to fill said supposed vacancy in said office. On 15 January, 1873, the said Battle took the oaths prescribed by law for such office and notified the defendant that he would be ready to take charge of said office on the next day. On 16 January, 1873, the said Battle demanded the surrender to him by the defendant of the said office, with all the books, papers and property of every kind whatsoever belonging thereto. This the defendant refused to do, and declared his purpose to hold said office, and all property pertaining or belonging thereto.

The questions submitted to the Court in this case are:

1. Is the defendant, Alexander McIver, lawfully entitled to hold and exercise the said office?

2. Is the relator, Kemp P. Battle, entitled, according to law, to recover the office of Superintendent of Public Instruction of the defendant?

Judgment to be rendered for the relator or the defendant, according as the opinion of the Court shall be in favor of the relator or otherwise.

The opinion of his Honor being in favor of the defendant, judgment was rendered accordingly, from which the plaintiff (469) appealed.

Batchelor, Edwards & Batchelor for appellant.
Fowle and *Bailey, contra.*

READE, J. Consider the case as if Ashley had not resigned. His term would have expired 1 January, 1873, if his successor had been elected and qualified. As his successor was not elected and qualified, he would have held over. Con., Art. III, sec. 1.

Up to 1 January, 1873, he would have held, as filling his own term, and after that time as holding over for the election and qualification of his successor.

As Ashley did resign and the defendant, McIver, was put in his place, he was put in his place to all intents and purposes; and up to 1 January, 1873, filled the vacancy caused by Ashley's resignation, and after that time as holding over for the election and qualification of his successor.

How long he may be entitled to hold over, or, when and how his successor is to be "elected and qualified," may be beyond the purposes of this decision; but it would seem that it will be only until the people can elect his successor at the "next general election," to-wit: August, 1874. Art. III, ss. 1 and 13.

It has been suggested, that as the term for which Mr. Reid was elected was four years from and after January 1st, 1873, and as the defendant, Mr. McIver, is in to fill the vacancy caused by Mr. Reid's failure to qualify, he is in Mr. Reid's place to all intents and purposes, and is entitled to hold for the whole four years. But the Constitution is express, that McIver shall hold only until the next election, "and the person then chosen shall hold the office for the remainder of the un-
(470) expired term fixed in the first section of this Article," to wit: four years from 1 January, 1873. Art. III, s. 13.

It has been suggested, that the Governor, instead of appointing Mr. Battle, or allowing Mr. McIver to hold over, ought to have nominated some one to the Senate to fill the vacancy on 1 January, 1873. The answer is, that the Governor never nominates to the Senate to fill vacancies. He does that *alone,* in all cases. But where officers have to be appointed to fill a regular term, then he nominates to the Senate, unless it be an officer who is elected by the people, and then he never nominates to the Senate, but fills the vacancy or term by his own appointment (unless there is an officer holding over), until the people can elect, as in this case.

Besides the provisions in the Constitution already quoted, we refer to the numerous authorities cited by defendant's counsel, which were to the point and conclusive. See, also, *Walker v. Bledsqe et al., ante,* 457, and *Nichols v. McKee* et al., *ante,* 429.

PER CURIAM. Affirmed.

Dist.: Sneed v. Bullock, 80 N. C., 135.

Cited: King v. McLure, 84 N. C., 157; *Ewart v. Jones,* 116 N. C., 578; *Holt v. Bristol,* 122 N. C., 248; *Day's case,* 124 N. C., 373, 377.

(471)

THE PEOPLE OF NORTH CAROLINA ex rel. R. C. BADGER and others v. C. E. JOHNSON and others.

(For a digest of this case, see the syllablus in *Nichols v. McKee, ante,* 429, and also *Welker v. Bledsoe, ante,* 457.)

The defendants were Directors of the Lunatic Asylum, appointed under the Act of 1871, and had served as a Board up to the institution of the present proceedings.

The plaintiffs, as in the cases cited in the opinion of the Court, were appointed by the Governor, 1st March, 1872, and demanded a surrender of the government of the Asylum. This demand was refused.

The facts agreed, being heard by *Watts, J.,* at Chambers, on 21 January, 1873, his Honor gave judgment in favor of the plaintiff. Defendants appealed.

Fowle and *Merrimon* for appellants.
Batchelor, Edwards & Batchelor, contra.

READE, J. The questions in this case are substantially the same as in *Nichols v. McKee, ante,* 429 and *Welker v. Bledsoe, ante,* 457, and are governed by the same principles and for the same reasons.

There will be judgment that the defendants be excluded from said office, and that the plaintiffs recover cost.

PER CURIAM. Affirmed.

Cited: Welker v. Bledsoe, ante, 465; *Brown v. Turner,* 70 N. C., 107; *Day's case,* 124 N. C., 377.

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(472)

WILLIAM H. BAILEY v. TOD R. CALDWELL, Governor, etc.

Chapter 16, section 1, Laws 1870-'71, purporting to repeal altogether section 8, chapter 41, of the Ordinances of the Convention of 1868, which fixes the compensation of the Commissioners to report a Code of Civil Procedure, etc., is unconstitutional and void.

MANDAMUS, submitted to *Watts, J.,* and by him determined at January Term, 1873, of WAKE.

The facts agreed and submitted to his Honor, and the questions arising thereon, to be determined by him, are as follows:

On 1 November, 1870, the plaintiff was duly appointed by his Excellency Governor Holden, one of the Commissioners to prepare a Code of practice and procedure in the different Courts, under secs. 2 and 3 of Art. IV of the Constitution, and under an ordinance of the Convention, entitled An Ordinance appointing commissioners, &c., ratified 13

March, 1868, *vice* V. C. Barringer, Esq., who had theretofore resigned his office as one of said commissioners.

2. That by virtue of the provisions of said sections of the Constitution and sec. 8 of the ordinance aforesaid, the plaintiff as commissioner as aforesaid, was entitled to have received a salary of $200 per month whilst actually engaged in the performance of his duties as said Commissioner; and by sec. 4 of said ordinance he was entitled to hold his office until 13 March, 1871.

3. That plaintiff accepted the office on 2 September, 1870, and was actually engaged in the performance of his duties of said office, until 13 March, 1871.

4. That on 20 December, 1870, the Legislature of the State passed an act purporting to repeal sec. 8, chap. 41, of the ordinance aforesaid.

5. That for his services as commissioner as aforesaid, from (473) 1 February, 1871, until 13 March, 1871, the plaintiff has received no compensation.

6. That he hath demanded of the defendant, who was at the time of such demand, and yet remains the Governor of the State of North Carolina, a warrant upon the Public Treasurer of said State for the amount of said compensation, to-wit: the sum of $286.

7. That the defendant has refused to issue a warrant for said sum, or any other sum in that behalf.

The question submitted to the Court, for decision, is whether the plaintiff is entitled to the said compensation, and to receive therefor from the defendant a warrant upon the Public Treasurer. If his Honor should be of the opinion that the plaintiff is so entitled, then a judgment that a peremptory writ of *mandamus* issue accordingly; otherwise, judgment against the plaintiff for costs.

His Honor, after argument, says:

"Plaintiff claims under secs. 2 and 3 of Art. IV of the Constitution, and under the provisions of chap. 41, of the ordinances of the Convention, ratified 13 March, 1868, secs. 4 and 8.

"Cons., Article IV, sec. 2, provides 'that three commissioners *shall* be appointed by this Convention to report to the General Assembly at its first session rules of practice and procedure, and shall provide for the commission a *reasonable compensation.*' Section 3 of the same article provides, that the same commission shall report to the General Assembly, as soon as practicable, a *code of the laws of North Carolina,* and that the Governor shall have power to fill all vacancies occurring in this commission."

Chapter 41, sec. 4, of an ordinance of the Convention provides that the commissioners shall hold their office for three years, &c., and sec. 8 of the same ordinance provides that each of the commissioners shall

receive a salary of $200 per month, while actually engaged in the (474) performance of his duties as such, etc.

Laws 1870-'71, ch. 16, sec. 1, ratified 20 December, 1870, repeals sec. 8, ch. 41 of the Ordinances of the Convention, which provides that each commissioner shall receive $200 per month.

The question is: Is the plaintiff entitled to pay for services rendered from 1 February, 1871, to 13 March, 1871, after the ratification of the act of the General Assembly, which was on 20 December, 1870?

I am of opinion that this act of 20 December, 1870, is in contravention of secs. 2 and 3 of Art. IV of the Constitution, and, therefore, void. That while the Legislature might perhaps alter, amend or repeal an ordinance of the Convention which fixes a salary, yet if the Convention (as in this instance) provides that a reasonable compensation shall be made for the services mentioned, the Legislature could not abolish altogether the pay or salary without fixing another compensation which they deem *reasonable*.

It may be contended that as an ordinance of this Convention is of itself legislation, that it is the subject of repeal by subsequent legislation. This may be true, but then it would leave the amount that the plaintiff is entitled to under sec. 2, Art. V, an open question. This point is, however, not taken by the defendant upon the facts agreed.

Therefore, I decide that the plaintiff is entitled to the compensation claimed, and to receive from the defendant a warrant therefor, for which he is further entitled to a peremptory writ. Judgment accordingly, and for costs."

Defendant appealed.

Attorney-General Hargrove for appellant.
Fowle, contra.

READE, J. *Cotton v. Ellis,* 52 N. C., 545, is directly in point. Cotton had been appointed Adjutant-General for three years, with a salary of $200. The Legislature passed an act repealing the (475) law under which Cotton had been appointed, both as to his appointment and salary. Cotton served his term and demanded pay, which the Governor, Ellis, refused. And this Court decided that he was entitled to it. The principles of that case are the same as in this, and it is unnecessary to repeat them. See also *King v. Hunter,* 65 N. C., 603.

PER CURIAM. Judgment affirmed.

Cited: Shaffner v. Jenkins, 72 N. C., 278; *Wood v. Bellamy,* 120. N. C., 218; *Day's case,* 124 N. C., 392.

Note. In effect *overruled, Mial v. Ellington,* 134 N. C., 131.

NOEL J. FALKNER v. SAMUEL R. HUNT.

1. An agreement of parties, that the decision of the Judge below, upon a question of fact submitted to his determination, shall be final and conclusive, does not deprive either party of their right of appeal, and of having the case heard *de novo* in this Court.
2. Where a case has been pending in the Supreme Court since July, 1871, and after this Court had ordered issues of fact to be made up and tried in the Court below, it is too late to contend, that such issues were, by consent of parties, finally determined by his Honor below.
3. Our Superior Courts are always open for the transaction of business, and the Judges of those Courts have a right to hear and determine upon questions of amending records at Chambers, as well as in term time.

MOTION to amend the record of a suit between the parties still pending in this Court, heard and determined by *Watts J.*, at Chambers, 15 June, 1872.

The suit commenced in the Court of Equity of Granville by original bill, and under the provisions of the Code of Civil Procedure, (476) was removed into the Superior Court of said county. At the July (Special) Term, 1871, of that Court, it came on to be heard before his Honor Judge Watts, upon the proofs, pleadings, &c.—no issues being settled or made up to be submitted to a jury and no jury being empanelled therein. Upon the hearing, the plaintiff, Falkner, obtained a decree in his favor, and the defendant appealed.

The suit is yet undecided in this Court, issues having been made up and sent down to the Superior Court, to be determined by the finding of a jury.

On 15 June, 1872, the plaintiff, after notice, and upon affidavit, moves his Honor, that the record of the Superior Court, made in the cause at the July Term, 1871, when the decree was obtained, be so amended as to show that the issues of fact raised by the pleadings, were by the consent of the parties, referred to his Honor then presiding, and were by him, then and there, determined in favor of the plaintiff. His Honor allowed the motion, and oredered the record to be amended as follows, by inserting the words: "By consent of parties to this cause, the facts put in issue by the pleadings are submitted for final determination to the Hon. Samuel W. Watts, the Judge presiding, and his finding thereon shall be conclusive on parties"; and further directing that the Clerk of said Superior Court now in session, transmit a certified copy of the record thus amended, to the Supreme Court.

From this order, allowing the record to be amended, the defendant appealed.

Lanier, Fowle and *Snow* for appellant.
Hargrove, Busbee & Busbee and *Batchelor & Son, contra.*

BOYDEN, J. The hearing of this case took place at the Special Term of GRANVILLE in July, 1871, and from the decision of his Honor, in open Court, the counsel on each side being present, a general appeal, without objection on the part of the Court or counsel for (477) the plaintiff, was taken to the Supreme Court, and the case has been pending in this Court up to this time. This was an old equity suit, which was to be proceeded with up to the final decree, according to the practice in use at the time of the adoption of the new Constitution and the C. C. P.

By that practice his Honor must have decided the facts as well as the law, unless there was such a conflict of testimony, that he deemed it expedient to order issues to be submitted to the jury, for the purpose of enlightening his conscience, upon the disputed facts. And from the decision of his Honor in the Court below, either party had by *law* the right to have the cause heard *de novo* in this Court, unprejudiced by the decision below; and this raises the question as to the legal effect of an agreement of the parties, that the decision should be final and conclusive upon the facts, and deprive the parties of their right of appeal and review in this Court.

The Court holds that such an agreement, if established beyond a doubt, would not and could not deprive the parties of the right the law, as it then stood, gave to them, to appeal to this Court and here have the whole case heard *de novo*. This is settled by *Fagan v. Jacocks*, 15 N. C., 263. That was a case at law, and the parties had agreed that the cause might be decided upon the same principles as though it was pending in a Court of Equity. His Honor, the late Judge GASTON, in delivering the opinion of the Court, says: "We do not conceive that this agreement of the parties could bestow upon the Court an authority to decide the case by any other principles than those which the law prescribes for its decision."

Suppose a defendant was on trial for murder or other crime, and his counsel should be so unmindful of his duty as, with the approbation of his client, to enter into a solemn agreement that his Honor should try the case, and that his decision should be final and (478) conclusive. Would any counsel attempt to maintain in this Court, when the defendant had taken an appeal, that we must refuse to hear his case and dismiss his appeal? In the case now before the Court we are of opinion that the amendment of the record can have no such effect as to deprive the defendant of having his cause heard

de novo in this Court upon both the facts and the law, even if the objection had been taken in apt time. But the Court is further of opinion that it was too late to take any such objection as to a hearing in this Court, after the cause had pended in this Court, since July, 1871; and after this Court had, at a previous term, ordered issues of fact to be made up and tried at the Court below.

As to the amendment of the record, it has already been settled in this Court that as our Superior Courts, as now constituted, are always open for the transaction of business, his Honor had a right to hear and determine upon the question of amending the record, at chambers, as well as in term time. *Mason v. Miles,* 63 N. C., 564.

Upon affidavit filed, it is ordered that the issues be sent to the Superior Court of Franklin, there to be tried by a jury. No costs allowed.

PER CURIAM. Order accordingly.

Cited: S. c., 73 N. C., 574; *Runnion v. Ramsay,* 93 N. C., 414; *Cowell v. Gregory,* 130 N. C., 85.

(479)

GEORGE W. LONG v. WILLIAM POOL and JOHN W. MILLER.

1. Where there was evidence tending to show a state of facts which would entitle the plaintiff to recover, and also evidence tending to show a state of facts which would entitle the defendant to a verdict and judgment, and his Honor stated both cases and left it to the jury as a question of fact: *Held,* There was no error.
2. For mere error in judgment, an agent with authority to do the best he can, is not liable.

APPEAL from *Mitchell, J.,* at Spring Term, 1872, of ALEXANDER.

Plaintiff complained against the defendants for the conversion of a note, of which he was the owner, worth $153 in gold value, and due to him by one Ward, of East Tennessee. The defendants came to the plaintiff's house in Alexander county, on their way to East Tennessee, in pursuit of a horse which had been stolen from defendant Miller. Plaintiff testified that he asked the defendant Pool, in presence of defendant Miller, to take the note and collect the money, and if Ward did not pay it on presentation, not to sue, nor leave the note in East Tennessee, but to return it to plaintiff, and that Pool agreed to these instructions and took the note. That shortly after defendants returned, Pool presented to plaintiff a receipt for the note from one Hamby, living in East Tennessee; which plaintiff took but refused to accept

in satisfaction and lieu of his note; and plaintiff did not assent to what had been done. That he demanded twenty-five dollars of Muller, who had refused to pay, and that he demanded the note of Pool before suit.

Defendant Pool testified, that he took the note from the plaintiff at the time alleged, and his only intentions were "to do the best he could with it"; that nothing was said about bringing the note back or not leaving it in East Tennessee if he could not collect it. That while at the house of Thomas Hambly, after Miller had recovered his horse, Miller came to him and stated that he owed Hamby $25 for help- (480) ing to recover the horse, and asked if he would not leave the note on Ward with Hamby for collection, and agree that if he collected it he might retain $25 out of it to pay what Miller owed Hamby and let Miller pay the amount to the plaintiff. That Pool agreed to this, but refused to allow the note to be pledged for the $25, and that he did this because he thought it the best he could do for the plaintiff, and that it was done for the benefit of the plaintiff. That he took Hamby's receipt and agreed with him that he should retain $25 for what Miller owed him and pay the balance to his receipt, and if he could not collect the note Miller was to be indebted to him $25. That the receipt was given to plaintiff on his return from East Tennessee, and that he told him all that had been done, plaintiff took receipt and made no objection to anything that had been done.

His Honor instructed the jury that if they should find the facts as detailed in the testimony of defendant, Pool, then defendants were not guilty of the conversion, but if they should find the facts as detailed in the evidence of plaintiff, Long, then they were guilty.

Verdict for defendants. Rule for new trial. Rule discharged. Plaintiff appealed to Supreme Court.

W. P. Caldwell and *Folk* for appellant.
Armfield, contra.

RODMAN, J. There was evidence in this case tending to prove two different states of fact between which the jury had to choose.

1. The evidence on the part of the plaintiff tended to prove that he gave the note to Pool upon a contract that he would carry it to Tennessee and endeavor to collect it from the maker, and if he failed to do so on presentation that he would bring it back to the plaintiff. He left it with Hamby to collect, and authorized him (481) to retain out of the proceeds $25, which Miller owed him, which sum Miller agreed to pay plaintiff.

The Judge charged the jury that if they believed this to be the true

state of facts, plaintiff was entitled to recover the value of the note, and that defendants were guilty of a conversion of it. There was no exception to this part of the Judge's charge, and we are not called on to consider it.

2. The evidence on the part of the defendant tended to prove that he agreed to take the note and do the best he could with it. That it was delivered to Hamby under the circumstances above stated was not denied.

His Honor charged the jury that if they believed that Pool received the note upon this agreement he was not guilty of having converted it, nor was he guilty of gross negligence. It seems to us that the question was properly left to the jury as a question of fact. We see no error in the instructions of the Judge. The agent of plaintiff may have acted imprudently, but we see no evidence that he acted fraudulently, and the jury have found that he did not. For mere error of judgment an agent with authority to do the best he can, is not liable.

PER CURIAM. No error.

Cited: Kinney v. Laughenour, 89 N. C., 368; *Patterson v. McIver,* 90 N. C., 499.

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(482)

WILLIAM F. SMITH v. A. G. HUNT.

Freeholders appointed under Act of 22d August, 1868, to lay off a homestead and allot personal property exemption, must be sworn, and it must appear that they were sworn; and they must make such a descriptive list of the personal property as will enable creditors to ascertain what property is exempted; and when these requirements have not been complied with, their proceedings may be treated as a nullity by creditors.

INJUNCTION, heard upon motion before *Tourgee, J.,* at Chambers, during CASWELL Court, Spring, Term, 1871.

The defendant, Hunt, made affidavit that on 19 March, 1869, he had his homestead laid off and personal property exemption allotted to him by three freeholders, according to the act 22 August, 1868. That there were at that time sundry judgments and executions against him, and among them one in favor of the plaintiff; that the excess of his homestead and personal property exemption was then sold, but plaintiff's execution remained unpaid; that since that time plaintiff has procured the sheriff of Caswell to cause his homestead and personal property to be re-assigned under an execution on his judgment against

him, and was about to sell the excess ascertained by this last assignment; that some of the property in said excess is a part of that laid off 19 March, 1869, and some is the increase, and that the increase has not exceeded the loss. The parties joined issue, and the cause was heard upon the defendant's affidavit.

His Honor refused the motion for an injunction, and the defendant appealed.

Dillard & Gilmer and *S. P. Hill* for appellant.
Scales & Scales and *Ovide Dupre, contra.*

BOYDEN, J. This was a motion for an injunction to restrain Smith, a judgment and execution creditor, from selling property levied upon to satisfy the judgment upon which the execution is- (483) sued.

The motion, after due notice, was heard by *Tourgee, J.*, at chambers, during CASWELL Superior Court. The motion was refused, and Hunt appealed to this Court. The case does not state on what ground his Honor refused the injunction. In the argument on the part of the counsel of Hunt in this Court, it was placed upon the ground that the owner of personal property exemption had a right to have at all times an amount equal to five hundred dollars.

Hunt had obtained an order before a Justice of the Peace for three freeholders to lay off his homestead and personal property exemption, and the following is the language in which they set apart the homestead and personal property exemption, to-wit: "A life interest in the tract of land on which he resides containing six hundred and forty-six (646) acres lying on Dan River, adjoining the lands on the north of R. W. Williams, on the east by the lands of N. Hunt, south by the lands of Thomas Bigalowe, and west by the lands of A. G. Walters and others, valued at one thousand dollars.

Household and kitchen furniture	$26.70
Tools of all description	42.00
Stock of all kinds	253.00
Crops of all kinds	127.00

This return was duly registered.

The only question we deem it necessary to notice is whether a personal property exemption laid off in this general way can be sustained. Upon this question the Court entertains no doubt. This homestead and personal property exemption was laid off on 19 March, 1869, under the Act of Assembly, ratified on 22 August, 1868. This Act requires three disinterested freeholders to take an oath to do impartial justice

in the case, and lay off and allot to the applicant a homestead
(484) by metes and bounds, according to the applicant's direction, not to exceed in value $1,000, and make a descriptive account of the same, under their hands and seals, and return it to the office of the register of deeds." That said freeholders shall assess of the personal property of said applicant, to be by him selected, articles of personalty, not exceeding in value the sum of $500, and make a descriptive list of the same, and return it under their hands and seals to the office of the register of deeds; and it is made the duty of the register without unnecessary delay to register the same. It does not appear that the freeholders took an oath, and further there is no descriptive list, unless the following can be termed a descriptive list:

Household and kitchen furniture	$26.70
Tools of all description	42.00
Stock of all kinds	253.00
Crops of all kinds	127.00
	$448.70

It may be that there was a very potent reason for not taking the oath required by law, as the return states they laid off a life interest in 646 acres lying on Dan River, estimated at a fraction over $1.50 per acre. Is it possible that any three freeholders could be found that under oath would value 646 acres of Dan River land in Caswell County at $1,000?

As to the personal property exemption, that is void, for the reason that there is no *descriptive list* of the property laid off. The Court deem it of the highest importance that all the requirements of the law should be observed, and especially that the freeholders should be sworn, and that there should be a descriptive list of the property, and that list registered, so that creditors when they desire to levy their debts, may ascertain by examining the descriptive list the property exempted.

But how could any creditor ascertain what property was ex-
(485) empted, if such a return as is made in this case should be held to constitute the descriptive list required by the Act. No one could identify the property exempted, nor could he by examining the registry have any idea of the property exempted, or whether it was worth $500 or $5,000.

In this case it appears that the officer by the direction of Smith laid off the homestead and personal property exemption as now required by law, and then levied upon the excess treating the action of the freeholders who laid off the homestead and personal property exemption in March, 1869, as a nullity. This we think he had a right to do.

There was no error in refusing the injunction. The application must be dismissed at the cost of Hunt.

PER CURIAM. Affirmed.

Cited: *Coble v. Thom,* 72 N. C., 123; *Bevan v. Ellis,* 121 N. C., 230.

JOSEPH H. CARDWELL, Administrator of Thomas F. M. Coyle, v. WILLIAM MEBANE, JOHN H. COYLE and others.

"Tax lists" are not admissible for the purpose of proving the truth of facts therein set out. "Tax lists" as an independent fact, when relevant, are admissible as evidence of such fact; and in repelling a charge of fraud resting among other circumstances on the allegation, that the pretended price paid for a tract of land exceeded very much its value, *it is competent* to prove the fact that it was entered at a certain value on the "tax lists.".

PETITION before the Clerk of ROCKINGHAM, by the plaintiff as administrator of Thomas F. M. Coyle, for a license to sell the land described in the petition, situate in said county, and to make the proceeds assets to pay the debts of his intestate.

The defendants, John H. Coyle and Cornelius Coyle, sons of the plaintiff's intestate, presented their affidavit, claiming said land as conveyed to them by deed upon a valuable consideration, and (486) upon filing said affidavit the said John H. Coyle and Cornelius Coyle were admitted to defend; and thereupon, the plaintiff filed his affidavit, alleging that the deed made by his intestate to defendants, John H. Coyle and Cornelius Coyle, was made with intention to defraud his creditors, and with a knowledge of such intention on the part of said defendants. And an issue of title having been joined between the said Joseph H. Cardwell, Administrator aforesaid, plaintiff, and the said John H. Coyle and Cornelius Coyle, defendants, the cause was put upon the docket for trial at the next Term of the Superior Court of said county, and was tried before *Tourgee, J.,* at ROCKINGHAM Superior Court, Fall Term, 1872.

On the trial, the plaintiff offered evidence to show that whilst the deed recited a consideration of $5,000 paid for the land, the land had never been rated in market at more than $3,000, and that the defendants, John H. Coyle and Cornelius Coyle, had themselves offered to sell the same for $3,500.

In explanation of this, the said defendants made oath that they had paid five thousand dollars in money, as recited in the deed; that their father, the grantor, asked them that sum, and they thought it was worth that amount; that they lived in Florida at the time of the pur-

chase and had not seen the land afterwards; and upon hearing from their agent in Rockingham County that this and all lands were dull of sale and could not be sold at the price they had paid, they instructed their agent to sell at $3,500. The defendants, John H. Coyle and Cornelius Coyle, in support of this defence, "offered to show what the value of the land was at and before the making of the deed and also before the war, by lists of assessments for taxable purposes. The plaintiff objected to this and the Court sustained the objection," and excluded the evidence. Defendants excepted.

(487) Verdict and judgment for plaintiff. Appeal by defendants.

Scales & Scales for plaintiff.
Dillard, Gilmer & Smith for defendants.

PEARSON, C. J. The "tax lists" were not competent evidence to show the value of the land, as assessors were not witnesses in the case, sworn and subject to cross-examination in the presence of the jury. So his Honor committed no error in rejecting the "tax lists" as inadmissible for the purpose of proving the truth of the matter therein set out. But we are of the opinion that the "tax lists" ought to have been admitted in another view of the subject. "Every fact" is admissible in evidence, provided it be relevant; for illustration, a record, *i. e.,* the fact of there being such a record, is evidence against the world, but it only imports absolute verity of its contents, as against parties and privies; all others are heard to say *"res inter alias acta."*

In regard to the "tax lists," it is a *fact* that the tract of land had been assessed at $5,000, and the question is as to the relevancy of that fact. These young men say "our father asked us $5,000 for the land, being away out in Florida. We paid him the money and took a deed from him and our mother, the same being duly, legally and in good faith conveyed for the consideration named in said deed"; and in reply to the suggestion that the pretence of having paid $5,000 for the land "runs over the mark," for that in fact the land was not worth more than $3,000; they offer to show, as a matter of fact speaking for itself, that by the tax lists, at the date of the deed and before the war, the land was assessed at the value of $5,000, which fact, they urge, is relevant to show, probable cause on their part to believe, that the land was of that value as represented by their father, and is explanatory, of the circumstance that they paid that price, confiding in the representation of their father.

In support of this view it may be said, an insurance agent on
(488) our wishing to invest money on mortgage, looks to the tax lists as a means of information; for property is seldom assessed too high.

The mere fact that this land was entered on the tax lists as of the value of $5,000 is evidence against everybody of that fact, and we are of opinion that in repelling a charge of fraud resting among other circumstances on the allegation that the pretended price paid exceeded very much the value of the land, the defendants ought to have been allowed to prove this fact, to pass for what it was worth in the estimation of the jury.

PER CURIAM. *Venire de novo.*

Cited: Daniels v. Fowler, 123 N. C., 42; *R. R. v. Land Co.,* 137 N. C., 333.

W. H. SHIELDS, Adm'r *de bonis non* of J. H. Harrison, v. W. H. JONES, Adm'r of B. D. Mann.

Where an administrator sold the effects of his intestate in 1862, and took as a surety to the note given by a purchaser, a person who lived and had all his property in Mississippi, *it was held,* That the administrator was not to be responsible therefor, if such surety was undoubtedly good for the debt when he was taken, though he became insolvent afterwards by the results of the late war.

Special proceeding brought before the Judge of Probate of HALIFAX, by the plaintiff as the administrator *de bonis non* of J. H. Harrison, deceased, against the defendant as administrator of B. D. Mann, who was the original administrator of the said Harrison for an account and settlement of his estate. Upon the filing of the defendant's answer, the case was by the consent of the parties, referred to John T. Gregory, the Clerk of the Superior Court (who was also the Judge of Probate), as a referee to state an account and make a report thereof to the Judge of Probate. The account and report were accordingly (489) made by the referee, and the plaintiff filed an exception to the report for that the referee allowed the defendant credit for two notes, dated November, 1862, and amounting principal and interest to $8,734 which his intestate, B. D. Mann, had taken upon the sale of the effects of J. H. Harrison, of whom the said Mann was administrator. The principal in the notes was the widow Martha M. Harrison, and the surety was S. T. Nicholson, who at that time resided in Mississippi, where all his property, real and personal, was situated, but both principal and surety were then undoubtedly good for the amount of the notes, though they became insolvent afterwards by the results of the late civil war. The Judge of Probate overruled the exception and confirmed the report, whereupon the plaintiff took an appeal to Judge WATTS, and he, on 23 January, at Chambers, in the city of Raleigh, affirmed the judgment, and the plaintiff appealed to the Supreme Court.

Batchelor, Edwards & Batchelor for the plaintiff.
Clark & Mullen for the defendant.

BOYDEN, J. The sale in the case was made to Martha Harrison, who was a resident of the county, and at the time good for the debt. The security was a man of property, worth several times the amount of the debt in land and slaves and other property, but he resided in the State of Mississippi, and his land and other property was in that State. There is no suggestion, that the defendant's intestate did not take security that at the time was abundantly able to discharge all his
(490) own debts, together with the debt for which he became security.

But the case of the plaintiff is put upon the sole ground, that the security resided in the State of Mississippi, and that his person and property were beyond the jurisdiction of our Courts, and that when an administrator sells property of his intestate, he must take security who reside within the State, and who have their property within the reach of process of our Courts; otherwise such administrator must be held to the same liability, as if he had sold the property and taken no security.

We do not think this proposition can be maintained to its full extent. Every case where security is taken that resides out of the State must depend upon the circumstances attending the particular case. No one would contend that an administrator living in a county adjoining the Virginia, South Carolina or Tennessee line, might not accept as security a citizen of the adjoining State, who lived near the place of sale, and who was well known to the administrator to be a man of property and ample security for the property sold; the only objection being that the security and his property were not within the jurisdiction of our Courts. The facilities of travel and communication are such at this time that, so far as business transactions are concerned, distance is almost annihilated. At least, so much so, that it would be a harsh and unnecessary rule to hold an administrator personally responsible and as an insurer because he accepted as security on the sale of property a man abundantly responsible but who resided beyond the limits of the State.

We take it that this debt was amply secured and would have been collected but for the results of the recent civil war, and it can hardly be doubted that the same result, to-wit: the loss of the debt, would have occurred had security residing in the State been required, as the same cause that prevented the collection out of a security residing in
(491) our State. We, therefore, hold that as the defendant's intestate took security amply sufficient and which security suddenly became insolvent by the results of the war, we see no good reason to visit this loss upon the administrator, who made the sale.

The principles established by the cases cited by defendant's counsel we think fully sustain our ruling in this case.

PER CURIAM. Affirmed.

SALEM FEMALE ACADEMY v. MARY E. PHILLIPS.

Where a guardian sends his wards to a school, the charges for board, tuition, etc., will, in the absence of a special contract to the contrary, be upon his individual responsibility, but where in a suit against the guardian for such board, tuition, etc., the answer of the defendant denies his individual liability, and alleges that the credit was given by the plaintiff to the estate of his wards in his hands, an issue of fact is raised as to the individual liability of the guardian, which must be submitted upon the evidence *pro* and *con* to the jury for their determination.

APPEAL from *Cloud, J.*, at Fall Term, 1872, of FORSYTH.

The plaintiff claimed the sum of $644, with interest, for the board, tuition, etc., of three daughters of the defendant, she being also their regularly appointed guardian. The account was commenced 31 December, 1864, and ended 12 June, 1865. The complaint alleged that the account was contracted by the defendant upon her individual responsibility. This was denied by the defendant in her answer, she alleging on the contrary that the plaintiff, through its agents, gave credit not to her, but to the estate of her wards in her hands. After (492) reading the complaint and answer to the Court and jury, the plaintiff's counsel requested his Honor to instruct the jury to render a verdict for the amount demanded, on the ground that the answer admitted all the material allegations of the complaint. This instruction was given against the objection of the defendant's counsel. The jury thereupon rendered a verdict in favor of the plaintiff for the amount claimed, to-wit: the sum of $644, with interest thereon from 12 June, 1865. There was a motion for a new trial, which being refused and a judgment rendered, the defendant appealed.

Scales & Scales for the plaintiff.
T. J. Wilson and *R. B. Peebles* for the defendant.

PEARSON, C. J. There is no doubt that a parent, guardian or any person who enters a child at a school is undeniably liable for the ordinary expenses of the institution; the services are rendered at their instance and request, and it is not to be expected, under ordinary circumstances, that the authorities of the institution are to concern themselves by inquiry as to the estate of their pupils. Indeed the policy

of such institutions is not even to rely upon the individual credit of the patron entering a scholar, but to require "prepayment" by the session or half session.

It seems, in this instance, "prepayment" was not required; and the Court is bound to take notice of the fact that in January, 1865, when the session commenced, the only currency was Confederate treasury notes, which, in fact, amounted to nothing; so, when these three young ladies who were pupils of the academy, continued for another session without prepayment, it must have been in pursuance of some arrangement between the authorities of the institution, and the mother and guardian of the pupils.

(493) Unless there be a special contract, the defendant is liable individually; his Honor acting upon that principle, without other evidence except the admission set out in the answer, directed a verdict for plaintiff. The question presented by the appeal, is: whether his Honor had a right to make "short work" of it in this way, and should not have submitted an issue to the jury—where the pupils continued for the session beginning 1 January, 1865, with the understanding that it was not on the credit of the defendant, but with the understanding that it was on the credit of the estate of the pupils?

The answer expressly denies the individual liability of the defendant, and avers that it never was her intention or expectation that she was to be liable out of her own estate for the expenses of her three children, all of which was known to the agents of the plaintiff. This averment, although made very inartificially, was enough to raise an issue of fact as to the individual liability of the defendant, which was fit to be left to a jury.

There is error. The question, whether the agents of the plaintiff did agree to let the three girls continue for session beginning 1 January, 1865, upon the credit of the funds in the hands of the defendant, and not upon the individual credit of the defendant, ought to be submitted to a jury.

PER CURIAM. *Venire de novo.*

(494)

JOHN M. CRUMMEN v. CYRUS BENNET *et al.*

A grantor, who makes a conveyance of his land, which is fraudulent as to his creditors, does not thereby forfeit his right to a homestead as to such creditors. They can sell under an execution only the remaining part of his land, leaving the homestead to be contested between the alleged fraudulent grantor and grantee.

EJECTMENT, before *Buxton, J.*, at Spring Term, 1872, of MOORE.

On the trial there was much evidence offered on both sides, consist-

ing of judgments, executions, deeds and parol testimony; but for the understanding of the case as it was decided in the Supreme Court, it is only necessary to state the following facts:

The plaintiff was a creditor of Cyrus Bennet, one of the defendants, who owned the land in question, and obtained judgment for his debt in 1869, and had the land sold under an execution issued thereon. Prior to that time, in 1868, the defendant Bennet conveyed the land to the other defendant Currie, under circumstances which it was alleged rendered the deed fraudulent as to Bennet's creditors. Among the objections which were made to the plaintiff's recovery was this, that Bennet was entitled to a homestead in the land and that it had not been laid off to him.

His Honor after recapitulating the evidence, submitted the following issue to the jury: Was the conveyance by Cyrus Bennet to James L. Currie *bona fide,* made upon good consideration, without notice? If so, the jury should find for the defendant; if not so, they should find for the plaintiff. There was a verdict for the plaintiff, upon which, after an ineffectual rule for a new trial, judgment was rendered, from which the defendants appealed.

N. McKay, J. D. McIver and *B. & T. C. Fuller* for plaintiff.
Howze and *McDonald* for defendant.

PEARSON, C. J. A makes a conveyance of his land to B, which conveyance is fraudulent and void as against the creditors (495) of A. A creditor takes judgment and issues execution, treating the conveyance to B as void; can the homestead of A be sold? The creditor treats the conveyance to B as void and of no effect; take that to be so, how can the creditor have any more right against A than he would have had if the conveyance had not been made? We can see no ground to support the position, that an attempt to commit a fraud is a forfeiture of the debtor's homestead; there is no provision of the kind either in the Constitution or the statutes. The only legal consequence of a deed with an intent to defraud creditors is, that although valid as between the parties, it is void as to creditors.

In this case, the fraud did not consist in conveying the homestead; for the creditor could not have reached that by his execution had the debtor retained his homestead, but the fraud was in conveying the other part of the land. That, the creditor can reach by his execution. As to the homestead, he has no concern; that matter will rest between the fraudulent donor and donee.

PER CURIAM. *Venire de novo.*

Cited: Jones v. Wagoner, 70 N. C., 324; *Duvall v. Rogers,* 71 N. C.,

221; *Curlee v. Thomas,* 74 N. C., 54; *Edwards v. Kearsey, Id.,* 243; *Lambert v. Kinnery, Id.,* 350; *Com'rs v. Reiley,* 75 N. C., 146; *Gaster v. Hardie, Id.,* 463; *Adrian v. Shaw,* 84 N. C., 832; *Burton v. Spiers,* 87 N. C., 92; *Arnold v. Estis,* 92 N. C., 167; *Pate v. Harper,* 94 N. C., 27; *Rankin v. Shaw, Id.,* 407; *Dortch v. Benton,* 98 N. C., 191; *McCanless v. Flinchum, Id.,* 370, 373; *Hughes v. Hodges,* 102 N. C., 246, 263; *Thurber v. LaRoque,* 105 N. C., 316; *Younger v. Ritchie,* 116 N. C., 783; *McGowan v. McGowan,* 122 N. C., 169; *Marshburn v. Lashlie, Ib.,* 240; *Rose v. Bryan,* 157 N. C., 174.

J. H. N. BRENDLE, by guardian, v. A. J. HERON and others.

The Clerk of the Superior Court, as well as the Judge, may make an order for a plaintiff, whether an adult or infant, suing by his guardian, to sue *in forma pauperis* in the Superior Court upon complying with the provisions, Laws 1868-'69, ch. 96, sec. 1.

Though a complaint has not been filed in proper time, the Judge may, in his discretion, permit it to be filed afterwards.

The plaintiff, a minor, brought this action by his guardian,
(496) as a pauper. It was heard before *Cannon, J.,* upon a motion to dismiss at the Fall Term, 1872, of HAYWOOD. The facts of the case are sufficiently stated in the opinion of this Court.

D. Coleman for plaintiff.

No counsel in this Court for defendants.

RODMAN, J. The defendants moved to dismiss the action, because:

1. No complaint had been filed. The Judge allowed plaintiff until the next day to file his complaint, which was done. This was certainly within his discretion.

2. No prosecution bond had been given. The plaintiff had been allowed to sue as a pauper by the Clerk of the Court. The question as to an adult plaintiff is decided in *Rowark v. Gaston,* 67 N. C., 291. It can make no difference that the plaintiff is an infant, who has no property except that in suit, who sues by a guardian who is a pauper. See *Anonymous,* 1 Marsh, 4. (4 E. C. L.) Laws 1869, ch. 96, requires one who applies to sue *in forma pauperis* to "prove by one or more witnesses that he has a good cause of action."

This does not expressly require that he shall have the certificate of an attorney to that effect. But we think that upon a fair con-
(497) struction of the Act, no officer authorized to make the order, should do so (at least in general), without such certificate. The

act, however, is only directory, and the matter is necessarily almost entirely in the discretion of the Judge.

We may be permitted, we hope without offence, to say to the bar, that in a case like this, where the parties (or at least one of them) are poor, and the matter in controversy of inconsiderable value, and the question one which plainly rests, greatly, if not entirely in the discretion of the Judge, appeals to this Court should not be encouraged.

PER CURIAM. Affirmed.

Cited: *Christian v. R. R.*, 136 N. C., 322.

THOMAS L. CLAYTON v. JOHN JONES.

1. Where the complaint (which was verified) in an action by the indorsee against the maker of a promissory note stated the indorsement, but omitted to allege that it was for value received, and the defendant demurred to the complaint for such omission: *it was held* that the demurrer was frivolous, and that, as there was no answer, the plaintiff was, upon motion, entitled to judgment for the amount of the principal and interest of the note.
2. The five days' notice which was required by section 218, the C. C. P. previous to a motion for judgment on account of a frivolous demurrer, answer or reply, is not applicable since the C. C. P. has been suspended and the summons in civil action is made returnable to the Court in term time. Now such notice is unnecessary, as the parties through their counsel must take notice, at their peril, of all motions and steps in the cause.

MOTION for judgment at the Fall Term, 1872, of BUNCOMBE, before *Henry, J.*

The facts necessary for understanding the case are fully stated in the opinion of this Court.

J. H. Merrimon for plaintiff. (498)

No counsel for defendant.

BOYDEN, J. This was a civil action upon a promissory note, which had been endorsed to the plaintiff by the payee, Smith. The complaint was verified. To this complaint the defendant demurred, and alleged in his demurrer "that the complaint did not state facts sufficient to constitute a cause of action against the defendant, for the reason that the complaint did not allege that Smith, the payee in said note, had indorsed the same to the plaintiff for value received."

The plaintiff's counsel at the return term, moved for judgment upon the ground "that no answer to the complaint had been filed, and that

the demurrer was frivolous." His Honor refused the motion, and declared his opinion to be "that the demurrer raised an issue of law, which, under the statute suspending the C. C. P., could not be heard till the next term." His Honor would have committed no error had the demurrer in fact raised an issue of law; but it was for his Honor to decide whether or not the demurrer did raise such issue. His Honor, we think, erred in holding that the demurrer raised an issue of law, for the reason that the grounds of the demurrer specified are plainly irrelevant and immaterial, and therefore frivolous. Sec. 218 of C. C. P. provides that "if a demurrer, answer or reply be frivolous, the party prejudiced thereby, upon a previous notice of five days, may apply to the Court or Judge thereof, either in or out of the Court, for judgment thereon, and judgment may be given accordingly."

This notice of five days was provided for the decision of cases, as the law stood before the several statutes suspending the C. C. P. Since these acts of Assembly making civil actions returnable to the Court in term time, the five days notice of the motion is unnecessary, as parties (499) through their counsel must take notice, at their peril, of all motions and steps in the cause, as under our old system, as has been decided in *Stone v. Latham, ante,* 421. His Honor should have allowed the motion, as the plaintiff was entitled to his judgment notwithstanding the sham demurrer, as in law it was wholly immaterial as far as the plaintiff's rights were concerned whether he paid value for the note or not.

There was error in refusing the motion. There will be judgment in this Court for the debt and costs.

PER CURIAM. Affirmed.

Cited: Blue v. Blue, 79 N. C., 74; *University v. Lassiter,* 83 N. C., 42; *Williams v. Whiting,* 94 N. C., 482; *S. v. Johnson,* 109 N. C., 855.

RALEIGH & AUGUSTA AIR-LINE RAILROAD COMPANY v. DAVID A. JENKINS, Public Treasurer.

The Public Treasurer is not bound, under the ordinance of the Convention, ratified 11 March, 1868, to accept "special tax bonds" and to deliver a like amount of Chatham Railroad bonds in exchange therefor, to the Raleigh & Augusta Air-Line Railroad Company.

MANDAMUS, tried before *Moore, J.,* at Spring Term, 1872, of WAKE.

By virtue of an ordinance of a Convention of the people of the State, entitled "An Ordinance to amend the charter of the Chatham Railroad Company," ratified 11 March, 1868, the Public Treasurer of the State

was authorized and directed to deliver to the said company coupon bonds of the State, to an amount not to exceed $1,200,000, with coupons for interest at 6 per cent, payable semi-annually, the (500) principal payable 30 years from the date thereof.

By the said ordinance it was further provided that before the Public Treasurer should deliver any of the said bonds to the said company, the said company should execute and deliver to the Public Treasurer its coupon bonds for the same amount, of the same date, and bearing the same interest, and the principal and interest payable at same time and place, as the coupon bonds of the State directed to be issued to the said company.

That to secure said bonds, the State should have a lien on the property, real and personal, of said company, and secured by a mortgage.

It was also further ordained by the third section of said ordinance, "That the Chatham Railroad Company may at any time before maturity, take up the bonds of said company deposited with the Public Treasurer, by substituting in lieu thereof coupon bonds of the State or other indebtedness of the State."

An exchange of bonds was duly made between the State and the said railroad company, and the mortgage duly executed and registered. By an Act of the General Assembly ratified the 13th day of December, 1871, entitled "An Act concerning the Chatham Railroad Company, amendatory of certain acts, and authorizing a change of name," said company was allowed to and did in fact change its name to that of the Raleigh and Augusta Air-Line Railroad Company. And by said act the said company, by the name of the Raleigh and Augusta Air-Line Railroad Company, became entitled to all the rights, privileges and immunities at any time by law granted to the said Chatham Railroad Company. By section 5 of said act it is enacted, "That the said Raleigh and Augusta Air Line Railroad Company may at any time hereafter discharge the bonds of the Chatham Railroad Company deposited with the Public Treasurer in the same manner and not otherwise as the said Chatham Railroad Company is now authorized by law (501) to do, and the Public Treasurer is hereby directed to return to the said Raleigh and Augusta Air-Line Railroad Company the said bonds of the Chatham Railroad Company, on payment in manner above prescribed, until the whole amount of said bonds of the Chatham Railroad Company held by the State shall have been surrendered." These amendments were duly accepted by the Chatham Railroad Company, and thereby it became the Raleigh and Augusta Air-Line Railroad Company. On 1 April, 1872, and before the bonds of the plaintiff became due, the plaintiff tendered to the defendant, David A. Jenkins, Public Treasurer of the State of North Carolina, divers bonds of the State,

issued at different dates and under various acts, but all under acts passed after the 11th March, 1868. The Public Treasurer refused to surrender and exchange. The plaintiff brought this action. Defendant demurred to the complaint. His Honor sustained the demurrer and ordered that the action be dismissed. Plaintiff appealed.

Batchelor, Edwards & Batchelor and *Clark* for appellant.
Hargrove, Attorney-General, contra.

PEARSON, C. J. This is an application for a *mandamus* to require the Public Treasurer to accept a tender of special tax bonds (as they are termed), and to deliver to the plaintiff a like amount of the Chatham Railroad bonds held by him.

The case is governed by *McAden v. Jenkins,* 64 N. C., 796. There are other considerations which support our conclusion set out in another case between the same parties, decided at this Term; to which reference is made, *post* 502.

Order for *mandamus* refused.

PER CURIAM. Affirmed.

Cited: Garner v. Worth, 122 N. C., 258.

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(502)

RALEIGH & AUGUSTA AIR-LINE RAILROAD COMPANY v. DAVID A. JENKINS, Public Treasurer.

1. Where an Act of the legislative branch of the government directs an executive officer to do a specific act, which does not involve any official discretion, but is merely ministerial, as to enter a specific credit upon an account, and the officer refuses to do so, a *mandamus* will be ordered.
2. The Court has power to compel the Public Treasurer to do only such an act as involves no official discretion, and is required by an *express command* of the General Assembly.
3. Under the ordinance of the Convention, 11 March, 1868, in favor of the Chatham Railroad Company, the Public Treasurer is not bound to accept in exchange for mortgage bonds of said Company any State bonds issued *after* the passage of the ordinance.

ACTION to obtain an order for a *mandamus* returned before *Chief Justice Pearson,* at Chambers, in Raleigh, on 1 February, 1873.

The facts are the same as in the foregoing case between the same parties, except that in this case the bonds tendered by the plaintiff, for which were demanded the mortgage bonds of the Chatham Railroad Company, were bonds of the State, some of them issued prior to the

ordinance of the Convention, ratified 11 March, 1868, and some issued after the passage of said ordinance.

On the return of the summons the defendant filed a special demurrer to the complaint, and Chief Justice PEARSON made the following order: No action of the Court being required it being informed that either party will appeal, I decide the matter against the defendant, to the end that the case may come up without further security.

From this decision the defendant appealed.

Attorney-General Hargrove for appellant.
Batchelor, Edwards & Batchelor and *Walter Clark, contra.*

PEARSON, C. J. We hold, but with much hesitation, that this Court has power by *mandamus* to require the Public Treasurer to accept bonds of the State, and to deliver to the plaintiff a like amount (503) of the bonds of the Chatham Railroad Company, which he holds by reason of an exchange of State bonds for the bonds of that Company.

It must be admitted that the power of the Courts to compel by the writ of *mandamus,* an executive officer of the government to do certain acts, has been carried to its utmost limit, so as not to violate the provision of the Constitution—that the executive, legislative and judicial powers of the government ought to be forever separate and distinct from each other. Const., Art. I, sec. 8.

It is settled, that when an act of the legislative branch of the government directs an executive officer to do a specific act which does not involve any official discretion, but is merely ministerial—as to enter a specific credit upon an account, and the officer refuses to do so, a *mandamus* will be ordered. *Kendall v. U. S.,* 12 Peters, 524.

By ordinance 11 March, 1868, it is ordained: "The Chatham Railroad Company may at any time before maturity take up the bonds of said company, deposited with the Public Treasurer, by substituting in lieu thereof coupon bonds of the State or other indebtedness of the State."

By an Act of the General Assembly, 13 December, 1871, it is enacted: "The said Raleigh and Augusta Air-Line Railroad Company, may at any time hereafter discharge the bonds of the Chatham Railroad Company, deposited with the Public Treasurer in the same manner and not otherwise, as the said Chatham Railroad Company is now authorized by law to do, and the Public Treasurer is hereby directed to return to the said Raleigh and Augusta Air-Line Railroad Company the said bonds of said Chatham Railroad Company, on payment in the manner above prescribed, until the whole amount of said bonds of the Chatham Railroad Company, held by the State, shall be surrendered."

Our doubt was, because of the fact that there was not one specific act to be done; that is, to hand over the Chatham Railroad bonds, as
(504) to hand over "the commissions." *Mabry v. Madison,* 1 Cranch, 49; but the further concomitant act, to receive State bonds of like amount in lieu thereof; no case has gone further than to commend a single specific act to be done, when required of an executive officer by the legislative branch of the government; and when it is purely ministerial, and does not involve any official discretion. At first blush it seemed there were two acts to be done, accepting State bonds, and returning the railroad bonds; and inasmuch as there were many classes of State bonds of different values in the market, it might be that the Public Treasurer would be called upon to exercise an official discretion as to the sort of bonds that he ought to receive. We are satisfied that this is not a question of official discretion, but one resting upon the construction of the two statutes above cited, which is purely a question of law. So neither of the acts called for the exercise of "official discretion," and both together amount to but one ministerial act, which he is required to do by acts of the General Assembly. Before doing it the Treasurer was well warranted in calling for a construction of the two statutes by the judicial branch of the government. Let it be noted that we put our power on the ground that there is an express command of the General Assembly that the Public Treasurer shall, upon the tender of State bonds, return a like amount of the Chatham Railroad bonds. This excludes the idea that any creditor of the State can have a *mandamus* against the Treasury; for there is no express command of the General Assembly that the Public Treasurer shall pay all of the debts of the State, and if a claim is presented to him, it must be left to his official discretion as to the time, condition of the Treasury, etc., when he will pay it; the Court could not interfere in such a case without encroaching upon the powers of the executive department of the government.

(505) We think it clear that the Public Treasurer ought to receive the State bonds issued in exchange for the Chatham Railroad bonds as it was one transaction. But we are of opinion that the Public Treasurer is not bound to accept any bonds after the ordinance made in favor of the Chatham Railroad Company, 11 March, 1868.

The plaintiff is seeking to take an unfair advantage of the State by buying up the most depreciated bonds of the State and tendering them for a return of the Chatham Railroad bonds, which although, by special legislation, the State did surrender its priority as first mortgage creditor, are still worth more in the market than the lowest class of State bonds which the plaintiff is "picking up." As is said, *McAden v. Jenkins,* 64 N. C., 796, it is well settled, that acts of the General Assembly drafted

by "promoters," as they are styled in England, or as we call them "lobby members," are to be construed in a sense most favorable to the State. In a broad sense, the words of the ordinance 11 March, 1868, include coupon bonds or other indebtedness of the State, as well as such as may afterwards be issued as such as were then outstanding.

Taking these words most strongly against the Railroad Company, we take them to mean any coupon bonds now outstanding, or other indebtedness of the State, to wit: any of the registered bonds that were issued without coupons attached, and were outstanding on 11 March, 1868.

A man makes a deed of trust to secure all of his creditors. The construction settled by the authorities, confines the operation of the trust to creditors at the date of the deed, and excludes subsequent creditors. So we exclude all bonds issued after 11 March, 1868.

PER CURIAM. Ordered accordingly.

Cited: County Board v. State Board, 106 N. C., 83; *Russell v. Ayer,* 120 N. C., 186, 197; *Farmer v. Worth,* 122 N. C., 258; *Bennett v. Com'rs,* 125 N. C., 470; *S. v. Biggs,* 133 N. C., 733; *Barnes v. Com'rs,* 135 N. C., 38; *Jones v. Com'rs,* Ib., 221; *Withers v. Com'rs,* 163 N. C., 345.

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(506)

ALEXANDER HILLIARD and wife and others v. W. H. & W. F. ROWLAND, Adm'rs, with the will annexed, of Elijah B. Hilliard.

Where a case has been referred for an account and report, and the report had been made and set aside by consent, and then by consent of parties it was ordered that the case be remanded for an additional report, showing what fund or estate still remains after setting aside the sum of $2,000 due the plaintiff B, showing also how each of the children of the testator stand towards each other as to the amounts received, what is due from each of them to the administrator, or from the administrator to each of them, and what is due to each other. And for the better adjustment of the matters in question, it is referred to J. H. T. as arbitrator, whose awards shall be a rule of Court, and who shall state the account necessary to exhibit what is here required, etc.: *it was held* that it was a reference to arbitration, and that the report of the arbitrator was an award, and not merely the report of a referee to take an account; and *it was held* further that the arbitrator had not exceeded his power in stating an account of the whole estate.

BILL IN EQUITY filed in the Court of Equity of NASH under the former system by the plaintiffs, who are the devisees and legatees of their father, Elijah B. Hilliard, against the defendants, who are administrators, with the will annexed, of their said father, for the purpose of getting a construction of his will, and then for an account and settlement of his estate.

The defendants filed their answers, and the case was set for hearing and then removed, by consent, to be heard in the Supreme Court. This Court having given an opinion as to the true construction of the will, an order was made that the case be referred to the Clerk of the Superior Court of Nash County to state the necessary accounts and make report, etc. In due time his report was made, but not being satisfactory, it was set aside by consent, and then by the consent of the counsel of both parties, the following order was made:

By consent of parties it is ordered that the case be remanded for an additional report, showing what funds of the estate still remain after setting aside the sum of $2,000 due to the plaintiff, Bettie, show-
(507) ing also how each of the children of the testator, other than the two oldest, stand towards each as to the amounts received, what is due, if anything, from each of them to the administrators, or from the administrators, if anything, to each of them, and what is due, if anything, from each other.

And for the better adjustment of the matters in question, it is referred to John H. Thorp, Esq., as arbitrator, whose award shall be a rule of Court, and who shall state the accounts necessary to exhibit what is here required, and shall report what testimony he may deem it necessary in explanation thereof. This order is made without prejudice to the account reported, or the exceptions thereto filed.

Mr. Thorp made his report to June Term, 1872, and the case was continued to give the counsel on both sides time to file exceptions. At the present term the defendant's counsel filed several exceptions to the report treating it as if it were the report of a mere referee to state an account. One of the exceptions, however, applied to it as an award. It was that the arbitrator had exceeded his power in taking an account of the whole estate, whereas it was contemplated that he should take only an additional account to the one already taken. The counsel for the plaintiffs moved for a confirmation of the report, insisting that it was an award.

Battle & Son for plaintiffs.
Moore & Gatling for defendants.

READE, J. There had been a reference to state an account and report, etc.; and a report had been made, with which neither party was satisfied. An order was then drawn up by consent, by the attorneys on both sides, reciting that it was desired to have an additional report showing what fund of the estate still remained after deducting $2,000 due one of the plaintiffs, and how the children of the testator stood towards
(508) each other as to the amounts received, and what each owed the other, and what each owed the administrators, and what the

administrators owed each of them. "And for the better adjustment of the matters in question, it is referred to John H. Thorp, Esq., as arbitrator, whose award shall be rule of Court, and who shall state the accounts necessary to exhibit what is here required," etc. The arbitrator made his award and reported to Court. And now the plaintiffs move for a confirmation of the report, treating it as an *award.* And the defendants file exceptions to the report, treating it as a report of a referee to state an account. And the first question is, whether said order was a mere reference as to a Clerk to state and report an account, or whether it was a reference to arbitration? There can be no doubt about it. The order is over the signatures of the counsel on both sides, learned in the law, so called, not by courtesy, but in verity; and it would be preposterous to suppose that they did not know the difference between a simple reference to state an account, and an arbitration. And the language is emphatic, that it is referred to Thorp as an *arbitrator,* and his *award* is to be a rule of Court.

One of the exceptions of the defendants is, however, entitled to be considered, *i. e.,* that the arbitrator exceeded his power in taking an account of the whole estate, whereas, it was contemplated that he should take only an *additional* account to the one already taken. But then, he was required to find what was the remainder of the fund after taking out $2,000, and *that* he could not do without ascertaining what was the whole amount. This exception is, therefore, overruled. And all the other exceptions are overruled; because, while they would be pertinent to a report of a referee, they are impertinent to the award of the arbitrator.

PER CURIAM. Judgment for the plaintiffs accordingly.

Cited: Keener v. Goodson, 89 N. C., 276.

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(509)

THOMAS P. JOHNSTON and wife v. THOMAS H. HAYNES.

1. Where the land of an infant was sold under the decree of a Court of Equity prior to the year 1862, and the purchase-money was in that year paid to the Clerk and Master in Confederate currency, who received it in the absence of instructions not to do so: *it was held* that the guardian of the infant was justified in receiving the same money from the Clerk and Master, and was to be made responsible to his ward only for its value according to the legislative scale.
2. When the amount of interest with which a guardian is to be charged in his settlement with his ward is doubtful, it is to be decided against him when it appears that his accounts are badly kept.
3. A settlement made by a guardian with his ward a few days after his coming of age is not binding upon the latter when it appears that he

was without the advice of friends, and that it was made under circumstances indicative of fraud and circumvention.

4. Counsel fees paid by a guardian are not to be allowed in his settlement with his ward when it appears that the counsel was employed not for the advantage of the ward, but solely for his own benefit.

5. When a case is referred without the written consent of the parties as required by the 244th section of the C. C. P., and both parties appear before the referee and examine testimony, and the report is afterwards made and confirmed in the Superior Court, and a judgment given upon it from which an appeal is taken to the Supreme Court, it is too late to object in that Court to the order of reference as having been improperly made in the Superior Court.

ACTION in the Superior Court of ROWAN upon the bond given by the defendant upon becoming the guardian of the *feme* plaintiff. The object of the suit was to set aside a paper-writing which purported to be a receipt in full and a release given by the *feme* before her marriage and a few days after she had arrived at full age, upon the ground that it had been obtained from her in the absence of her friends by fraud and circumvention. The answer of the defendant denied the charges of fraud and circumvention and insisted that the receipt and release was given after a full and fair settlement in the presence, and with the assistance of counsel, to the employment of whom she had agreed.

At the Fall Term, 1870, the following entry appears upon the (510) record: "Referred to J. S. Henderson and Andrew Murphy to try all issues of law and fact." Both parties appeared before the referees and examined testimony, and the referees after hearing counsel on both sides, made up their report and returned it to the Fall Term, 1871. It was confirmed and judgment entered upon it, setting aside the receipt and release which the defendant had taken from the *feme* plaintiff, and directing an account of the defendant's guardianship to be taken, etc., and for this purpose it was "referred to Thomas G. Haughton and James E. Kerr to state an account between the plaintiff and defendant, and ascertain what sum, if any, is due the plaintiffs from the defendant as guardian aforesaid, and that said referees report to the next term of this Court." These referees, after hearing the testimony and proofs of both parties, made their report to the ensuing Spring Term, 1872, of the Court, when both parties by their counsel filed exceptions to the report, all which were overruled by his Honor *Cloud, J.*, and the report was confirmed and a judgment given thereon, from which both parties appealed to the Supreme Court. The following were the exceptions filed by the defendant:

1. That the referees did not allow a credit to the defendant for the sum of $1,385.68, paid by the defendant to the *feme* plaintiff on the 7 December, 1862, with interest since said payment till 15 April, 1872.

2. That the receipt of $3,881.37 given by *feme* plaintiff to the de-

fendant on the 7th December, 1863, was not allowed for the amount therein specified, and that the weight of evidence shows that the payment therein alleged to have been made was actually made and received as such.

3. That the referees did not allow a credit for $59 paid to *feme* plaintiff by defendant 7 December, 1863.

4. That defendant has been charged with interest on the whole amount of the proceeds of the real estate from 7 December, 1862, when a large proportion thereof was not, nor could have been (511) received by defendant till 7 Dec., 1863.

5. That defendant is not credited with the sum of $25 paid to S. Blackmer, 7 Dec., 1863.

The 6th, 7th and 8th exceptions were that the defendant was not allowed certain sums on account of errors in the calculation of interest.

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

READE, J. In this case there were exceptions on both sides and both sides appealed. In this branch of the case only the defendant's exceptions are considered.

1. The first exception is allowed in part. It appears that $3,150 was the whole amount of the land money paid over by Clerk and Master Blackmer to the defendant. He is charged with the amount as of 7 December, 1862, with interest from that time. It is evident however from the testimony of the defendant himself and from the testimony of Blackmer that he had received a part of the land money several years before, $400 in 1859 and $1,000 in 1860. It does not appear clearly and it is the fault of the defendant that it does not, but we assume as probable that the balance due of the land money on 7 December, 1862, was $1,385 and that sum was paid over to the defendant by Blackmer in Confederate money, and that is the amount embraced in the exception which we are now considering.

We assume also that Blackmer had received the Confederate money in 1862 or before, and that without instruction to the contrary he was authorized to receive it, and if he was authorized to receive it, then the defendant was authorized to receive it also. Instead, therefore, of charging the defendant with $3,150 land money, 7 December, 1862, he ought to be charged with that sum less $1,385, and then not with the $1,385 of Confederate money, but with its value according (512) to the legislative scale, ascertained by the scale with the gold premium added. But the interest item must not be altered, because, although he is charged with too much interest on the land money after 7 December, 1862, he is charged with no interest at all on what he had

received prior to that time. And although this rule may not be precisely accurate, it is as near as we can come to it, and it is the defendant's fault that the account was badly kept. So that the effect of our ruling is to deduct from the item of $3,150, the difference between $1,385 and the value of $1,385 of Confederate money as of 7 December, 1862, to be ascertained by the legislative scale with the gold premium added, to be ascertained by the report of the gold market at this time. And the Clerk here will make the inquiry and the calculation.

2. The second exception is disallowed, because it appears that the settlement was made a few days after the ward plaintiff arrived at age, and when she was without the advice of her friends and under circumstances indicating fraud and circumvention.

3. The third exception is disallowed, not being supported by the facts.

4. The fourth exception is disallowed, for the same reason stated in considering the first exception, that although the defendant may be charged with too much interest at one time, he is charged with none at all at another, and the confusion is his own fault.

5. The fifth exception is disallowed, because the circumstances indicate strongly that Blackmer was employed by defendant not for the advantage to the plaintiff of his professional aid in making a fair settlement with the plaintiff, but as a device to cover a fraud.

6, 7, 8. The 6th, 7th and 8th exceptions involve only clerical calculations, which the Clerk here will make, and if the errors exist the exceptions will be allowed.

(513) When the account is reformed in the particulars indicated, there will be judgment here for the plaintiff for the amount found to be due by the Clerk.

It seems that the case was referred below without the written consent of the parties: C. C. P., s. ..., but without objection at Fall Term, 1870. Both parties appeared before the referees and offered evidence. At Fall Term, 1871, the referees reported, and their report was confirmed without exceptions. It was then referred again without written consent, but without objection, to other referees to state an account, and both parties appeared before the referees and offered evidence. At Spring Term, 1872, a report was made, and both parties filed exceptions and both parties appealed. In this Court for the first time the defendant excepts to the reference as being without the written assent of the parties. We think that it is too late.

Judgment modified and judgment here for plaintiff.

PER CURIAM. Modified and affirmed.

Cited: *White v. Utley,* 86 N. C., 417; *Kelly v. Odum,* 139 N. C., 281.

(514)

THOMAS J. JOHNSTON and wife v. THOMAS W. HAYNES.

1. A guardian cannot be allowed in an account with his ward for an expenditure greater than the income of such ward's estate.
2. The amount of allowance of commissions to a guardian by a referee is usually adopted by the Court, unless it is shown to be excessive.

This case is the same with the foregoing, that having been stated on the appeal of the defendant, while this is an appeal of the plaintiff. The following are the exceptions which were filed by the plaintiff's counsel:

1. That the referees have allowed the defendant in his disbursements an amount greatly in excess of the annual interest of the *feme* plaintiff's estate.

2. That they have allowed the defendant excessive commissions.

3. That they have allowed him interest on his commissions.

4. That they have allowed him compound interest on disbursements and commissions.

5. That voucher 3d is unsupported by testimony, and if allowed, as it was paid 5 December, 1863, ought to have been scaled, as the proof shows he paid it in Confederate money.

Dupre and *Jones & Jones* for plaintiffs.
Fowle, Bailey and *Blackmer & McCorkle* for defendants.

READE, J. In this case there were exceptions on both sides in the Court below and both sides appealed. In this branch of the case, which is the plaintiff's appeal, we consider only the plaintiff's exceptions:

1. The first exception is that the defendant is allowed as expenditures an amount greater than the income of the ward's estate. If that be so and to the extent that it is so, the exception is allowed, and the account will be reformed. And as that is a matter of clerical (515) calculation from the account already stated, it is referred to the Clerk here to make the calculation.

2. The second exception is disallowed. It is usual to adopt the allowance made by the accountant unless it is shown to be erroneous. It is not shown here.

3. The third exception that defendant is allowed interest on his commissions is disallowed, because he is *charged* with interest on the whole amount, which includes his commissions.

4. The fourth exception, that defendant is allowed compound interest on his disbursements and commissions, is disallowed for the same reason as in exception three. He was *charged* in the same manner.

5. The fifth exception to voucher 3 is disallowed for indefiniteness. There are no vouchers on file, and item three in the account stated is the only thing to which the exception can be referred by us, and that item is only thirty-five cents, and therefore we suppose is not what was intended by the exception.

If the calculations by the Clerk here shall find an excess of expenditures over the income, judgment will be entered for the plaintiff in this branch of the case for such excess only; as in the other branch of the case, we have given the plaintiff judgment for the amount due outside of this exception. If the calculation shall show no excess of expenditure over the income, then there will be judgment here for the defendant for his costs.

PER CURIAM. Judgment accordingly.

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(516)

THOMAS P. JOHNSTON and wife v. THOMAS W. HAYNES.

1. When an account and the report of a referee thereon is directed to be modified and corrected in this Court, and it is referred to the Clerk of this Court to make the necessary corrections, no evidence is admissible before him to show that the account which had been passed upon by this Court is erroneous. In such a case, the duties are only clerical, and the Clerk is right in confining himself to them.
2. Upon a petition to rehear a judgment rendered in this Court at a former term, the Court will not reverse or vary the former judgment unless it plainly appears that injustice was thereby done to the petitioner.

PETITION to rehear the judgment which was rendered against the defendant at the last term of this Court upon his appeal. The petition was founded upon the affidavit of Luke Blackmer, Esq., and all the matters connected with it will sufficiently appear in the opinion of the Court.

Dupre and *Jones & Jones* for plaintiffs.
Fowle, Bailey, and *Blackmer & McCorkle* for defendants.

READE, J. An opinion was delivered in this case at the last term, which settled the principles involved, and passed upon all the exceptions filed by the defendant to the account stated and report made by the referees, but it was necessary to make some mere clerical alterations in the accounts so as to make it conform to the opinion, and then the report with the account so corrected was confirmed. And it was referred to the Clerk of this Court to correct the account in conformity with the

opinion. The Clerk reports to this Court at this term, that he has conformed the account to the opinion filed. And the defendant excepts to the report in the particular that the Clerk has allowed an interest item to stand unabated when the Court had directed an abatement of the item of principal.

The exception is not allowed, because the action of the Clerk in that particular is in exact accordance with the decision of the Court under which he acted.

When the Clerk of this Court was reforming the account in (517) conformity with the opinion filed at last term the defendant appeared before him and offered testimony to prove that the account taken and report made and confirmed by the Court at last term was erroneous. The Clerk refused to hear the evidence. In this the Clerk was clearly right, as the reference to him was for no such purpose, but only to perform certain clerical duties. The evidence offered before the Clerk was the affidavit of Luke Blackmer. And the defendant filed the affidavit of Blackmer as the foundation of a motion which he made to the Court to rehear the exceptions which were passed upon at the last term.

It is attempted to be shown by Mr. Blackmer's affidavit that the account and report originally taken and confirmed is erroneous in this: There is an item in the account against the defendant as guardian of the plaintiff of $3,150.22 as of 7 December, 1862, with interest to the time of taking the account. The defendant excepted to that item, and this Court sustained the exception in part and overruled it in part and referred it to the Clerk to reform the account. The aforesaid item was the proceeds of real estate sold by Blackmer as Clerk and Master prior to 7 December, 1862. It did not appear when the land was sold, or what portion, if any, of the $3,150.22 was interest. But it did appear from Blackmer's testimony, who was a witness in the cause on the part of the defendant, that he as Clerk and Master collected $1,385 of that sum in Confederate currency in 1862. And on that account the Court sustained the exception so far as to abate from the amount the depreciation of Confederate currency, but did not abate the interest, because it appeared that a portion of the $3,150.22, viz.: $1,400 had been paid by Blackmer to the defendant in 1859 and 1860, and it did not appear that upon these payments the defendant had been charged with interest, and the Court assumed that what did not appear did not exist, and (518) therefore allowed the interest item to stand as it was for the reason fully explained in the opinion. Mr. Blackmer now sets forth in his affidavit that defendant had accounted for interest upon the $1,400, and that a part of the item of $3,150.22 was that interest. Taking the fact to be so, still it is the defendant's fault that he did not keep his

guardian account so as to show the items. And this gross neglect on his part would prevent the Court from opening the account unless it were certain that injustice had been done.

But so far from Mr. Blackmer's affidavit satisfying us that the item of interest ought to be abated, it makes what was before somewhat obscure clear that it ought not. His affidavit is that only $2,908.99 of the item of $3,150.22 was principal money. Take that to be so. Then he says that he paid the defendant $400 20 May, 1859, and $1,000 23 April, 1860, and that the interest upon these items were put in the item $3,150.22. Take that to be so. Then it appears that he only accounted for interest upon $1,400 of the principal and did not account for interest upon the balance of principal, viz.: $1,508.00. So that he had accounted for interest upon less than half of the principal money. There may be some reason why the defendant did not account for interest upon the $1,508, balance of the principal, but it is his fault that he did not show the reason. He does not show when the sale was made or when the money was due. The only fact that appears to us is, that the sale must have been made prior to 1859, because in May, 1859, the Clerk and Master pays over to him a part of the sale money, $400, and although it did appear that a balance of principal-money was not collected by Clerk and Master until 1862, yet it did not appear how much interest he had collected on it. And even if it be true that he did not receive interest from the Clerk and Master, yet he does not show why he did not, and the fact that he did not receive interest is no reason (519) why he should not account for interest if it appear that he ought to have received interest, as inferentially it appears that he ought. In short, it appears that prior to 1859 the plaintiff's land was sold for $2,908, and that 7 December, 1862, she received interest upon only $1,400. Inferentially, she is entitled to interest upon the balance of $1,508. And if this inference does injustice to the defendant, it is his own fault, because, being the plaintiff's guardian, it was his duty to make a full exhibit of all the facts. But since Mr. Blackmer's late affidavit we are not left to inference that the balance of principal-money did bear interest, for he says, "That after paying defendant $400 and $1,000 as aforesaid, this affiant received the balance of said principal sum with accrued interest as Clerk and Master of the late Court of Equity of Rowan County, in Confederate money, during 1862." Now, what became of the interest, and how much was it?

Mr. Blackmer swears he collected it and the defendant does not account for it. And although defendant was twice examined before the referees, and although Mr. Blackmer was twice examined before the referees and the account twice stated, yet it no where appears when the land was sold or how much interest was received prior to 7 Decem-

ber, 1862. And although the matter now under consideration, and the only matter, is the amount of interest with which the defendant ought to be charged on the principal-money before 7 December, 1862, and since, and although the defendant files Mr. Blackmer's affidavit to show that the defendant had been charged with too much interest, yet the affidavit only shows that he had acounted for interest ($241.23) on $1,400 paid in 1859-'60. And although he says he collected the "balance of principal and accrued interest in 1862," yet he does not say how much interest he collected and the defendant does not account for any.

So the most that can be made out of Mr. Blackmer's late affidavit is, that $2,908.99 was the principal of the land-money (520) upon which defendant was liable for interest from the time when the sale notes fell due. Upon $1,400 he had accounted for interest, and upon $1,508 he had accounted for no interest, although the Clerk and Master collected it. Therefore it does not appear from Mr. Blackmer's affidavit that any injustice had been done to the defendant.

The report of the Clerk is approved and confirmed.

PER CURIAM. Judgment accordingly.

THE PEOPLE OF THE STATE OF NORTH CAROLINA *ex rel.* Isaac W. Rogers v. PATRICK MCGOWAN.

The Act February, 1872, entitled, "An Act in relation to the election of Keeper of the Capitol," is void, and confers no power on the General Assembly to appoint that officer.

ACTION, for the recovery of the office of the Keeper of the Capitol, tried at Fall Term, 1872, of WAKE, before *Watts, J.*

On 27 March, 1872, the relator was appointed Keeper of the Capitol by the Governor, and demanded the office of the defendant who was performing the duties thereof under an appointment of the General Assembly. The Act entitled "An Act in relation to the election of Keeper of the Capitol," under which the defendant claimed the office, was ratified 2 February, 1872. The question as to the constitutionality of this Act being argued before his Honor in the Court below, he gave judgment in favor of the relator for the same reasons that are fully set out in the cases referred to in the opinion of the Court. (521) From this judgment defendant appealed.

Fowle and *Merrimon* for appellant.
Batchelor, Edwards & Batchelor, contra.

READE, J. The questions in this case are substantially the same

as in *Nichols v. McKee, ante,* 429, and *Welker v. Bledsoe, ante,* 457, and are governed by the same principles and for the same reasons.

There will be judgment that the defendant be excluded from said office, and that the plaintiff recover his costs.

PER CURIAM. Judgment affirmed.

Cited: Welker v. Bledsoe, ante, 465; *Brown v. Turner,* 70 N. C., 107.

MOSES A. BLEDSOE v. ELIZABETH NIXON and others.

1. A surety who pays the bond of his principal thereby discharges it; and his right of action against the principal for the recovery of the amount of such bond being upon a simple contract, is barred after three years by the statute of limitations.
2. A. B and C enter into a copartnership with a capital of $8,400. A sells out to B, who, after reciting that the concern had incurred a debt for capital stock for which A, B and C "were equally liable," covenanted to "assume the payment of all liabilities incurred by the said A on account of the aforesaid business," and B further agreed "to pay off and discharge all the liabilities incurred by said A on account of the aforesaid business, so that the said A shall come to no loss or damage:" *Held,* that B was responsible to A for his share of the capital stock, and that the share of each was a charge against the copartnership business.

APPEAL from *Watts, J., at* January Term, 1873, of WAKE.

The suit is brought by plaintiff against the defendants, who (522) are the legal representatives of Jere. Nixon, deceased, and for the adjustment of an account and for a settlement of the same, and also for the performance of sundry covenants contained in articles of agreement entered into between the original parties, some of which were as far back as 1853. The suit was referred, and upon the coming in of the report of the referee, both parties excepted to it. His Honor confirmed the report as to the facts reported and as to the conclusions of law found, from which judgment the plaintiff appealed.

The two material exceptions to the report made by the plaintiff, and the only two receiving the attention of the Court, is sufficiently set out in the opinion delivered in the cause.

Smith & Strong and *Battle & Son* for appellant.
Haywood and *Fowle, contra.*

RODMAN, J. The first exception to the report of the referee is as to his conclusion of law respecting what is called the Poole note. The parts reported are as follows:

On 9 March, 1850, Jere. Nixon made his bond to Poole for $800, with Bledsoe and Yarborough as his sureties. On 9 July, 1855, Bled-

soe paid the note and Poole indorsed and delivered it to him. The referee finds that Bledsoe did not intend to pay off the bond, but to keep it alive against the estate of Nixon, who was then dead, and that Poole transferred it at the request of Bledsoe for that purpose. Jere. Nixon died December, 1854, and administration was granted on his estate, at February Term, 1855; the administrator died October, 1868, and Macy became administrator *de bonis non* March, 1871. The referee further finds that Nixon had made some payments on the bond before it was paid off by Bledsoe; that exclusive of the time from 21 May, 1861, to 1 January, 1870, more than ten years had elapsed between the last payment by Nixon and the time when plaintiff, (523) Bledsoe, by amending his complaint in the action, made the bond a cause of complaint; but that ten years had not elapsed from the payment by Bledsoe up to said amendment.

These latter matters in the view we take of this case are of no importance.

It is clear, at least at law, that by paying off the bond the plaintiff discharged it, and his right of action against Nixon upon a simple contract was barred by the statute of limitations in three years.

There are a number of cases which say that where parties contract in writing, and by mistake as to a matter of fact, or by accident, the writing differs from the contract really made, a Court of Equity will reform the written evidence of the contract, to make it conform to the real intentions of the parties.

There are also a number of cases in which it has been held that when the written contract contains accurately the real contract of the parties, although its legal effect is different from what the parties supposed it would be, in such cases a Court of Equity will not reform the contract so as to give it the effect in law which the parties expected it would have. The leading case on this doctrine is *Hunt v. Rousmanier,* I Am. L. C., 404, and notes. But it is not necessary for us to enter into any discussion of such questions. In this case the writing was exactly what the parties desired it should be as a matter of fact, and had in law the effect they expected and intended it should have. It was evident that plaintiff, as surety for Nixon, had paid his debt, and by virtue of such payment he acquired a right of action against Nixon, which was what he expected and intended. His mistake, if any, was in supposing that his right would not be barred in three years. This is a mistake which many creditors have made, but they have not been relieved in Equity. We think this claim was barred by the statute of limitations, and (that statute being pleaded) did (524) not form a legal item in the account between the plaintiff and the representative of Nixon. Report of referee affirmed.

2. The legal exception is as to the finding of the referee upon the legal effect of the contract between plaintiff and Jere. Nixon, dated 12 May, 1854. The facts on this question so far as they are material are these:

In the Spring of 1853, plaintiff, Nixon and Hall formed a partnership in a saw-mill. In October, 1853, Hall sold out to Nixon and Bledsoe. On 21 November, 1853, plaintiff, Nixon and Snow formed a partnership for the same business. They began business 1 January, 1854, and continued until 12 May, 1854. The capital stock of this partnership was made up by Snow putting in property valued at $3,991.77, and by Bledsoe and Nixon putting in an engine, etc., known as the Burns engine, and other property, valued in the aggregate at $4,433.50, making the total capital stock $8,425.20. No member of the firm appears to have put in any money. The firm contracted no debt for its capital stock.

At the time the partnership of Bledsoe, Nixon and Snow was formed, the partnership of Bledsoe and Nixon owed Burns $4,000 or thereabouts for the Burns engine. This debt was paid on the 15th December, 1853, in part by a sale of certain property belonging to the firm of Bledsoe and Nixon, and in part by the proceeds of a note of Nixon and Bledsoe for $2,500, payable to some bank and afterwards paid by Nixon. Since the making of the agreement about to be mentioned, plaintiff has never been compelled to pay any debt of Bledsoe, Nixon and Snow, and it does not appear whether or not any such debts existed on the 12th of May, 1854, when the following agreement was entered into between Bledsoe and Nixon: "Whereas, Jere. Nixon, Theophilus Snow and M. A. Bledsoe, all of the County of Wake and State of North Carolina, entered into an agreement to carry on the
(525) steam saw-mill business in the County of Johnston, in the State aforesaid, with a capital of $8,400.22 or thereabouts, to commence business on or about the 1 January, 1854, and incurred a debt for the amount of their capital stock for which the aforesaid parties are equally liable, and whereas the said company had incurred other liabilities previous to 1 January, 1854, for the benefit of the aforesaid business in the purchase of provisions, etc., and have incurred similar liabilities for hands, provisions, etc., *Now, therefore,* It is agreed between the said Bledsoe and the said Nixon that the said Bledsoe for and in consideration the said Nixon shall (and doth hereby) assume the payment of all liabilities incurred by the said Bledsoe on account of the aforesaid business, and for the further consideration of the sum of two hundred and fifty dollars, bargain, sell and convey unto the said Nixon all his right, title and interest in and to the aforesaid business, capital stock and profits resulting from the same.

"And the said Nixon hereby agrees and binds himself to pay off and

discharge all the liabilities incurred by the said Bledsoe on account of the aforesaid business, so that the said Bledsoe shall come to no loss or damage. It being understood that the said Nixon is to occupy the place and stead of the said Bledsoe in the aforesaid business, and for the privilege of doing so is to pay the said Bledsoe the sum of $250. Signed and sealed by the parties 12 May, 1854."

For the defendant it is contended that the plain and natural meaning of the covenant on the part of Nixon is merely to indemnify Bledsoe from any debts and liabilities he had on account of the business of the firm of Bledsoe, Nixon and Snow, and that inasmuch as there were no such liabilities, or if there were that Nixon has indemnified Bledsoe against them; the covenant has not been broken (except as to the $250, about which there was no controversy), and the plaintiff is not entitled to any damages.

On the part of the plaintiff it is argued, that admitting that (526) such would be the natural (though not the necessary and only possible) meaning of the words in the operative part of the covenant, if taken detached from the recital; and admitting that legally speaking the capital stock which one partner puts into the business is not a debt owing by the partnership to him (at least not unless by some special agreement it be made such), yet it is not uncommonly so regarded and spoken of, both by ordinary business men, and in the most refined and perfect systems of book-keeping. When a man makes an investment in the stock of a corporation, or in a share of a partnership, or in a farm, a mine or other property, nothing is more usual than to open an imaginary account, in which the business or the investment is considered as debtor to the investor (that is to his capital otherwise invested, from which the money for this particular investment was taken), for the amount invested, and all receipts from the business are put down as credits. In no other way could a man engage in several pursuits, keep an accurate account of the profit and loss from each. It is true that the more accurate way of keeping such an account would be under the heading "My share in the partnership of A, B & Co., Dr.," but it might naturally happen that a man not accustomed to accuracy of thought or expression, would in his own mind or even on his books, consider the partnership his debtor.

Turning then to the recital to explain the somewhat ambiguous language of the other parts of the instrument, we find that the parties did in fact consider the capital stock put in by the several partners as a debt from the partnership to them severally. Its language, although not accurate, admits of no other construction.

It states that the partners had incurred a debt for the amount of their capital stock, for which they are equally liable. When we con-

sider in connection with this that the several partners had in-
(527) curred no debt to raise and put in their respective shares of the capital stock, and that if they had, such debt would not (or at least would not clearly) come within the description of the debts against which Nixon agrees to indemnify Bledsoe, and that the property which the several partners had put in to the aggregate value of $8,400 was regarded as the capital stock, we can put no other meaning on the words of the recital (which nevertheless had some meaning) than that the parties regarded the value of the capital stock of each as a debt from the partnership to him, and thus covered by the agreement to indemnify. This construction harmonizes with the somewhat loose language of the covenant by which Nixon agrees to discharge liabilities of Bledsoe on the account of the aforesaid business, so that he shall come to no loss. Whereas, if the intent had been merely to indemnify Bledsoe against debts then owing by the partnership to third persons, we should naturally expect other and clearer language to be used.

We agree with these positions of the counsel for the plaintiff.

We think the plaintiff entitled to credit for one-half the value of his capital stock.

The conclusion of law of the referee on this point is reversed. It is referred to the Clerk of this Court to remodel his report in accordance with this opinion. A decree will be drawn accordingly. Neither party will recover costs in this Court.

PER CURIAM. Order accordingly.

Cited: S. c., 69 N. C., 81; *Liverman v. Cahoon,* 156 N. C., 204.

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(528)

JOHN W. B. WATSON v. ORREN L. DODD.

Contingent interests, such as contingent remainders, conditional limitations and executory devises are not liable to be sold under execution. Hence where land was devised to A for life, and at his death to such of his children as might then be living, and the issue of such as might have died leaving issue, and if A should die without issue living at his death, then to B in fee. *It was held* that while A was living unmarried and without children, the contingent interest of B in the land could not be sold under the execution, nor made available in any other way to the payment of a judgment against him.

ACTION, to subject the interest which the defendant had in certain land situate in the said county to the payment and satisfaction of a judgment which he had obtained against him and had docketed in said Court. The interest of the defendant in the said land was derived under a clause in the will of Josiah O. Watson, deceased, which devised

it to John W. B. Watson, to have and to hold during his life, and at his death to such children of the said John W. B. Watson as might be then living, and the issue of such as might have died leaving issue; with the provision, that if the said John W. B. Watson died without issue living at his death, the said land should be equally divided between the defendant, Orren L. Dodd, and three other persons.

Upon this statement of facts, his Honor *Judge Watts,* at the Fall Term, 1872, of WAKE, being of opinion that the interest of defendant in the said land was not subject to sale under execution issued on the judgment, adjudged that the plaintiff was not entitled to the relief which he demanded and that his suit be dismissed, from which judgment he appealed.

E. G. Haywood and *Moore & Gatling* for plaintiff.
E. W. Pou for defendant.

PEARSON, C. J. In *Watson v. Watson,* 56 N. C., 400, it is (529) said by Judge BATTLE, in reference to the will of Josiah O. Watson, which is now under consideration: "John W. B. Watson is tenant for life, with a contingent remainder in fee to his children who may be living at his death, and to the issue of such children who may have died in his life time; with 'an executory devise' over to the defendants in the event of his dying without leaving issue." It was not necessary to decide whether the limitation over to the defendants was a contingent remainder or an executory devise, for that case turned upon the power of the Court to convert the fund, and the difficulty was in respect to the rights of the children unborn of John W. B. Watson, the tenant for life, to whom a contingent remainder in fee is limited; and it is held that the Court has no power to convert the fund, although the tenant for life, and the takers of the ultimate estate, in the event that the contingent remainder did not take effect, applied for and consented to a sale for conversion.

It would seem that the ultimate limitation is a contingent remainder and not an executory devise, for it is not to take effect in derogation of the preceding estates, which is the characteristic of a conditional limitation and an executory devise; but it is to depend on and await the termination of the preceding estates, which is the characteristic of a contingent remainder.

It is, however, not necessary to decide the question, for the same principle applies to contingent remainders and executory devises in respect to the question presented by this case, to-wit: the power of a Court of Equity to compel a sale for the satisfaction of creditors of the expectant interest of the claimants under the ultimate limitation, whether it be a contingent remainder or an executory devise.

In *Watson v. Watson, supra,* it is held that the Court has no power as against the first takers of the estate by way of contingent
(530) remainder, to order a sale for the purpose of conversion.

We are of opinion that the Court has no power to subject this expectant interest of a claimant under the ultimate limitation to sale on execution. A contingent remainder, conditional limitation or executory devise, where the person is certain, is transmissible by descent. But such interests are not assignable at law, for the reason that in every conveyance there must be a grantor, a grantee and a thing granted—that is, an estate, and such contingent interests do not amount to an estate, but are mere "possibilities coupled with an interest." It is held in the old cases, that such contingent interests cannot be devised, as a devise is a species of conveyance, but by the later cases they are held to be devisable, upon the wording of the statute of devises, a devise being in effect a mere substitution of some person to take in place of the heir. *Jones v. Doe,* 3 Term, 93.

Such contingent interest not being assignable at law, it follows as a matter of course that they cannot be sold under execution.

It one entitled to a contingent interest of the kind we are treating of, assigned it and received therefor a valuable consideration, and there was no fraud or imposition, and the estate afterwards vested, a Court of Equity would compel the assignor to make title, or else would hold the estate a security for the consideration paid, according to circumstances under its jurisdiction of specific performance of executory contracts.

This action is based upon the idea that inasmuch as the party can make an assignment of his contingent interest, which equity will enforce, provided the estate afterwards becomes vested, a Court of Equity has power to subject such interest to the claims of creditors by ordering a sale. The action is of the first impression, no authority was cited in support of the position, and we presume the diligent counsel of
(531) the plaintiff was unable to find a case in which the power was ever exercised. This, as is said in *Watson v. Watson, supra,* is conclusive to show that the Court has no such power.

When one has a resulting trust, for instance a debtor, who has executed a deed in trust to secure certain creditors, such resulting trust cannot be sold under execution, but a Court of Equity will subject it to the satisfaction of debts not secured by compelling a sale of the property and the application of the excess, but then the property is sold and the purchaser acquires a title. In our case the idea is not to sell the property, but to sell "the possibility coupled with an interest," which may or may not become afterwards a vested estate, and the purchaser would acquire nothing but a right to have a specific performance, treat-

ing the sale as being in effect a mere executory agreement. It is clear that such a possibility would sell for little or nothing, as no one would bid except the holder of the first estate, for the purpose of extinguishing the limitation. The party may, if he choose, enter into such an executory agreement to convey, provided the estate vests, but there is no principle upon which a Court of Equity can compel him to make an agreement.

PER CURIAM. Affirmed.

Cited: *Watson v. Dodd,* 72 N. C., 240; *Bodenhamer v. Welch,* 89 N. C., 92; *Bristol v. Hallyburton,* 93 N. C., 387; *Watson v. Smith,* 110 N. C., 7; *Hodges v. Lipscomb,* 128 N. C., 62; *Kornegay v. Miller,* 137 N. C., 662.

(532)

JACOB YOUNCE and wife *et al.* v. HIRAM McBRIDE.

When a guardian uses the funds of his wards in the purchase of a tract of land, they can follow the land to enforce the payment of the amount due them, and nothing can divest their right to do so except the exercise of their own free wills after coming of age, or the decree of some Court of competent jurisdiction.

ACTION, brought by the plaintiffs after they had come of age against the defendant, who had been their guardian, to follow some funds belonging to them, which he had used in the purchase of a tract of land. He admitted that he had used their funds in paying for the land, but he contended that under the circumstances, the plaintiffs were not entitled to the relief which they demanded. These circumstances are fully stated in the opinion of this Court.

Henry J., at Fall Term, of WATAUGA, gave judgment against the plaintiffs, from which they appealed.

G. N. Folk for plaintiffs.
J. W. Todd and *Busbee & Busbee* for defendant.

READE, J. It is admitted that the defendant used the fund of his wards, the plaintiffs, in paying for the tract of land mentioned in the pleadings, and took a conveyance to himself.

The question is, whether the plaintiffs have the right to follow the fund, and subject the land to the satisfaction of their claim. There is no principle better settled. They have the right. But the defendant says that this case is taken out of the general principle, by reason of one or both of the following circumstances:

1. The person of whom he bought the land was administrator of an estate in which the plaintiffs were distributees and the fund
(533) aforesaid was their share of the estate in the hands of the administrator. And the defendant, when he settled with the administrator, instead of requiring the administrator to pay up the amount due his wards, gave him a receipt as if he had paid it, and charged himself with the amount in his guardian account; and the amount was put in to his credit in part payment for the land. And he says he did this merely for convenience, and with no view to make an investment for his wards, but for his own benefit. It is not necessary to charge the defendant with *mala fides* in the transaction. What he did not intend, the law intends for him. And the moment he put his wards' funds in that land, that moment it became incorporated with every grain of it. It became their land to the extent of the investment, and no shift or contrivance, however intended, could divest it out of them except the exercise of their own wills, or the decree of some Court of competent jurisdiction.

2. The defendant says that he not only charged himself with the amount as guardian, but that, subsequently, he resigned, and another guardian was appointed; and that he settled with the new guardian, and paid him over the amount. And, therefore, he says the plaintiffs' remedy is against the new guardian.

If the defendant had gone a step farther and alleged that the plaintiffs, upon arrival at age, had received of the new guardian the aforesaid amount, it may be that this would have been a satisfaction and an abandonment of their equity in the land. But the defendant stops short of that allegation; and, therefore, we infer that the fact is not so. And if it be not, then the defendant, after the plaintiffs are satisfied out of the land, may, probably, have the satisfaction of being substituted in their stead, in a claim against the new guardian. And so it will work out, that his wards will follow their funds and he may follow his funds.

The judgment below is reversed, and judgment here for the
(534) plaintiffs for the amount invested in the land, with interest from the time of the investment. The Clerk will make the calculations; and unless the judgment is satisfied by the next term of this Court, the land will be sold for its satisfaction.

PER CURIAM. Judgment accordingly.

Cited: *Beam v. Froneberger,* 75 N. C., 542; *Coble v. Coble,* 82 N. C., 541; *S. v. Bevers,* 86 N. C., 594.

D. C. and JAS. D. HARDIN v. J. T. MURRAY and ELI MURRAY.

It is the duty of the appellant in this Court to show error otherwise the judgment below must be affirmed. When there is conflicting testimony the Judge cannot be required to charge the jury that, if they believe a certain witness, they must find for the plaintiff or the defendant, as the case may be.

APPEAL from *Henry, J.*, at Fall Term, 1872, of BUNCOMBE.

The complaint contained two causes of action: First, that the defendants, who were commission merchants in New York, had sold 132 bags of dried fruit for the plaintiffs and received the money and refused to pay it. Second, that the defendants did not use due diligence in selling a former lot of 134 bags of dried fruit, and unlawfully applied the proceeds of sale of the 132 bags.

The answer denied the material allegations in the complaint, and the following issue was submitted to the jury: "Did the defendants sell the fruit in their usual trade?" There was much testimony, both oral and written, and after his Honor had charged the jury, the counsel were asked whether they desired any special instructions. Thereupon the defendant's counsel asked the Judge to charge that if the jury believed the deposition of the defendant, J. T. Murray, which had been read to them, they should find that the defendant had acted in (535) the usual course of trade in selling the fruit. His Honor declined so to charge, saying there was some conflicting testimony on that point. The defendants excepted.

The case as made out for this Court sets forth a part of the deposition of J. T. Murray, showing that they sold part of the fruit consigned to them, on a short time, to merchants who became insolvent before the expiration of the time, etc., but none of the other testimony is given.

There was a verdict and judgment for plaintiff; a motion for a new trial was refused, and the defendants appealed.

J. H. Merrimon for plaintiffs.
Battle & Son for defendants.

BOYDEN, J. In this case his Honor states that there was much testimony, both oral and written, and that at the conclusion of his charge (without showing what his previous charge had been) the counsel on both sides were asked if there was anything overlooked, or anything special they desired given to the jury. To this the defendant's counsel (the case states), asked the Court to charge the jury, that if they believed the deposition of the defendant, J. T. Murray, the defendants

had acted in the usual course of trade in making the sale of the plaintiff's fruit. This his Honor refused, remarking that there was some conflict of testimony on that point. The conflicting testimony is not set out, nor any part of the testimony, save that portion of the deposition of the defendant, J. T. Murray, upon this point.

Upon this point the following issue was submitted to-wit: "Did the defendants sell the fruit in their usual course of trade?" This issue was found for the plaintiff. So the only question in the cause is, whether his Honor erred in refusing the instruction requested.

No question is better settled than that it is the duty of the (536) appellant to show error, otherwise the judgment below must be affirmed.

Now it may be that injustice was done the defendants on the trial below. If his Honor had deemed the verdict wrong, or contrary to the weight of the testimony, he might have granted a new trial. But the only question here is the single legal question, whether his Honor erred in refusing the instruction requested. Upon this point we think it clear that from the case sent here no error has been shown.

Gaither v. Ferebee, 60 N. C., 303, is decisive upon the point that the defendant was not entitled to the instruction asked.

PER CURIAM. No error.

Cited: McDaniel v. Pollock, 87 N. C., 505.

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(537)

MARTHA JANE CAMP v. RICHARD H. SMITH, Ex'r, etc.

1. An unmarried daughter, to whom was bequeathed $3,000 in money or bonds, and in the event of her death without lawful issue, her legacy was to be divided, etc., is entitled to the immediate payment of the whole of such legacy, its ultimate devolution being a question between her and the contingent remaindermen, if they are such.
2. An executor, who surrenders upon the request of the surety, a bond for which the principal and such surety are bound, and takes in lieu thereof the individual bond of such surety unsecured, makes himself personally responsible for the payment of the bond, or such portion thereof as remains unpaid.

ACTION, brought by plaintiff, daughter and one of the heirs of Humphrey S. Camp, deceased, to obtain a construction of the clause in her father's will and for payment of a legacy, tried by *Watts, J.,* at the Special (Dec.) Term, 1871, of HALIFAX.

The testator left to each of his three daughters $3,000 in the following bequest:

"I do will and bequeath to my three daughters, Martha Jane, Mariana

C. and Lucy Camp each, three thousand dollars in money or bonds, and in the event of the death of either one or any of my said daughters, without lawful issue, it is my will that her or their legacy shall be equally divided and heired by the survivor of my four daughters now single."

The plaintiff had never married, nor had issue. Her sisters, above named were married and had issue.

His Honor in the Court below, upon the hearing found as facts:

1. That the testator did not leave cash sufficient to pay the legacies, but left the bonds amounting to enough for that purpose.

2. That the defendant had satisfied the other legacies mentioned in the clause above set out, and had retained a bond for nearly the sum of $3,000, principal money, payable to his testator by (538) one Spier Pittman, principal, and Joseph J. Powell, surety, with the purpose of satisfying said legacy; and to that end, caused the same, after the death of the testator, to be removed, payable to himself as executor in the precise sum of $3,000.

3. That in 1861, Pittman, the principal, was insolvent, but the surety Powell, was a man of large estate, and unembarrassed.

4. That in 1861, the defendant upon the request of Powell, surrendered to him, Powell, the bond of Pittman, and took his, Powell's note, without any security for the amount, holding the same for the like purpose of providing for plaintiff's legacy. Of this exchange or substitution of notes the plaintiff had no notice.

5. That the defendant has paid the interest on the note to plaintiff up to May, 1863. And that of money received from the estate of Powell, he had paid plaintiff the further sum of $600, in March, 1870, and that he has now from the same source, $174.27.

6. That Powell is dead, his estate in the hands of a receiver and supposed to be insolvent.

Upon this statement of facts, the plaintiff insisted, that the defendant is liable for the full amount of the legacy with interest, and that she is entitled to the immediate payment of the same.

On the other hand, the defendant insisted that he had done nothing of which the plaintiff could, with reason complain, and that upon the facts as found, he is liable only for such portion of said legacy as he may succeed in collecting from the estate of Powell. And further that the plaintiff is entitled only to call for the accrued interest in so far as the defendant has collected the same, and not for the principal of the fund.

His Honor adjudged:

1. That the plaintiff could recover only the accrued interest (539) on the legacy bequeathed to her; and that the defendant is en-

titled to the payment made by him, to be applied to extinguish the accrued interest.

2. That the defendant in giving up the bond of Pitman to the surety, Powell, and taking the note of Powell unsecured therefor, changed the credit at his own risk, and thereby became liable for the whole debt, although it is not yet ascertained whether the estate of Powell is insolvent or not. The Court directed an account.

From this judgment both plaintiff and defendant appealed.

Peebles & Peebles for plaintiff.
Batchelor & Son and *Conigland* for plaintiff.

RODMAN, J. The will of Humphrey S. Camp (the father of the plaintiff), contains the following clause:

"I do will and bequeath to my three daughters, Martha Jane, Marianna C. and Lucy Camp, each three thousand dollars in money or bonds; and in the event of the death of either one or any of my said daughters without lawful issue, it is my will that her or their legacy shall be equally divided and heired by the survivor of my four daughters now single."

The plaintiff, Martha Jane, has never married, the other two daughters named in the above clause have married and have children. The defendant is the executor of the testator.

1. It will be convenient to consider the right of the plaintiff to the immediate payment of the legacy to her on the assumption that the defendant has assets applicable to it. He contends that she is entitled to receive only the annual interest of the legacy during his life,
(540) and that the principal must remain in his hands to await the contingency of her leaving issue at her death or not.

We do not agree with the defendant.

It is not material to inquire now whether the plaintiff took an absolute interest in the legacy upon the death of the testator, according to *Hillard v. Kearney,* 45 N. C., 221, or only an estate defeasible on her death without issue. In either case she is entitled to receive the *corpus* of the legacy, and its ultimate devolution is a question between her and the contingent remaindermen, if they are such. *Clapp v. Fogleman,* 21 N. C., 466. It is not material that she has not married.

2. As to the liability of the defendant for the note of Pitman, the facts found by the Judge are: Defendant received as part of the estate of his testator a bond for a principal sum of $3,000, made by Spier Pitman as principal and one Powell as his surety, payable to the testator, and he retained it for the purpose of satisfying the legacy to plaintiff therewith. The will was proved and defendant qualified as

executor at May Term, 1856, of Halifax County Court. Some time after his qualification (the length of time is not stated) defendant procured the bond to be renewed and made payable to himself as executor for the exact sum of $3,000. It is to be presumed that both Pitman and Powell were then solvent, and that in thus receiving the bond there was no want of diligence. In 1861 Pitman was insolvent (we are not informed when he became so), and the defendant at the request of Powell, who was then possessed of a large estate and was unembarrassed, surrendered the bond to him, and took his bond without security in place of it. Powell afterwards (it is not said when), died, and his estate is now supposed to be insolvent. Defendant has made several payments to plaintiff, of which he will have the benefit on an account, but we need not notice them now.

We think the defendant, in failing to require security of Powell after the known insolvency of the principal, was guilty (541) of such negligence as makes him liable for any loss which may occur.

Rev. Code, ch. 46, s. 18, requires that all sales by executors shall be on a credit of six months and that the proceeds shall be secured by bond with good security and collected as soon as practicable, &c. It may reasonably be said that somewhat less diligence in obtaining unexceptionable security would be expected of an executor selling property on a short credit and where the debt was to be promptly collected, than in making what may be called a permanent investment for the benefit of a legatee. In such a case, the executor assumes to act as a trustee for the legatee, and the security should be as good as it is reasonably possible under the circumstances to obtain. In this case it can scarcely be doubted that when the executor surrendered to Powell the bond of Pitman to which he was surety, he could have obtained from Powell then a man of large estate, surety to his bond. And under the principles maintained in *Boyet v. Hurst,* 54 N. C., 166, and the other cases cited for the plaintiff, he is guilty of culpable negligence in not having done so. *Whitford v. Foy,* 65 N. C., 265, was referred to for defendant. But it is not in point. There the guardian received from the administrator in 1855 notes which were then good. It is not stated in the report whether both principals and sureties were good or not; nor, indeed, is it stated that there were any sureties. But it is to be presumed, inasmuch as plaintiff made no exception of that sort, that there were sureties, and that both principals and sureties continued good to the capture of New Bern, in 1862, which suspended the Courts and made intercourse impossible between the debtors who resided within the United States lines and the guardian, who resided without. Between 1855 and 1862 both principal and surety remaining good, there would

have been no additional security obtained by renewing the notes in the name of the guardian as payee. The only difference would have
(542) been that in the last case they would have carried compound interest, and the guardian was held responsible for that, which he might have made if he had collected and reinvested the interest annually. In that case, it is said, "It has never been held that a mere neglect to change an investment amounts to a conversion of the security. The guardian, therefore, cannot be held liable for the loss of the notes merely by reason of his omission to change their form, or to take others payable to himself as guardian."

That was meant of course in reference to the facts in that case, where the original security was and continued to be good while it was possible to change it, and where the only change which the guardian was complained of for not making, was in the name and title of the payee. In this case the executor neglected to reinforce the security after the failure of the principal, and took the note of the surety without security, when for aught that appears, he might have obtained it.

So much of the judgment below as declares that plaintiff is not entitled to the immediate payment of what is unpaid of the principal and interest of the legacy to her is reserved. And so much as declares that the defendant is personally liable for such portion of the note of Powell as he has not paid to the plaintiff is affirmed. It is referred to the Clerk of this Court to state and report an account of what is due upon the legacy. A judgment may be drawn in conformity to this opinion.

The plaintiff will recover her costs in both cases.

PER CURIAM. Judgment accordingly.

Cited: Hodge v. Hodge, 72 N. C., 620; *Ritch v. Norris,* 78 N. C., 383; *Whitfield v. Garris,* 134 N. C., 31; *In re Knowles,* 148 N. C., 467.

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(543)

R. G. TUTTLE and D. M. PUITT, Ex'rs. etc., v. W. J, PUITT and others,

1. Testator devised a certain tract of land, describing it, to his son D and his heirs forever, annexing this condition: "Now in case the said D and the balance of my heirs can not agree in the price of the above described or bounded lands, the parties can choose a mutual board of valuation, and if the said D is not willing to abide by the valuation thus obtained, then in that case I will that the above bounded lands be sold and the proceeds equally divided among all my heirs, excepting, etc.: *Held,* That D should have the land, but that he should pay to the other heirs their proper share of its reasonable value: *Held further,* That should D decline to take the land the same will be sold and the proceeds divided as prescribed in the will.

2. Where a testator directs his property, land or personal property to be equally divided among his heirs, the division must be *per capita* and not *per stirpes*.

3. A testator makes the following bequest: "Item 3. I will and bequeath that after my death all my remaining estate and effects, consisting of notes, accounts, household and kitchen furniture and farming utensils, etc., *be sold* and the proceeds thereof be *equally* divided among all my heirs:" *Held*, That the testator did not intend that his notes and accounts should be sold; they will be collected: *Held further*, That the proceeds of the sale will be divided into ten parts—one to each of his six children, and one to each of the four grandchildren.

ACTION, to obtain from the Court a construction of the will of John Puitt, deceased, tried at Fall Term, 1872, of CALDWELL, before *Mitchell, J.*

The testator, John Puitt, died in June, 1872, leaving him surviving, six children and four grandchildren. A short time before his death he made a will, appointing the plaintiffs, his son and son-in-law, executors. Finding some difficulty in the construction of the will, the executors bring this suit against the other heirs and legatees and devisees of the testator, praying the judgment of the Court as to the true intent and meaning of certain clauses in the will, and from the judgment of the Court below, the executors appealed.

The parts of the will upon which a construction is asked, and all other circumstances necessary to a proper understanding of the points decided, are fully stated in the opinion of the Court. (544)

Busbee & Busbee and *Folk* for appellants.

No counsel in this Court for defendants.

RODMAN, J. The plaintiffs are the executors of John Puitt, who died in 1872, leaving a last will, and they request the Court to advise them on its construction. The defendants are the legatees, devisees and heirs of the testator. The testator left surviving him six children, and four infant grandchildren.

Item 1 gives a certain piece of land to his two grandchildren, William M. Puitt and Joseph N. Puitt. There is no doubt as to the meaning of this clause, at least as the case at present is.

"Item 2. I will and bequeath to my son, Daniel M. Puitt" (a certain described piece of land), "to have and to hold to him and his heirs and assigns forever. Now in case the said D. M. Puitt and the balance of my heirs cannot agree in the price of the above-described or bounded lands the parties can choose a mutual board of valuation, and if the said D. M. Puitt is not willing to abide by the valuation thus obtained, then in that case I will that the above bounded lands be sold and the proceeds equally divided among all my heirs, excepting the above-mentioned William M. and Joseph N. Puitt."

We think the intention of the testator was that Daniel, the devisee, should have the land, but that he should pay to the other heirs their proper shares of its reasonable value. There can be no difficulty in making the valuation. All the persons interested are parties to this action; the Court can appoint a guardian *ad litem* to represent the two infant grandchildren; these persons (excluding Daniel) will value the land and report their valuation to the Court; if they disagree in their valuation the highest will be taken as the valuation. On the re-
(545) port being returned, Daniel will be called on to make his election whether he will take the land at that valuation; if he takes it, the sum will be divided as hereinafter stated; if he declines to take it, the Court will appoint a Commissioner to sell the lands on such terms as to credit and security as may be just. The proceeds will be subject to division exactly as the amount of the valuation will be if Daniel accepts the land at the valuation.

As to the mode of the division. It is too firmly settled by authority to admit of a question, that where a testator directs his property whether real or personal to be equally divided among his heirs, the division must be *per capita,* and not *per stirpes. Ward v. Stowe,* 17 N. C., 509; *Freeman v. Knight,* 37 N. C., 72; *Redfield on Wills,* 411 citing among other cases *Rayner v. Mowbray,* 3 Brown's Ch. Cas., 234, where the Lord Chancellor says: "When a rule has been laid down it is best to abide by it. We can not be always speculating on what would have been the best decision in the first instance." And GASTON says, in *Freeman v. Knight, supra,* that to doubt on such a question is *"quietas movere."* See also *Butler v. Stratton,* 3 Br. Ch. C. 367 and Bonds Appeal, 31 Con. 183.

That the two grandchildren, William and Joseph, who are provided for in the first clause, are excluded from the distribution of this land mentioned in the second clause, cannot alter the application of the rule. It follows that the fund in question must be divided into eight parts, of which each of the six children (including Daniel), will take one, and each of the two grandchildren, Mary and Salvadora, one.

"Item 3. I will and bequeath that after my death all my remaining estate and effects, consisting of notes, accounts, household and kitchen furniture and farming utensils, etc., *be sold,* and the proceeds thereof be *equally divided* among all my heirs."

(546) We think the testator did not intend that his notes and accounts should be sold. The executors will, therefore, collect them. The other property will be sold, and the proceeds of the sale will be divided into ten parts, viz: one part to each of the six children, and one part to each of the four grandchildren. The authorities cited equally govern this clause.

Let a decree be made declaring the rights of the parties according to this opinion. The case is remanded for further proceedings in the Superior Court. The costs will be paid by the executors out of the fund.

PER CURIAM. Decree accordingly.

STATE OF NORTH CAROLINA *ex rel.* Wm. H. Howerton *et al.* v. S. McD. TATE *et al.*

1. The Legislature can not authorize the presiding officers of its two branches to appoint proxies and directors in behalf of the State in corporations in which the State has an interest: nor can the Legislature itself make such appointments, for the reason that it would be an usurpation of executive power.
2. The Legislature by the Acts of 13 February, 1871, and 6 April, 1871, having assumed to take the appointment of Directors for the State of the Western North Carolina Railroad from the Governor, it thereby dispensed with the necessity of his sending nominations to those offices to the Senate and left the Governor to pursue the law as far as he could.

ACTION to recover the offices of directors on the part of the State in the Western North Carolina Railroad Company (Eastern Division), commenced in ROWAN, and at Fall Term, 1872, a trial by jury having been waived by consent of both parties, the case was by agreement let for trial before his Honor *Judge M. Cloud,* Judge of the Eighth Judicial District, on the — day of January, 1873, in Raleigh. (547) The case was accordingly tried at the time and place agreed on.

The said Western North Carolina Railroad Company is a corporation duly created by Act of the General Assembly, ratified 15 February, 1855.

The charter provides for eight directors on the part of the State and four on the part of private stockholders; and that those on the part of the State shall be appointed by the Governor, by and with the advice and consent of the Council of State, and four on the part of the private stockholders shall be elected by them.

It also provides that the Board of Directors shall have power to fill vacancies in the Board. The defendants who claimed to be directors for and on behalf of the State, hold and claim their positions by virtue of the Act of the Legislature, ratified 13 February, 1871, and also of the Act of 6 April, 1871, under which they took possession of the road, property and effects of said corporation.

The relators were appointed by the Governor by and with the advice of the Council of State, Directors for the State in said corporation for the year beginning on the second Thursday in October, 1871. The said

Directors met in Marion, in McDowell County, on the second Thursday in October, 1871, the time and place for the regular annual meeting of the stockholders; and a majority of the stock of private stockholders not being represented, the President of the Board, which had been illegally displaced, called a meeting of the stockholders in conformity with the by-laws of the corporation, to assemble in Statesville on 26 October, 1871, within twenty days from said second Thursday. A majority of the stock of private stockholders not being then represented, the said directors who had been appointed by the Governor organized as a Board. The relator, William H. Howerton, was duly elected President of the Board, and afterwards the Board ap-
(548) pointed four other directors to fill the vacancies caused by the failure of the private stockholders to elect.

A demand was made by the relator, Wm. H. Howerton, of the defendants for the surrender of the road, property and effects of the corporation. The demand was refused and the relators, by leave of the Attorney-General, brought this action in the name of the State. The opinion of the Court contains a full statement of the facts of the case. His Honor gave judgment for the plaintiff, and that the relators were entitled to offices and that they be admitted to the same, and the defendants ousted therefrom. Defendants appealed.

A. S. Merrimon and *D. Coleman* for appellants.
Bailey, contra.

SETTLE, J. In deciding the points presented in this record we have only to apply the principles enunciated in *Clark v. Stanley,* 66 N. C., 59; *Welker v. Bledsoe, ante,* 457, and *Nichols v. McKee, ante,* 429.

We shall endeavor to do so in as few words as possible, and for the sake of convenience we will designate the boards of directors contending for the management of this road by the names of their respective presidents.

Clark v. Stanley decides that the Legislature can not authorize the presiding officers of its two branches to appoint proxies and directors in all corporations in which the State has an interest.

We argue from this that they could not authorize a committee of their body to do so, and the prohibition is equally strong upon the whole number of members, and all for the same reason; it would be an usurpation of executive power. The Legislature itself, like the other departments of the government under our new Constitution, exists
(549) by a grant of power from the people, and it cannot exceed that grant, either directly or indirectly.

The Tate board, who are the defendants in this action, and now in

possession of the road, claim power and authority to hold the same under an Act of the General Assembly, ratified 13 February, 1871.

It will be observed that this act does not profess in terms to remove the Mott board, which is admitted then to have been in lawful possession of the road, but after providing for a meeting of the stockholders at Salisbury, declares that if a quorum of such stockholders and the State's proxy representing the stock of the State in said company shall be present at such meeting, it shall be competent for the stockholders of the said company for cause satisfactory to them, to remove the present board of directors, etc. The Legislature did not directly remove the directors appointed by the Governor, but it made a very forcible suggestion to the stockholders to do so, and the act goes on to say that in the event the present board of directors shall be removed, then F. N. Lucky and others (naming the eight persons who claim to be the State directors in the Tate board), shall be directors, etc., and that C. A. Henderson shall be proxy for the State.

It seems that the Legislature doubted their power to remove directors, or at least those appointed by the stockholders, and hence they suggest to the stockholders to clear the board, not only of the four directors appointed by themselves, but also of the eight appointed by the Governor; and they say to the stockholders in advance, as soon as you so clear the board here are eight persons whom we appoint to act with you as directors on the part of the State and another to act as State's proxy.

The second section of this act throws some light upon the subject; taken in connection with the decision in *Clark v. Stanley,* it is as follows: "That hereafter the Speaker of the House of Representa- (550) tives shall by a proper writing to that effect, appoint the directors and proxy to represent the stock and interest of the State in said company." Admit for the sake of the argument that directors in a railroad are not officers in the strict meaning of that term, but only officers in a corporation in which the State has a large interest, still the reason of the rule in *Clark v. Stanley* applies, and destroys the foundation upon which the defendants have built.

The conclusion is that the eight State directors and the State's proxy thus appointed contrary to law by participating in the meeting of the stockholders at Salisbury, vitiated the proceedings of that meeting.

The persons composing the Howerton board claim that they are entitled to the possession of the road; eight of them by virtue of the appointment and commission of the Governor, who made the same by and with the advice and consent of the Council of State, and four of them by virtue of the appointment of the board of directors, as will be seen hereafter.

The original charter ratified the 15 February, 1855, enacts, sec. 9: "That upon the subscription of six hundred thousand dollars as herein provided by the Treasurer under the direction of the Board of Internal Improvement, the State shall appoint eight directors in said company, who shall be appointed by the Governor by and with the advice and consent of the Council of State."

The State directors have always been appointed in pursuance of this provision until 1869, when the stockholders under the authority of an Act ratified 29 January, 1869, Laws 1868-'69, ch. 20, elected twelve, the whole number.

The old mode, however, was returned by Laws 1869-'70, ch. 112, and the validity of this Act was recognized by the stockholders (551) in their annual meeting at Morganton on 13 October, 1870; for they held said meeting under its provisions, and in accordance with its requirements.

The provision of the original charter then, in respect to the manner of appointing directors being restored by this act is still law, except as it may have been modified by the Constitution, for all acts subsequent to Laws 1869-'70, ch. 112, which profess to take these appointments from the Governor we have seen are unconstitutional. But it is contended that since the Constitution, Art. III, sec. 10, requires the Governor in making such appointments to consult the Senate, and as he failed to do so, the Howerton board has no valid claim to the road.

The question is, should the Governor have sent nominations to the Senate after the General Assembly had in express terms taken the power of appointment from him and exercised it themselves in one instance, and by the presiding officers of the two branches in another instance?

It would have been a mockery to have done so, for they had already said by their action, you have nothing to do with the matter. This action on the part of the Legislature dispensed with the necessity of sending in nominations, and left the Governor to pursue the law as far as he could. We have decided at this Term that the appointment of directors made by the Governor to manage the Penitentiary and the Asylums during a recess of the General Assembly are valid.

The commissions of the directors of Howerton board are stated in the pleadings to bear date on 2 October, 1871, and we must, therefore, know that they were appointed when the Legislature was not in session; this circumstance, however, in our view of the case, is immaterial, for had the Legislature been in session, the Senate had declared by its acts in advance that they would reject them.

But it was said upon the argument, grant that the Governor had the

right to appoint, yet he should have acted alone, and not by and with the advice and consent of his Council. (552)

We do not rely upon the charter which requires these appointments to be made by and with the advice and consent of the Council of State; but we are of opinion that the Governor's appointments are not prejudiced by asking the advice of his Council.

The appointment of the Howerton board was as regular and lawful as it was possible for the Governor to make it; and it was not in the power of the Legislature either by action or non-action to prevent the Governor from taking charge of the State's interest in this corporation.

The Howerton directors met at the time and place appointed for the regular annual meeting of the stockholders; but the stockholders refused to meet with them, and then Mott, the President of the Board, which had been illegally displaced, called another meeting of the stockholders in pursuance of the by-laws of the corporation, to be held at Statesville, on 26 October, 1871; but still the stockholders refused to recognize or act with this board.

The directors on the part of the State then organized as a board and elected Howerton as their President, and afterwards, to-wit: on 6 November, 1871, at Morganton, proceeded to fill the four vacancies in their body in accordance with section 18 of the original charter, which enacts that the board of directors may fill vacancies which may occur in it, during the period for which they have been elected, etc.

Not only do we find this provision in the charter, but one of the by-laws adopted unanimously at the annual meeting in 1869, as follows: "All vacancies in offices which are elective by the stockholders, shall be filled by the board of directors until an election be made by the stockholders."

As there had been no legal election of directors by the stockholders, it was the duty of the directors to fill the vacancies in (553) their board.

It would seem strange if private stockholders, owning but a small portion of the stock, in a corporation, could by absenting themselves from the regular meetings and refusing to act with the representatives of the State, defeat the State's interest and take charge of the whole corporation. If the private stockholders have no directors chosen by themselves on this board, it is their own fault.

The fact that the board of directors was afterwards, to-wit: on 6 November, 1871, completed by filling the four vacancies, and that they then re-elected Howerton, does not affect the question; the full board only ratified what was valid before.

Those directors of the Mott board, who assisted in turning it out, and

afterwards went into the Tate board, forfeited their claim to be considered members of the Mott board, after the meeting at Salisbury.

Our conclusion is, that the Tate board are not the lawful directors of the road, and that they must be ousted from the same.

And further, that the members of the Mott board, who had not forfeited their offices, were the lawful directors, and entitled to the possession of the same, up to 26 October, 1871, when the Howerton board organized at Statesville, and that from and after that day the Howerton board, were the only persons lawfully entitled to the possession of the road.

We refer to the case of *Nichols v. McKee, ante,* 429, for the form of the judgment to be entered in this case.

PER CURIAM. Affirmed.

Cited: Brown v. Turner, 70 N. C., 102, 107; *Howerton v. Tate, Id.,* 161; *Walker v. Fleming, Id.,* 484; *Eliason v. Coleman,* 86 N. C., 239; *Bryan v. Patrick,* 124 N. C., 662; *R. R. v. Dortch, Id.,* 667.

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(554)

STATE OF NORTH CAROLINA *ex rel.* Joseph S. Jones as Trustee, v. JACOB F. BROWN.

1. **When a guardian subsequently became thrustee, there is no presumption of law that he ceased to hold the fund as guardian as soon as he became trustee.**
2. **When a guardian received a note in settlement from a former guardian which had no surety, but the maker was solvent, although the taking of the bond without security was negligence in the former guardian, and although the subsequent guardian was not obliged to take it, yet after he has taken it, the former guardian is discharged.**

ACTION OF DEBT on a guardian bond, tried before *Watts, J.,* at Fall Term, 1871, of WARREN.

The case was argued at the last June Term of this Court, and the judgment of the Court was deferred, in order that the exceptions to the report might be fully argued. The facts are stated in the report and opinion of the Court, 67 N. C., 475, *et seq.* which *vide.*

Batchelor & Son and *Plummer* for appellant.
Moore & Gatling, contra.

READE, J. There came into the hands of the principal of the defendant as guardian of Lucy Brown such sum as added to the interest up to 1 September, 1871 (see report of referee), make $33,871.83. And

the defendant is entitled to credits (see same report, with commissions at 2½ per cent and the Burgess note added), $29,485.95, which deducted from the receipts as above, leaves a balance in the defendant's hands as guardian, as of 1 September, 1871, $4,385.88. From which is to be deducted interest upon Burgess' note.

1. In arriving at this conclusion, we overruled the first exception, which is founded upon the fact that the guardian subsequently became trustee, and upon the supposed presumption of law that the defendant ceased to hold the fund as guardian, as soon as he became trustee. (555)

The answer is, that there is no such presumption of law. See *Harrison v. Ward,* 14 N. C., 417, and *Clancy v. Carrington, Id.,* 529. And whatever presumption of fact might ordinarily arise from assuming a new relation to the fund is rebutted here by the finding of the referee, that there had been no change of the fund from the guardian to the trustee.

2. We overrule the second exception, founded upon the supposed fact that the real estate of Lucy Brown, the defendant's ward, was not conveyed to the plaintiff Jones, as trustee, but was conveyed to the husband of Lucy, Samuel W. Eaton. The fact is misconceived, for the deed of October, 1861, from said Lucy to plaintiff Jones, conveyed all her real and personal estate, including what was in the hands of her guardian in trust for her husband, Eaton. And the money arising from the sale of land, which was realty, was in the hands of her guardian.

3. We overrule the third exception for the same mistake of fact. The interest and profits follow the principal, and the principal, as was just said, was conveyed to the plaintiff as trustee.

4. We sustain this exception to the commissions allowed by the referee, which were only the trifling sum of $117.84; we have added two and a half per cent upon the receipts, making $796.10.

5. The fifth exception is allowed, and is embraced in the statement and balance aforesaid. The guardian received the Burgess note from a former guardian, and although it had no sureties, yet the maker was solvent, and although the taking of the bond without security was negligence in the former guardian, and although the subsequent guardian was not obliged to take it yet he did take it, and that discharged the former guardian. See *Shaw v. Coble,* 63 N. C., 377. And (556) so the plaintiffs Jones and Eaton were not obliged to receive it, yet they did receive it, and that discharges the guardian from liability to *them.*

7. The seventh exception is overruled. The supposed primary liability of the former guardian does not exist, because the subsequent guar-

dian by receiving the Burgess and other notes from him as so much money, discharged him so far at least as the subsequent guardian was concerned.

8. The eighth exception is founded upon the supposed fact that the real estate and income were not conveyed to plaintiff Jones as trustee; but we have already seen that is not true. The excepton is, therefore, overruled. There are divers other exceptions which were not insisted on in this Court.

The result is to sustain the account of the referee, except that there must be deducted from the balance stated against the defendant, the amount of the Burgess note, and additional commissions, $796.10. It will be referred to the Clerk of this Court, to make the calculations and report; and there will be judgment here for the balance against the defendant.

PER CURIAM. Judgment accordingly.

Cited: Harris v. Harrison, 78 N. C., 216; *Ruffin v. Harrison,* 81 N. C., 220.

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(557)

JOHN G. LEWIS, Assignee, v. WM. SLOAN and others.

1. The jurisdiction of a Bankrupt Court being conceded, its adjudication of bankruptcy is a judgment *in rem* fixing the *status* of the bankrupt, which upon that point is binding upon all the world, and can only be impeached for fraud in obtaining it.
2. Prior to the Bankrupt law, it was held in North Carolina that an insolvent had the right to prefer one or several among his creditors, although the effect was to hinder and delay others. This right of preference is taken away by that Act, and the State Courts are bound to hold that fraudulent and void, which the Act declares to be so under the conditions which it prescribes. Every Court, however, in which a controversy as to the title to the property alleged to have been fraudulently conveyed, may arise, has jurisdiction to inquire whether the conveyance was in fact and in law frauduent, *i. e.*, whether the conditions prescribed by the Act to make it fraudulent, existed.
3. A charge of the Judge in the Superior Court, which is in part erroneous, but which calls the attention of the jury, as fairly as could be expected under the circumstances to the material questions on which they were to pass, is no ground for a new trial.

APPEAL from *Logan, J.,* at Spring Term, 1872, of LINCOLN.

The following is substantially the case agreed and transmitted to this Court as part of the transcript of the record.

The plaintiff, assignee in bankruptcy of Christy Rhyne, one of the defendants, seeks by this action to recover the possession of a tract of land in Gaston County, which the other defendant, Sloan, had purchased of Rhyne, in November, 1867. On the trial below, judgment by default

was taken against Christy Rhyne and Harry Rhyne, another defendant, who were in possession of the land, for want of an answer, and the trial was had as to defendant, Sloan.

In his complaint, the plaintiff charges that the sale to Sloan was fraudulent and void, as being in direct violation of the "Act to establish a uniform system of bankruptcy throughout the United States," and the question involved in this charge, is the principal one decided in this Court.

The defendant, in his answer, positively denies any fraud or fraudulent intent in the purchase of the land from Christy Rhyne, and alleges in detail the indebtedness of Rhyne to him, and the con- (558) sideration given in the purchase of the land in dispute.

There was much evidence introduced by both parties. On the part of the plaintiff to show the indebtedness of Rhyne about the time the deed was given, the involuntary bankruptcy of Rhyne, the appointment of plaintiff, as assignee, and the knowledge of the defendant Sloan, of the embarrassment and insolvent condition of Rhyne's estate. And for the defendant, in denial and explanation of the testimony offered by the plaintiff. So far as is material, the evidence is set out in the opinion of the Court.

The deed from Christy Rhyne to Sloan bears date 27th November, 1867. The creditors' petition declaring Rhyne a bankrupt was filed 18 March, 1868, charging the sale of the land as the act of bankruptcy relied upon. The suit originally commenced in Gaston was removed on affidavit to Lincoln.

After the evidence closed on the trial in the Superior Court, the defendant, in writing, prayed the following instructions:

1. That plaintiff acquired no title under the assignment in bankruptcy, as the copy of the record from the District Court, on its face, shows that the Court had no jurisdiction to declare Christy Rhyne a bankrupt.

2. That if said adjudication had been covinously and fraudulently obtained, it was void as to the defendant.

3. Before plaintiff can recover, he must satisfy the jury that when defendant, Sloan, received his deed from Rhyne, a fraud upon the bankrupt act was intended by Rhyne, and that Sloan had reasonable cause to believe that such fraud was intended, and also that said Rhyne was insolvent.

His Honor charged the jury:

"In this case it is the opinion of the Court, that the petition of Craig and Bell in the Bankruptcy Court (praying that Christy Rhyne be declared a bankrupt) was adjudicated in that Court, and this (559) Court cannot go behind the record.

"In this case the plaintiff alleges fraud in the transaction between the defendant, Sloan, and Christy Rhyne as to the transfer of the land by Rhyne to Sloan. Fraud is a question of law, and defined to be, 'when an act is done by concealment or otherwise, prejudicial to the rights or interests of a party and without his knowledge or consent.' Wherefore, gentlemen of the jury, you being the judges of the facts, if you find that fraud has been committed by the defendant, you will find for the plaintiff, but if you find that no fraud has been committed, you will find for the defendant.

"According to the bankrupt law, one is considered a bankrupt, who is unable to pay his debts. You are to take into consideration the knowledge of the defendant, Sloan, as to the condition of Rhyne at the time the transfer was made. Whether he was insolvent or not? Did the defendant know that Rhyne was insolvent? Did he have reasonable cause to believe that Rhyne was insolvent at the time the transfer was made, or did he have reasonable cause to believe that the conveyance was in fraud of the bankrupt act, and intended to defraud other creditors? Intent means an actual design in the mind, and must be found as a question of fact. If you should find these facts to be true, you will find for the plaintiff; if not true, for the defendant.

"Persons have the right to secure their debts, or to prefer creditors, providing they do so according to law, not fraudulently. Every one is bound to know the law. Ignorance is no excuse for an unlawful or fraudulent act."

The jury returned a verdict for the plaintiff. Motion for a new trial; motion refused. Judgment and appeal by defendant.

Guion for appellant.
Bynum and *Schenck, contra.*

(560) RODMAN, J. The plaintiff claims the land in controversy as the assignee of Christy Rhyne, adjudicated a bankrupt on 28 August, 1868.

1. Defendant claims that plaintiff is not lawfully assignee, and contends that the adjudication is void, because it appears from the petition of record in the bankrupt court that the principal of the petitioning creditors' debt is less than $250, although if the interest up to the date of the petition be added, it will exceed that sum. In England, as in the United States, the law requires that the petitioning creditors' debt shall be equal to at least a certain sum, and it appears from the authorities cited by the counsel for the defendant that the courts in England do permit adjudication of bankruptcy to be collaterally avoided by proof that the petitioning creditors' debt was less than the sum; and also, that in arriving at that sum the interest is not added to the princi-

pal, at least unless the note or other writing bears interest on its face. Eden Bank, 42; *Cameron v. Smith,* 2 B. & A., 305. This, it would seem, can only be done on the theory that the petitioning creditors' debt must be of the prescribed amount in order to give the Court jurisdiction; for it is well settled that when a Court has jurisdiction of the subject matter, its judgments will not be allowed to be collaterally impeached or questioned in any other Court. How the English law may be, or on what principles their courts proceed in such cases, it is unnecessary for us to inquire. In the United States, Congress has a constitutional right to enact a uniform bankrupt law, and it has done so and given a jurisdiction to the District Courts of the United States under certain circumstances to adjudicate persons bankrupt.

The act does not in terms declare that those courts shall have jurisdiction only when the petitioning creditors' debt amounts to $250 of principal money. These courts are competent to put the construction on the statute that the debt is sufficient if the principal and interest added together amount to that sum. And it would seem (561) like wantonly seeking a conflict, if the State Court by a different construction, should deny the jurisdiction of the United States Courts in such a case. We may admit that if a want of jurisdiction in any case plainly appeared on the record of a bankrupt court, the State Courts would be justified in holding the judgment void on that account. But that is not this case; and without undertaking ourselves to put any construction on the bankrupt act in question as to the petitioning creditors' debt, we accept that which the bankrupt court has acted on in declaring Rhyne a bankrupt. We were not referred to any decision on this question made since our bankrupt act, and we know of none; but we have reached our conclusion on general principles only.

The jurisdiction of the bankrupt court being conceded, its adjudication of bankruptcy is a judgment *in rem,* fixing the *status* of the bankrupt, which, upon that point, is binding on the world, and can only be impeached for fraud in obtaining it. See Duchess of Kingston's case, 2 Smith L. C., 438 to 447, where the effect of judgments is discussed at great length, and with eminent learning.

2. The defendant then claims the land under a conveyance from Rhyne and his wife to him, dated on 27 November, 1867, and professing to be made for a consideration of $3,500. The plaintiff contends that this deed was in fraud of the bankrupt act, (sec. 39,) and therefore void; that having been made either "with intent to delay, defraud or hinder his creditors," or by one who was a bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, with intent to give a preference to one or more of his creditors, and to defeat or delay the operation of that law; and a petition to adjudicate the said Rhyne a

bankrupt having been brought within six months after such conveyance, it was void, and he, as assignee, could recover the property conveyed. Bankrupt Act, 2 March 1867—5—39.

(562) By the law of North Carolina prior to the enactment of the bankrupt act, every conveyance made with intent to delay, defraud or hinder creditors, was void as to them. It was held, however, that an insolvent had a right to prefer one or several among his creditors, although the effect was to hinder and delay others. The preference being allowed by law, and in favor of a just debt, did not in a legal sense defraud the other creditors. By the bankrupt act, however, this right of preference among creditors was taken away from an insolvent, or from one in contemplation of bankruptcy or insolvency, and the preference itself made void; *provided* a petition should be filed within six months thereafter by a creditor, etc., to procure an adjudication of bankruptcy against the insolvent debtor. The State Courts are bound to hold that fraudulent and void, which the Act declares to be so under the conditions which it describes. But every Court in which a controversy as to the title to the property alleged to have been fraudulently conveyed, may arise, has jurisdiction to inquire whether the conveyance was in fact and in law fraudulent; that is, whether the conditions prescribed by the act to make it fraudulent, existed. If a petition was not filed within six months after the alleged fraudulent conveyance, it cannot be held void, as being an unlawful preference.

It would not be so held in the bankrupt courts, and of course not in the State Courts. And it is open in the State Courts, to inquire whether the grantor was bankrupt or insolvent; whether the conveyance was made in contemplation of bankruptcy or insolvency, and whether with the intent unlawfully to prefer one or several creditors.

Although the adjudication of bankruptcy is a judgment *in rem.* and as such conclusive on all the world, and although in arriving at that judgment, the bankrupt court declares the conveyance alleged as the act of bankruptcy to be a preference among creditors, and therefore, fraudulent within the meaning of the act; yet such declaration

(563) is no part of the judgment, but is merely indidental to it, and so far from being conclusive on strangers that the conveyance was fraudulent, is not even evidence against them for that purpose. It is merely "res inter alias acta quæ nemine nocere debet." No one not a party to the record is affected by it, except so far as it is *in rem.* (2 Smith's L. C. *ub. sup. Barrs v. Jackson,* 1 You. & Coll. 585, S. C. 1 Phil. 582. Of the American cases see *King v. Chase,* 15 N. H., 9.

In addition to what is said in these cases, there is reason why the effect of the judgment *in rem.* should be more closely confined to the

precise point adjudged, viz.: That so far as it is *in rem.* and fixes the *status* of the person or property affected, it binds all the world; whereas, a judgment *in personam* binds only parties and privies who have once had an opportunity of contesting it.

There was evidence in this case tending to show that the conveyance in question was fraudulent within the Act, and the jury found that it was. We are now prepared to consider the exceptions to the Judge's charge.

There are several propositions of law in the instructions of his Honor which are obviously erroneous. For example, his definition of fraud: "Fraud is a question of law, and defined to be, where an act is done by concealment or otherwise, prejudicial to the rights or interest of a party, and without his knowledge or consent." And so, his definition of a bankrupt: "according to the bankrupt law, one is considered a bankrupt who is unable to pay his debts."

But upon a consideration of the instructions as a whole, we think they call the attention of the jury as fairly as could be expected under the circumstances, to the material questions on which they were to pass. He says to them, "You are to take into consideration the knowledge of the defendant Sloan as to the condition of Rhyne at the time when the transfer was made. Whether he was insolvent or not? Did the defendant know that Rhyne was insolvent? Did he have (564) any reasonable cause to believe that Rhyne was insolvent at the time the transfer was made, or did he have reasonable cause to believe that the conveyance was in fraud of the bankrupt act, and intended to defraud other creditors? 'Intend,' means to have an actual design in the mind, and must be found as a question of fact. If you should find these facts to be true, you will find for the plaintiff; if not true, for the defendant. Persons have the right to secure their debts, or prefer creditors, provided they do so according to law, not fraudulently. Every one is bound to know the law; ignorance is no excuse for an unlawful or fraudulent act."

If the defendant had desired more particular instructions upon any point omitted by his Honor, he might have asked for them.

PER CURIAM. No Error.

Cited: Hislop v. Hoover, ante, 146; *Dills v. Hampton,* 92 N. C., 571; *Pearson v. Simmons,* 98 N. C., 283; *Williams v. Scott,* 122 N. C., 549; *Westbrook v. Wilson,* 135 N. C., 402.

RULES ADOPTED

BY THE

SUPREME COURT

JANUARY TERM, 1873

1st. The counsel for the appellant shall have the right to address the Court for not over two hours, which shall include both his opening argument and reply. The time may be divided between them at his discretion.

2d. The counsel for the appellee shall be allowed not over one hour.

3d. The time occupied in reading so much of the record as may be necessary, shall not be counted under the above rules.

4th. The time for argument allowed above may be extended by the Court in proper cases, provided the extension be allowed before the argument begins.

5th. Any number of counsel will be heard on either side within the limits of time above described, but it is required that when several counsel speak, each shall confine himself to a distinct part or parts of the argument so as to avoid tedious repetition.

6th. Every appellant, at the time of settling the case, or if there be no case within ten days after the appeal, shall file in the Clerk's office, his exceptions to the judgment or proceedings briefly stated and numbered. And in civil (as distinct from criminal) actions no other exceptions than those so filed and made part of the record will be considered in the court.

7th. No case will be heard until there shall be put in the margin of the record brief references to such parts of the text as it is necessary to consider in a decision of the case.

8th. The costs of copies of unnecessary and irrelevant testimony or of other irrelevant matter, not needed to explain the exceptions, shall in all cases be charged to the appellant, unless it appears expressly that they were sent up by the appellee, in which case the costs will be taxed on him.

9th. In every case the appellant before the hearing, shall file with the Clerk one or more written or printed briefs, in which shall be set forth the exceptions taken below. Under each shall be briefly stated so much of the pleadings, case agreed, or other finding of facts, as will make it intelligible. Also if several acts of Assembly are relied on, a citation of them by date and chapter. Also the authorities in law principally relied on. This, however, shall not forbid the citation of others on the

oral argument. If a statement of the record or any part of it be necessary to an understanding of the case, it shall be made briefly, and the page of the record containing it referred to.

10th. If the above brief shall be printed, eight copies shall be delivered to the clerk, viz.: One for each of the Justices, one for the Clerk to file with the record, one for the Reporter and one for the opposite counsel.

11th. Whenever printed briefs shall be filed, and the matter in controversy equals or exceeds $300, the costs of such briefs shall be taxed in the costs in favor of the party filing them, if he be successful, at the rate of five cents for each printed page of the usual size of the reports of this Court.

12th. The appellee may in like manner file such briefs and shall under like circumstances be entitled to have the costs thereof taxed for him.

R. M. PEARSON, C. J.

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